Myth, Facts & Reality of EU FLEGT VPA:

Sarawak's perspective

MYTH, FACTS & REALITY OF EU FLEGT VPA: SARAWAK'S PERSPECTIVE

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Abbreviations and acronyms

EC	European Commission
EU	European Union
FLEGT	Forest law enforcement, governance and trade
G8	Group of Eight
ILUC	Indirect land use change
IMM	Independent market monitor
JIC	Joint implementation committee
MDG	Millennium Development Goals
MPOC	Malaysian Palm Oil Council
MPRM	Ministry of Planning and Resource Management
NCR	Native customary rights
NSC	National steering committee
PFE	Permanent forest estate
RB	Reporting body
RSPO	Roundtable on Sustainable Palm Oil
STA	Sarawak Timber Association
TPA	Totally protected area
TPM	Third party monitor
UN	United Nations
VPA	Voluntary partnership agreement
WWF	World Wide Fund for Nature

Preface

The response of the European Union (EU) to illegal logging and its associated trade is the Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT). The Action Plan, as adopted by the European Parliament in February 2004, seeks to differentiate legal from illegal timber and timber products, and prevent these products from entering the EU market, and is implemented through a Voluntary Partnership Agreement (VPA) entered into between the EU and any other country willing to sign the same.

Malaysia, represented by the then Minister of Plantation Industries and Commodities, Datuk Peter Chin Fah Kui, commenced formal negotiations with the EU in 2006. In the process of negotiations, the broader objectives of poverty reduction, growth and sustainable development, and governance reforms took centre stage. This significant deviation imposes undue conditionalities to parties subscribing to the VPA, thereby clouding the original intent of the Action Plan to curb illegal logging and associated trade. These objectives, though noble, should be implemented independently from this Action Plan to prevent any

diversion of focus from the primary aim of the Action Plan. By the inclusion of these broader objectives, it further deepens the myth that *the* focus of the Action Plan is to prevent illegally-logged timber and timber products from entering the EU market.

This book posits that these conditionalities restrict and challenge the right of a sovereign nation to govern, to legislate and to formulate and achieve policy goals specifically tailored to its circumstances. The first chapter briefly introduces the global scenario of illegal logging and subsequent responses by consumer countries. The second and third chapters introduce forestry and timber industry in Sarawak, and Sarawak Timber Association (STA) respectively. Chapter four details the general concerns for the VPA: its premise and the conditionalities. It also highlights the negative implications for and impact on the Sarawak forestry and timber industry. The final chapter summarises the main arguments of this book.

Much has been said and deliberated on EU FLEGT VPA since 2003. The real intention(s) of each party involved in the process of EU FLEGT VPA negotiations will never be revealed but the consequences of EU

FLEGT VPA will be very revealing one way or the other at a later stage when most of the negotiators might have moved on, leaving the timber industry to either bear the brunt or reap the benefits. The myth, facts and reality of EU FLEGT VPA are therefore really important and should be evaluated from Sarawak's perspective prior to any commitment.

Chapter 1

1.1 Global Scenario

The issue of illegal logging has gained widespread attention over the years. The actual scale and value of illegal logging are unknown as officially verified data is nonexistent. However, a definitive study commissioned by the American Forest and Paper Association in 2002 estimated that 8.0% to 10.0% of global timber products production and approximately US$5.0 billion out of US$69.0 billion (8.0% to 10.0%) of trade are illegal[1]. The study further concludes that the world prices of timber products are depressed by 7.0% to 16.0%. The complexity of illegal logging is also compounded by the fact that there is no internationally agreed definition. Whereas a narrow definition confines illegality to unsustainable harvesting practices, e.g., harvesting undersized trees, a broader definition includes illegal forest activities, e.g., avoidance of royalty payments[2]. Generally, illegal logging is understood to have occurred when “timber is harvested, transported, bought or sold in violation of national laws”[3].

Illegal logging is perceived as being more prevalent in developing countries than in industrialised countries. It

is often a symptom of system failures in developing countries: weak governance structures, poor law enforcement and an absent civil society. Furthermore, it can be motivated both by commercial purposes and by subsistence living. The ability to differentiate between these drivers is important not only to understand the scale of illegal logging, but also to prescribe the appropriate remedial solution.

In May 1998, illegal logging was listed as an area for action in the G8 Action Programme on Forests. This led to a series of Forest Law Enforcement and Governance conferences co-ordinated by the World Bank that sought to establish a framework for governments of producer and consumer countries to address the issue of illegal logging. The European Union's (EU) response to these conferences was the Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT). The core of this Action Plan is a licensing scheme, negotiated through Voluntary Partnership Agreement (VPA), which identifies legal timber products in partner countries and licenses them for import into the EU.

1.2 The EU Action Plan for FLEGT

Box 1: What is the EU Action Plan for FLEGT?

The EU Action Plan for FLEGT is a demand-side pressure for reform. It is part of a broader objective to introduce governance reforms and capacity building in producer countries in order to achieve sustainable forest management. The initiative was first introduced in April 2002 at a European Commission (EC) Workshop in Brussels that considered available options to address the illegal logging and trade issue, and more importantly, options to prevent illegally-logged timber products from entering the EU market. The details of the Action Plan were finalised in May 2003, approved by the EU Council in October 2003, and the motion adopted by the European Parliament in February 2004. Essentially, the Action Plan seeks to differentiate legal from illegal timber products. Currently, there is no internationally agreed framework to exclude illegal timber products from the international market, vis-à-vis the Kimberley Process for conflict diamonds and the Convention on International Trade in Endangered Species of Wild Flora and Fauna for animals and plants.

The thrust of the Action Plan is a licensing scheme negotiated through VPA on a bilateral basis. The VPA is a time-bound, legally binding inter-governmental bilateral agreement between the EU and major timber producing countries (EU partner country). It aims to implement the scheme by strengthening governance in the partner country. Based on a nationally-agreed definition of legally produced timber, the scheme takes the form of a legality license that will be attached to timber products exported into the EU: unlicensed products from the partner country will be denied entry. These products are currently limited to logs, sawnwood, plywood and veneer. In December 2005, a regulation to implement this FLEGT licensing scheme was adopted by the EU Council[4].

There are five parts to the scheme. Firstly, a definition of 'legally-produced timber' (legality definition), currently confine to the ambit of national laws and regulations, must be agreed between the partner country and the EU. This implies that these laws must not only be robust and coherent, but that the partner country must also have in place technical and administrative structures to monitor compliance, and undertake enforcement measures. The partner country

is encouraged to keep interested parties abreast through multi-stakeholder consultations. Secondly, all points along the supply chain or chain-of-custody (from harvest to export) must be legal and traceable. This covers land or concession ownership, harvesting, processing, transport and export procedures which includes payment of taxes and royalties. Parts one and two are subsequently audited by the third component of the scheme, a verification of legality process. The verification process on the other hand, is validated by a legality license. This means that the partner country must strengthen or establish issuance-related procedures. Finally, as an assurance for the credibility of the entire scheme, independent third-party monitoring is emphasised[5].

Box 2: FLEGT-VPA Process in Malaysia

Malaysia, represented by the then Minister of Plantation Industries and Commodities, Datuk Peter Chin Fah Kui, first commenced formal negotiations with the EU on 25 September 2006 in Brussels. National preparations are overseen by a National Steering Committee (NSC). The NSC is guided by various working groups that focus specifically on the

definition of legality; timber legality assurance system; and market benefits and capacity building. Subsequently, the NSC provides input to technical working groups and the Senior Officials' Meeting. The latter is the authorised body for negotiations between Malaysia and the EU.

The overall management and implementation of the VPA will be governed by a Joint Implementation Committee (JIC), whose members will comprise representatives from Malaysia and the EU. It will be granted with decision-making powers. Amongst others, the JIC will mediate and resolve conflicts and disputes that may arise; and deliberate upon additional measures to strengthen the practical delivery of the VPA. These functions will be supported by a Reporting Body (RB), a Third Party Monitor body (TPM) and an Independent Market Monitor body (IMM).

Chapter 2

2.1 Malaysia

Map of Malaysia

Located near the equator, Malaysia covers a land area of 32.8 million hectares, of which 19.4 million or 59.2% are under tropical forest cover. A tropical climate endows Malaysian forests with rich biological diversity (biodiversity) and is acknowledged as one of 12 megabiodiversity countries in the world: there are approximately 15,000 species of plants and more than 1,100 species of ferns and fern allies; 300 species of

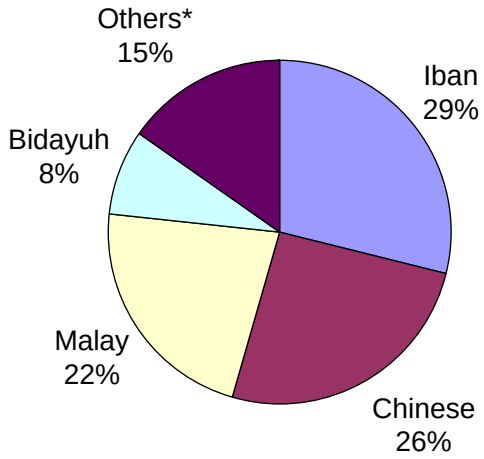
wild mammals, 700 to 750 birds, 350 reptiles, 165 amphibians and more than 300 freshwater fishes for vertebrates; and more than 100,000 species of invertebrates [6] . Malaysia is party to numerous international environmental agreements; *inter alia*, biodiversity, climate change, endangered species, tropical timber 1983, tropical timber 1994 and wetlands.

The Malaysian Federal Constitution Article 74 (2) stipulates that land and natural resources are under the legislative authorities of the State i.e. state matters: each state can formulate its own forest policy and enact forestry laws. Each state, therefore, acts as a trustee of public forest lands. Nonetheless, the federal government provides "technical advice on forest management and development, undertakes research and education, and promotes industrial development of wood-based industries and trade"[7]. Whilst the federal government oversees the management of natural resources, the state governments undertake forestry operations, enforcement and royalty collection from timber products.

2.2 Sarawak

Kuching, the capital city of Sarawak

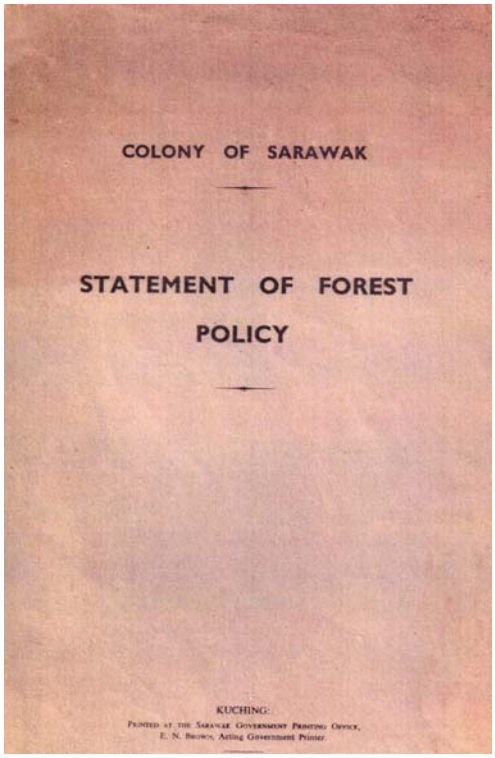
The largest state, Sarawak, with a landmass of 12.4 million hectares, is located on the island of Borneo and is approximately the size of Peninsular Malaysia. However, in contrast to its size, Sarawak has a small



**comprise 27 other ethnic groups*

Pie chart of ethnic groups
Source: Sarawak State Planning Unit

population of 2.5 million: 29.0% Iban, 25.5% Chinese, 22.3% Malay and 8.0% Bidayuh[8]. Indigenous tribes continue to live in the forests although there is increasing migration amongst the young to urban areas for work purposes. Around 8.2 million hectares or 66.1% of Sarawak's total land area continues to be covered by forests.



Forest Policy of Sarawak

The Forest Policy of Sarawak was formulated in 1954 to provide guidelines for forest management, *inter alia*, permanently reserve sufficient land for the benefit of current and future generations; and based on the principle of sustained

yield, manage permanent forest estate (PFE) to obtain the highest possible revenue. Forests in Sarawak are divided into three categories: PFE, stateland forest and totally protected areas (TPA). A targeted six million hectares have been designated as PFE and permanent forest which comprises dipterocarp forest where valuable commercial species are commonly found. Hence PFEs are set aside for timber production and harvesting on a sustainable basis. Out of these six million hectares, one million hectares has been set aside for planted forests. Stateland forest occupies 3.7 million hectares and includes water catchment and urban areas. This forest is set aside for possible conversion to other land uses. TPA amounting to a

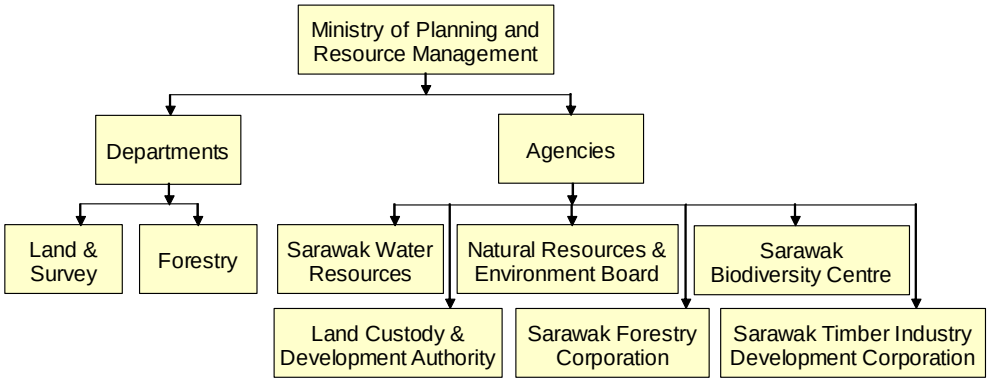
Hill Mixed Dipterocarp Forest

targeted one million hectares is used for conservation of biodiversity as well as for research and educational purposes. However, within the PFE, stateland forest and TPA, there exists 1.6 million hectares of native customary land [9], to be utilised by the indigenous groups residing in these land. Sarawak subscribes to selective management system which is based on a series of research projects conducted by United Nations Food and Agriculture Organization from the 1960s till the mid-1970s. It is a harvesting regime that aims to selectively remove designated mature commercially-traded trees in a single harvesting operation. As such, between five to seven trees per hectare are fell, leaving a residual stand that will grow back to form the crop for the next cutting cycle which is usually 25 years[10].

Mangrove Forest

Forestry in Sarawak falls under the purview of the Ministry of Planning and Resource Management

(MPRM). It oversees and co-ordinates the functions of the Department of Land and Survey, Land Custody and Development Authority, Natural Resources and Environment Board, Sarawak, Forest Department Sarawak, Sarawak Water Resources, Sarawak Biodiversity Centre, Sarawak Forestry Corporation and Sarawak Timber Industry Development Corporation.



MPRM Organisational Chart

While Forest Department Sarawak is tasked with implementing the Forest Policy of Sarawak and the overall management of forests, Sarawak Forestry Corporation undertakes sustainable forest management and conservation activities. Sarawak Timber Industry Development Corporation regulates and controls the manufacture of timber and timber

products, and related sale, distribution and marketing; determines the manufacturing standards and quality; and determines the trade practices of the timber industry.

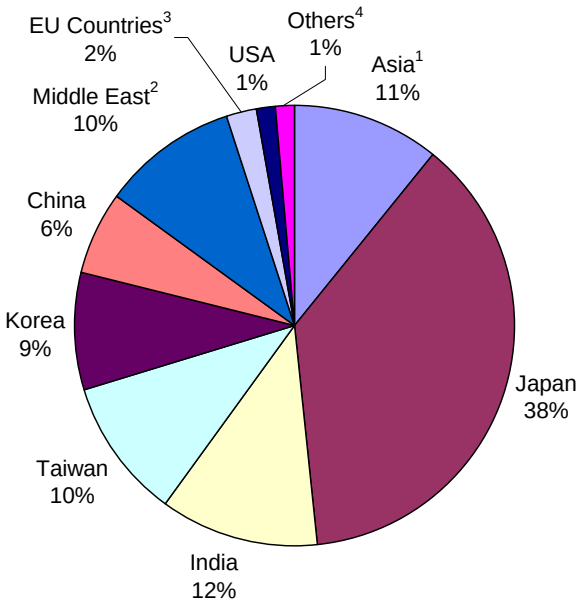
2.2.1 Sarawak Forestry & Timber Industry

The timber industry is an important revenue generator for the State. In 2008, forestry revenue is estimated to contribute 17.0% to total State revenue[11]. Forest royalties are calculated on a volume basis, as opposed to a value basis for export taxes. This has provided a source of continuous revenue for the State[12]. Export earnings from timber and timber-based products amounted to RM 7.4 billion in 2008, with the highest contribution from the plywood sector, 59.3%, and log exports, 22.9%. In value terms, the main export market is dominated by Japan, 37.2% in the plywood sector,

Plywood mill

followed at a distant second by India, 11.6%[13] in the log sector.

Export of Timbers from Sarawak for 2008
(Logs, Sawntimber, Plywood and Veneer only)
Total Export Value: ***RM 7,397,573,710****



[1] Bangladesh, Brunei, Hong Kong, Indonesia, Malaysia, Maldives, Pakistan, Philippines, Singapore, Sri Lanka, Thailand, Vietnam

[2] Algeria, Bahrain, Egypt, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syrian Arab Republic, Turkey, United Arab Emirates, Yemen

[3] Belgium, Cyprus, Denmark, France, Germany, Greece, Ireland, Italy, Netherlands, Romania, Spain, United Kingdom

[4] Australia, Fiji, New Zealand, Russian Federation, Canada, Mexico, Mauritius, Morocco, Seychelles, South Africa

**Exchange Rates as at October 2009;*
US$1 = RM3.50 €1 = RM5.10

Additionally, the forestry and timber industry is a significant contributor to the employment market, engaging more than 100,000 people in both upstream and downstream activities. Timber companies also demonstrate corporate social responsibilities towards the local communities living within the vicinity of logging operations by providing gratis direct and indirect assistance.

Chapter 3

3.1 Sarawak Timber Association

Box 3: Introduction to Sarawak Timber Association

Sarawak Timber Association was formed on 7 August 1971 in Sibu by three founding members: The Fourth Division Timber Merchants' Association; The Sarawak First and Second Divisions Sawmillers' Associations; and The Third Division and Bintulu District Sawmillers' Association. On 20 September 1988, STA restructured its membership when existing members of the three Associations then were dissolved. Together they joined a single association, STA.

On 15 June 1988, STA shifted to its new office in Kuching. In a historical move, STA further shifted to its own building, Wisma STA on 15 October 2000. Currently, STA has approximately 500 member companies which are involved in

Wisma STA, Kuching

the timber trade and industry, including forest plantations. They deal with timber and timber products which include logs, sawntimber, plywood, mouldings / dowels, furniture, furniture parts, laminated boards and other panel products.

Level 10, Wisma STA

One of the objectives of the Association is to promote, ascertain and protect the continuous well-being of the timber trade and industry in the State. Guided by a council and accomplished through a team of fulltime secretariat staff, the Association advances this objective by *inter alia* representing member companies at meetings with the government and relevant authorities; representation in national and international fora; information dissemination; and provision of training, technical and research support to member companies.

Training on site by STA Training trainers

Recognising the importance of upgrading the skills of the forest workers while simultaneously reducing wastage during the harvesting process, STA started training chainsaw operators in August 1996. An innovative program was drawn up for training tree-felling operators in logging camps throughout Sarawak. In 2004, through its wholly-owned company, STA Training Sdn Bhd engaged the New Zealand Forest Industries Training and Education Council to develop the Sarawak Modular Training Framework for the forest and timber industries. The first trainer development program in both the tree-felling and log extraction

Log extraction by tractor

(tractor operation) skills sets had successfully trained 79 trainers, many of whom are now training operators in their own logging camps. Subsequently, training was extended to cover three new skills sets: Certificate in Log Loading, Certificate in Clear-fell Site Preparation; and Certificate in Mechanical Site Preparation (Excavator). In 2006, STA and Lincoln University New Zealand offered a Postgraduate Diploma in Applied Science (Sustainable Tropical Forest Management) in Kuching, with a specific focus on sustainable forestry management in the tropics. This was in cognizance of the complexity of evolving forestry issues that necessitated informed decision-making at a managerial level.

Postgraduate Diploma in Applied Science – Classroom session

Postgraduate Diploma in Applied Science – Field session

STA Mutual Sdn Bhd, another wholly-owned company, complements social initiatives of the logging companies by undertaking welfare work. In co-operation with these companies, it endeavours to develop and improve the welfare of communities in Sarawak living within the vicinity of logging operations regardless of race, religion or creed. Within the context of the Sarawak timber trade and industry, it provides scholarships, sponsorships to qualified and eligible Malaysian citizens to undergo tertiary education and training; and encourages and promotes scientific and industrial research and development. It also promotes and supports forest conservation efforts and initiative.

Community project - Water dam for gravity feed water supply

Community project - Construction of water dam for gravity feed water supply

Chapter 4

4.1 General Position

All forestry-related activities in Sarawak are required to be conducted within the confines of a legal framework. *Based on this principle, the State has continuously strengthened the regulatory framework of harvesting operations and timber trade activities.* However, the costs of introducing measures to reduce illegal logging and its associated trade *must not* be at the expense of legitimate logging and trade. Ensuing compliance with regulatory requirements and cost differentials must not punish law-abiding timber operators[14].

The long-term effects of the proposed Malaysia – EU FLEGT VPA, specifically towards the progress of striving for economic development in Sarawak, are matters of deep concern. The convergence of competing and often conflicting usages for land and resource in the pursuit of development is inevitable. As part of a developing country, these challenges and constraints are unavoidable and have to be surmounted in order to achieve a developed country status. In order to fully succeed, the conditions must not only be conducive, but also must stimulate

economic growth. Furthermore, it is posited that economic growth is both a precursor to and a catalyst for developing a sophisticated social framework: an improvement in the quality of life stimulates social awareness, and consequently socio-economic progress. Hence, the State of Sarawak must be given the freedom to respond to these challenges internally and according to democratic norms, without undue pressure from the international community. The proposed VPA, however, imposes conditionalities that threaten to constrict this freedom of choice or decision-making, in a manner that could retard current and future progress of Sarawak's economic and social development, and create conditions for social unrest. These conditionalities must be satisfactorily rectified before an agreement with the EU is concluded.

Box 4: EU FLEGT VPA and Other Initiatives

Globally, there is a plethora of voluntary schemes and initiatives for timber legality assurance. Forest certification, for example, is a process of independently verifying forest management practices against a predefined standard. For some countries, this is a lengthy and difficult process. A phased approach was eventually introduced to assist tropical producer

countries in achieving forest certification. These phases coincide with different components of forest certification: legal, technical, environmental and social. The first phase, the legal component, seeks to ensure that timber complies with all relevant forest management and timber harvesting laws. To assess this phase, specific legal criteria are produced to ascertain timber is harvested legally: verification of legality. Various independent and private initiatives have worked to produce these legality criteria[15].

It is important to note that verification of legality and forest certification schemes adhere to a uniform standard with specific principles and criteria. More significantly, these efforts operate purely on a voluntary basis. The EU FLEGT VPA, however, needs to be contextualised to negotiating countries' conditions, and in due process, subject these countries to restrictive conditionalities.

The amended United States' Lacey Act, prohibits the entry of illegal timber and timber products into the US. Importers of timber products are required to provide information on the scientific name of the species, the value and quantity of the timber and the name of the

country in which the timber was harvested. As opposed to the EU FLEGT VPA process, the US does not convene negotiations with timber producing countries to create a legality license. Producer countries that are not exporting to the United States are therefore not required to satisfy the requirements of the Lacey Act: it is a voluntary initiative.

4.2 Current EU Scenario

4.2.1 Premise of the VPA

The Action Plan emphasises the broader objectives of enhancing sustainable economic, social and environmental development, good governance and sustainable forest management[16]. Eventual references include the Millennium Development Goals (MDGs) which synthesise the global concerns of, and interdependence between poverty reduction, growth and sustainable development. Neither the noble intentions of these far-reaching objectives nor the lofty goals of the MDGs are disputed.

However, the ever expanding agenda convolutes current VPA negotiations while the high standard of expected output demotivates legitimate players. Moreover, the mixed messages are confusing, and

serve to further dilute the original intent of the licensing scheme: eradicate illegal logging and associated trade. Hence, the broader objectives of enhancing sustainable economic, social and environmental development, good governance and sustainable forest management must be separated from the scheme and current VPA negotiations. They will be addressed more effectively through different avenues, in separate capacities and with additional resources.

The ***primary aim*** of the licensing scheme is to prevent the trade of illegal timber in the EU market. Under the Malaysia – EU VPA, legal timber is defined as "timber harvested by licensed person from approved areas and timber and timber products exported in accordance with the laws, regulations and procedures pertaining to forestry, timber industry and trade of Malaysia". One of the demands put forth by the EU during VPA negotiations is a resolution to the native customary laws and native rights over land issue. Box 5: Native Customary Land and Native Rights over Land are emotional issues, governed by laws passed prior to Malaysia Day. Though the Government adheres to the laws and customs recognised for the creation of native rights over land, others have their own perceptions and

theories on what is native customary land. Pressure groups in the EU currently withhold their support for the Malaysian VPA process in order to exert pressure on changes to the laws. Pressured to mitigate undue criticisms that will undermine the overall success of the FLEGT licensing scheme, the EU has grown increasingly vocal in urging for governance reforms in Sarawak, especially in relation to native customary laws and native rights over land. This is a lengthy process which lies beyond the ability of the industry to resolve individually: it can only operate within the legal framework that Malaysia or Sarawak as democratic sovereign states should determine.

On the other hand, records show the State has always respected, recognised and upheld native rights. For example, the State has set aside approximately 1.6 million hectares as area under Native Customary Land. On average, a native already has more land than other races[*]. In the event that the natives require more land

[*] Excluding the Malays, approximately 48 percent of the Sarawak population of 2.5 million as of 2008, belong to various native groups. An extrapolated figure derived from State Planning Unit reveals that each native has between three to four acres of native land. Accounting for migration effects, this

for proprietary or development purposes, there are provisions established by the State to consider their requests. The basis of these requests should not only be bound to their customs and traditions, but with due regard to their individual or communal needs and their capacity to put such land into proper economic utilisation. This arrangement does not, in any way, extinguish or diminish their native rights and identities. However, there must be justifiable grounds that additional land allocated must be used productively, thereby contributing to the overarching goals and policies in achieving a fully developed State, in consonance with Malaysia's vision of becoming a fully developed nation by year 2020.

In light of the existing judiciary, legislative and executive arms of the State, all disputes arising from the different interpretations of native customary laws and native rights over land must be resolved between the Sarawak state government and the native claimants, and ***not*** between the logging companies and the native claimants. With the inclusion of native customary issues in the scope of VPA negotiations, is

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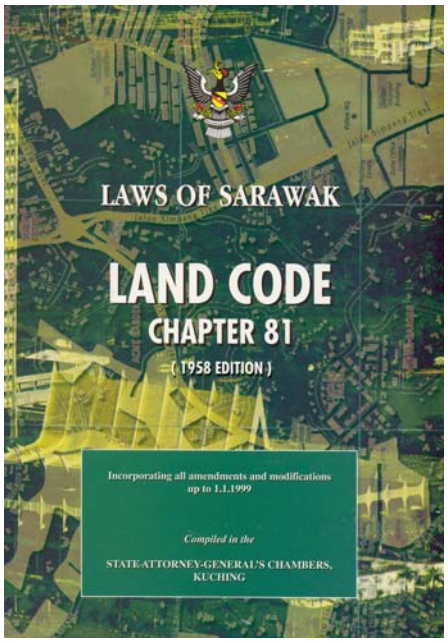
figure may easily be increased to between five to six acres per person.

EU alluding to the fact that the State is erroneous in her interpretation of laws related to native rights over land by compelling the logging companies to resolve this matter with the native claimants? The EU briefing notes states that the laws to be included in the legality definition are to be decided by Malaysia. This also means that the definition should be confined to ***existing*** laws, regulations and mechanisms. The State therefore, should be granted the space and freedom to resolve this internally, if and as it sees fit. Furthermore, the institutional structure of the VPA in Malaysia will not be the correct channel to either initiate changes or mediate and resolve conflicts of this nature as it undermines the sovereignty and autonomy of the country. Any dispute should be settled through the efficacious judicial process, which is independent from the legislative and executive arms. In this matter, the Court of Appeal's judgement in the Nor ak. Nyawai case has determined that native customary rights are conferred only in areas where the native occupy continuously and not the forests where they roamed or foraged for their livelihood. This authoritative judgment of an appellate court should be respected and followed.

To reiterate, it is believed that the State has the best interest of the natives at heart. This is evident by statutory provisions that consistently recognise and retain native rights over the years. In the past, the State will also duly consider requests for land not only based on customs and traditions, but also based on their merits. Furthermore, the judiciary arm of the State is the only legitimate avenue to address different interpretations of native customary laws and native rights over land. In summary, native customary laws and native rights over land cannot be part and parcel of a VPA negotiation that seeks to specifically address illegal logging and its associated trade.

Box 5: Native Customary Laws and Native Rights over Land

The issue of native customary laws and native rights over land



Sarawak Land Code

in Sarawak has attracted increasing scrutiny from the global community, resulting in a growing body of literature. At the heart of this debate is a challenge to the concept of native customary rights (NCR): as legally defined by the Sarawak state government vis-à-vis its traditionally accepted form. Salient points of this contention will be expounded upon below.

Who is a native?

A native is a Malaysian citizen, belonging to one of the indigenous races in Sarawak. These races are specified in the Interpretation Ordinance 2005 (Cap. 61) and Article 161A, Clause 7 of the Federal Constitution. The legally verified status of a native is essential as it affects proprietary interest.

What is native customs or adat?

Native customs are traditional and often unwritten rules that govern all aspects of life. Adat is defined as "a way of life, basic values, culture, accepted code of conduct, manners and conventions"[17]. Although the State gives recognition to the existence of adat, it is deemed not to have any legal force yet until it is recognised by law . The Majlis Adat Istiadat Sarawak Ordinance, Ord. No. 5 of 1977, for instance, defined adat as "native customs

or body of native customs to which lawful effect has not been given thereto"[18].

Cleared site for shifting agriculture by local communities

What is native customary law?

Native customary law is native customs that are not only codified by the Majlis Adat Istiadat, but also given the sanction of law. To date, five customs have been codified: Adat Iban 1993, Adat Bidayuh 1994, Adat Kayan-Kenyah 1994, Adat Bisaya 2004 and Adat Lun Bawang 2004. Consequently, these customs may be modified or extinguished by legislative or executive action. This prerogative is necessary to ensure the natives are beneficiaries of the State's development plans.

In Article 160 of the Federal Constitution, one of the definitions of law is "customs and usage having the force of law". From a human rights' perspective, Bulan and Locklear (2008)[19] counter that the State's view of

"the force of law" being equal to codified law is flawed, and therefore morally unfair as the basis of native customary law. The argument posited is that custom is fluid and changes in conjunction with time and context. The State's position is juxtaposed against a growing tide of international recognition for indigenous peoples' rights as couched in the UN Declaration of Rights of Indigenous Peoples[*]*. This has led to a claim that the State has eroded her fiduciary obligation: trust and confidence the public placed upon the government to act. On the contrary, the State maintains that written laws which have evolved over 160 years have consistently and continuously recognised and preserved native rights. Moreover, these laws and codified customs have been instrumental in maintaining the State's racial harmony while pursuing her long-term goals of becoming a fully developed state. These written laws provide a degree of certainty and stability in the implementation of these developmental goals.*

What is native customary right to land?

The State specifies NCR to land as a system of recognition to occupy and use land owned by the State.

[*] While Malaysia is a signatory of the UNDRIP, this declaration is non-legally binding and does not require ratification.

Although there are no legal documents to signify ownership of native land, this can be rectified by fulfilling all the prevailing legal requirements at that particular point in time. From the time of the Rajah's reign to the current State government, the matter of native land has always been carefully dealt with due to the cultural sensitivities attached. The judiciary, legislative and executive arms of the State have persistently upheld native rights. Details of native customary laws and native rights over land in Sarawak have been prepared by the State Attorney-General's Chambers, Sarawak and are appended as Annexure One.

What are the points of contention?

The ongoing debate with regards to NCR to land may be encapsulated by the validity of unwritten native customs and traditions vis-à-vis written laws of the Sarawak state government, with specific reference to land ownership.

Firstly, there are two sets of laws governing native rights over land: pre-1958 statutes enacted during the Rajah's reign and the rule of the British Crown; and post-1958 Land Code (Chapter 81) and other

corresponding statutes. The evolution of land laws for the past one and a half centuries had greatly preserved the essential legal intent and provisions provided by the Rajah. The British Crown acknowledged the unique position of the natives, and sought to consolidate all statutes related to native rights. This gesture was recognised and maintained by the State even after the formation of Malaysia. In short, if a native were to claim NCR to land established before 1958, his claim must be determined in accordance with laws.

Secondly, from the State's perspective, NCR to land may only be claimed in an area that has been cultivated and occupied prior to 1st January 1958. This is locally referred to as "temuda". The natives, however, believe claims for NCR to land extend to communal land or "pemakai menoa" and reserved virgin forest or "pulau galau". The latter is accessed to meet the various needs of the natives: hunting, fishing and collection of jungle produce. According to the State, these customs are not part of the Rajah's legislation or codified by the Majlis Adat Istiadat Sarawak. Therefore, these customs, though practised, are not part of native customary law. Without the sanction of law, the natives cannot create rights over

untitled State land. The Court of Appeal in the Nor ak. Nyawai case decided that ownership rights are only conferred upon land that has been continuously cultivated and developed; and not over land that is used to forage and roam.

Burning of site for shifting agriculture

On the other hand, a different school of thought contends that these written laws have nullified the pre-existence of rights under native laws and customs. It is argued that the Application of Law Ordinance 1949 provided a platform for common law and doctrines of equity in conjunction with statutes of general application, subjected to the specific context of Sarawak and native customs. Moreover, recent rulings have also acknowledged the pre-existing rights of natives based on their laws and customs. In light of the perceived unbalance of power between the natives to protect their rights and the State's extensive ability to utilise native

land and extinguish native rights, special protection of these rights are proposed.

The State agrees that pre-existing rights under native laws and customs before the Rajah assumed sovereignty are recognised by the common law. After assuming sovereignty, however, the Rajah could "modify, extinguish or regulate the creation or exercise of such rights"[20]. Section 5(3) of the Land Code further permits the executive arm of the State to extinguish these rights, on the proviso that reasonable compensation is made. Subsequently, these pre-existing rights have no application.

The State further asserts that reference to common law should only be confined to the common law of England, as clearly stated in the Law of Sarawak Ordinance 1928 and its successor, the Application of Laws Ordinance 1949. Additionally, the principles of this English common law were not subscribed to in their totality. Applications were not only subjected to modifications, but also dependent on the specific circumstance, local and native customs of Sarawak.

What about the timber industry and corporate social responsibility?

The State maintains that native rights have been continuously recognised and preserved through her judiciary, legislative and executive arms. Similarly, the Sarawak timber industry has always respected the customs and rights of the natives. With an awareness of the difficult logistics involved in accessing the interiors of Sarawak, logging companies have repeatedly gone above and beyond the norm by enabling developmental conditions to improve the native's quality of life. These companies provide important infrastructure: roads and bridges that connect the natives to nearby towns or cities; help build churches, clinics, longhouses and public toilets; assist with water dams for gravity feed water supply. They also contribute financially: monthly allowances to longhouses; purchase of books, stationery and food for students; gifts during the festive seasons. In certain areas, companies
communities in ref
constructing infrast
providing a mean
projects to incre

Children of the Rural Community

companies have undertaken this corporate social responsibility at their own great expense.

Concluding remarks

The brief exposition on native customary laws and native rights over land serve to highlight the magnitude of the on-going contention. It requires commitment, expertise, finances, patience and most of all, time to reach an amicable compromise.

4.2.2 Unreasonable Conditionalities

4.2.2.1 Restrictive Import Requirements

One condition of this agreement places the onus on *Malaysia to ascertain the legality of her source of timber import.* This stems from the EU's reservations of non FLEGT-licensed timber and timber products entering the supply chain, thereby weakening the Action Plan. Although the actual form of this legality assurance is unspecified, it is required to satisfy the expectations of the EU. Ideally, this form of legality assurance should not differ vastly from the Action Plan. In addition to imposing undue constraints on Malaysia, it also raises doubt on the authenticity and validity of the existing documentation from the country of original import. It further insinuates that Malaysia's existing

importing scheme is not well-regulated and cannot be confidently perceived to prevent the entry of illegal logs and timber products. In the event that Malaysia cannot satisfactorily fulfil this requirement, there is high probability that this condition will eventuate as a non-tariff barrier for Malaysian timber and timber products entering the EU market. This violates the objective of World Trade Organization that seeks to liberalise international trade.

4.2.2.2 Restrictive Export Requirements

The second conditionality calls for *Malaysian exporters to apply FLEGT licensing scheme to non-EU markets,* regardless of whether this particular form of legality assurance is demanded by other consuming countries. Resultantly, timber producing companies will face additional administrative and bureaucratic procedures. As the Action Plan is limited to logs, sawntimber, plywood and veneer, producing companies have to differentiate these from other non-listed products.

It is understood that the intended signatory parties of this agreement are Malaysia and the EU. Therefore, Malaysia *should not be coerced* to bind non-EU markets to the terms of this agreement. Currently, the

Action Plan is restricted to the demands of the EU market and is not widely accepted elsewhere. Furthermore, this condition is prescribed without tangible corresponding market benefits. The cost differential will markedly increase and diminish Malaysia's hard-earned competitive edge in trade.

Within the context of Sarawak, the *State has a strong framework* to manage her natural resources: existing laws, rules, regulations governing the timber supply are discernible in a comprehensive and robust licensing scheme. Additionally, there are *competent and experienced State authorities* to monitor all matters related to timber imports and exports. Collectively, these components put forth credible evidence of legal timber. The oft-equated system failures of developing countries: weak governance structures, poor law enforcement and an absent civil society, do not apply to Sarawak.

The conditionalities imposed by the EU challenge the legitimacy and the autonomy of the State to make decisions on matters pertaining to land and natural resources. While the VPA will affirm the legality of timber and timber products produced, it is only

assumed that trade in illegal timber will decrease significantly. This scenario may only come to fruition if and when consumer countries such as the EU, reciprocate in kind: put in place and legislate regulations and procurement policies to deter the purchase of illegally harvested timber; enforce compliance with these regulations and policies; and demonstrate willingness to pay a price premium for legal timber. In other words, these demand-side issues must be adequately addressed by EU to make the FLEGT Action Plan effective in putting an end to illegal logging and associated timber trades.

4.2.3 Non-Reciprocal Commitment

4.2.3.1 Full Acceptance of FLEGT-licensed timber?

There has yet to be concrete evidence of a unilateral commitment from all 27 EU Member States to accept FLEGT-licensed timber. Even if this unilateral commitment is forthcoming, the constitution of the EU allows for *Member States' individual interpretation of the EU's Directive*. While the definition of legal timber will be commonly applied throughout all Member States, there will be discrepancies in terms of implementation procedures. There will be, *inter alia*, varying speed of recognition and different forms of

penalties. Furthermore, on the EU's part, there is no convincing assurance of any form of consistency and conformity in the implementation procedures. The industry will be expected to fulfil 27 variations of recognition for FLEGT-licensed timber; translated into additional resources expended with opportunity costs incurred. Resultantly, Malaysia loses any competitive advantage she may have gained prior to entering into this agreement.

4.2.3.2 Differentiation between FLEGT-licensed and non FLEGT-licensed timber and timber products

For the EU market, there is *no differentiation between FLEGT-licensed and non FLEGT-licensed timber and timber products*. Moreover, non FLEGT-licensed timber will continue to be granted access into the EU market. This does not create a level playing field for FLEGT-licensed timber within the EU market.

Table 1: Top 10 Exporters of Illegal Wood into EU

No	Country	Estimated illegal or suspicious quantity of wood (in million m^3)
1.	Russia	10.4
2.	Indonesia	4.2
3.	China	3.7
4.	Brazil	2.8
5.	Belarus	1.5
6.	Ukraine	1.5
7.	Bosnia Herzegovina	1.2
8.	Cameroon	0.64
9.	Gabon	0.59
10.	Cote d'Ivoire	0.53

Source: WWF Germany 2008[21].

Malaysia is ranked in the twelfth position, with an estimated 0.28 million m^3 of illegal or suspicious quantity of wood. With the exception of Indonesia, Cameroon and Gabon, none of the other countries have entered into formal negotiations with the EU for the FLEGT VPA. Of these, only Cameroon and Gabon have recently entered into an agreement with the EU. Until and unless these 10 countries enter into an

agreement with the EU, the playing field remains greatly lopsided. As such, Malaysian producers are once again greatly disadvantaged: additional layers of bureaucratic procedures and costs without accompanying market benefits, resulting in a loss of market share in the EU and non-EU markets. A study on the market impact of the FLEGT VPA between Malaysia and the EU has documented European importers' low willingness to pay premium prices for FLEGT-licensed over non FLEGT-licensed timber and timber products[22].

The EU has proposed a regulation known as "Laying down the obligations of operators who place timber and timber products on the market" (Due Diligence Regulation). Pending legislation by the European Parliament, the regulation is expected to be operational by the spring of 2012. It seeks to avoid illegally harvested timber and timber products from being placed on the EU market. Critical analyses by think-tanks and NGOs have revealed weaknesses within this draft regulation: undefined risk management procedures; and important elements of the regulation to be left to Member States[23]. Thus far, there is no concrete evidence that this draft regulation will

completely prevent the entry of illegal timber and timber products or circumscribe its movement upon gaining entry in the EU market. Additionally, it does not guarantee the creation of market space and demand for FLEGT-licensed timber. This regulation should have been introduced and implemented prior to the commencement of VPA negotiations.

4.3 Implications for the Sarawak Forestry & Timber Industry

The rhetoric propounded to the Sarawak forestry and timber industry is the solidification of her international reputation as a legal producer of timber and timber products, and guaranteed market access into the EU market. Costs incurred in implementing the VPA were predicted to be kept at a minimum: terms of negotiations were expected to be based on Sarawak's existing laws, regulations and mechanisms. The State government asserts that her existing policy environment and regulatory systems are sufficiently efficient to address the issue of illegal logging. Moreover, studies sponsored by WWF Malaysia (2001) and the Netherlands Ministry of Agriculture, Nature and Food Quality (2008) showed that the occurrence of illegal logging in Sarawak is deemed to be low and

manageable [24] . Nonetheless, under the guise of promoting good governance, the EU moved to include conditionalities as stated in section 4.2.2 into the VPA negotiation process. These conditionalities were seen as a catalyst for environmental, political, and social reforms in Sarawak.

Therefore, it is natural to deduce that implementation costs would no longer be kept at a minimum. Conversely, the Sarawak timber industry views market incentives proposed by the EU as unappealing and weak. Market returns are almost non-existent. In the event that the VPA proceeds to implementation stage, it is with certainty that the industry will encounter undetermined compliance costs in conjunction with additional administrative and bureaucratic measures; a limited willingness to pay price premiums by European importers for FLEGT-licensed timber and timber products; a loss of market share in EU and non-EU markets resulting from restrictive import and export requirements; potential backlash from non-governmental organisations that will undermine the recognition of FLEGT-licensed timber; and erosion of Sarawak's trade competitiveness. The benefits derived from guaranteed market access into the EU as

compared to Sarawak timber producers' flexibility to choose alternative schemes are questioned. Opportunity costs may prove to be too significant.

In essence, either definitive market benefits or freedom of choice for participation must be fundamental elements of the FLEGT licensing scheme. Definitive market benefits will ensure that legitimate logging will not be penalised. Illegal logging will also not be rendered as a more economically attractive option. As a matter of principle, freedom of choice to participate must be incorporated into the scheme in the absence of a clearly defined market preferential treatment. Regardless of whether the broader objectives are incorporated into the scheme, the non-inclusion of these two key factors will punish legitimate logging, and attract illegal logging instead.

Accordingly, it is imperative that Sarawak should be allowed the space to conduct a state-wide impact assessment of this EU FLEGT VPA. More information is required to understand potential economic, environmental, political and social consequences of this VPA.

Box 6: The Fallacy of Price Premiums

Established in Switzerland in 2004, the Roundtable on Sustainable Palm Oil (RSPO) was initiated by WWF to unite all stakeholders in the global palm oil supply chain to promote the growth and use of sustainable palm oil products through credible global standards. Currently, a secretariat for the RSPO operates from Kuala Lumpur, Malaysia[25]. The RSPO sought to ensure price premiums for certified palm oil. However, these premiums have not been forthcoming. Moreover, these global standards have been subjected to different interpretations with dire effects.

Similarly, forest certification was perceived as a tool to advance the pursuit of sustainable forest management. These schemes were widely adopted in temperate countries, but lagged in tropical countries due to a variety of factors. Although price premiums were once again put forth as an incentive, it was a promise unfulfilled. Premiums only existed for limited certified timber products in niche markets. For other certified timber producers, the negligible premium barely offset costs of conformance.

4.3.1 "Involuntary" Voluntary Partnership Agreement?

The conditionalities: restrictive import and export requirements, imposed by the EU subtracts from the supposed voluntary nature of the partnership agreement. Upon adoption, the FLEGT licensing scheme will become the status quo throughout Malaysia. In return for these conditionalities, the EU has not applied restrictions of similar weight to their own market. *In the absence of definitive, guaranteed market incentives, the industry must be given the freedom of choice to participate or adopt other schemes as determined by the market*. Much can be said for the inflexibility of a single program as opposed to the effectiveness of comparable programs.

The broader issue at stake is one of a changing global governance structure, leading to a diminishing policy space for a developing nation[26]. Previously, national and regional policies were formulated within the confines of a country. However, the trend has reversed: developed countries have increasingly used international fora to push for change in developing countries. Aid promised is often laden with conditionalities, coupled by unequal power relations, e.g., the governing structure of the JIC, RB, TPM and IMM. As in the oft-used political conditionality of

promoting good governance, developed countries believe that there is a direct correlation between good governance and development. However, literature perused has repudiated this correlation. Instead, it is economic and political development that leads to good governance[27]. In summary, it is crucial that Malaysia, and specifically, Sarawak be given that policy space to devise appropriate instruments, response and policies for development needs that are explicit to her conditions[28]. *Sarawak reserves the right not only to maintain her sovereignty, but also her autonomy in determining how best to use and apply its natural resources*.

Box 7: The EU as Global Environmental Governance Leader

The EU and its Members States contribute 55% of the world's official development assistance, making it the largest global development donor[29]. It proffers 38% to the UN regular budget, and a further 50% to UN funds and programs. The EU has approximately 30% voting power within the Bretton Wood Institutions and up to five members in the UN Security Council[30]. By virtue of its size and financial might, the EU is a major player in all areas of the global political arena.

As part of an emerging identity, the EU posits herself as a leader in global environmental governance and as a driver for sustainable development. In addition to eradicating illegal logging and associated trade, the EU is actively involved in mitigating climate change. The EC's recent Renewable Energy Directive requires an impact assessment of indirect land use change (ILUC) on greenhouse gas emissions whilst identifying ways to minimise these impacts. The increasing global demand for biofuels led to ILUC: reduction of forest areas to enable agricultural production. NGOs, seeking to reduce consumption of carbon-based fuels, lobby governments such as the EU to include agricultural sector in carbon accounting.

As a major global producer of palm oil, Malaysia has an interest in the EU biofuel market. However, one of the seven land use change policy proposed in the directive requires the EU to "extend to other commodities/countries the restrictions on land use change that will be imposed on biofuels consumed in the EU". Essentially, this means that Malaysia will be prevented from future land use decisions, in particular conversions of land for palm oil plantations. The

Malaysian Palm Oil Council (MPOC) has argued that this policy tantamounts to a violation of WTO rules while subverting a country's sovereignty [31] *. Furthermore, the concept of ILUC is still at an infancy stage, exhibited by an absence of generally accepted methodology to scientifically determine ILUC. While ILUC may result in changes to greenhouse gas emissions, it has not been scientifically proven that these changes will be negative. This begs the question of how minimising ILUC in other countries will increase the consumption of renewable energy in the EU.*

The EU, in an effort to preserve her lead in global environmental governance, has resorted to creating unequal playing field for developing countries through the introduction of double standards.

Chapter 5

5.1 Conclusion

The first and foremost concern is to *support a favourable climate for the development of Sarawak*. As such, support is rendered to measures and initiatives to strengthen the legality of harvesting operations and timber trade activities. However, these measures must inherently and explicitly respect the State's right to govern, to legislate and to devise and achieve policy goals that are clear-cut to her conditions. Furthermore, the timber industry must be allowed the *freedom of choice* to participate or adopt other legality schemes as determined by the market.

Secondly, the broader objectives of poverty reduction, growth and sustainable development *must be separated* from the licensing scheme as they cloud the original intent of the Action Plan to curb illegal logging and associated trade. These broader objectives are not only multi-faceted, but complicated and will be better addressed through other avenues. Beyond this, the terms and conditions presented during the VPA negotiations must be consistent with the EU's own regulations, norms and standards to address illegal

logging and associated trade. In particular, non FLEGT-licensed timber and timber products must not be granted access into the EU; and there must be full acceptance of FLEGT-licensed timber and timber products in all 27 Member States.

Thirdly, illegal activities thrive upon the notion of economic gain. Any scheme to fight illegal activities must therefore incorporate beneficial economic factors. Without such essential contributing factors to combat illegal logging, the EU FLEGT VPA will invariably not only fail to arrest illegal logging, but also be unable to achieve the broader objectives of sustainable forest management, poverty reduction, protection of native customary rights and others. As in the law of nature, definitive market benefits will attract and guarantee a successful EU FLEGT participation like bees attracted to honey. The degree of success and the depth of attraction will of course, depend on the costs accrued against benefits attained.

Finally, there must be an *equal platform for VPA negotiations*: reciprocal commitment from EU in the fight against illegal logging especially on the demand side; and removal of unreasonable conditionalities

placed on Malaysia. No VPA should be signed unless and until all countries exporting to the EU are ready. Moreover, once an agreement with the EU is entered into, non FLEGT-licensed timber and timber products must not be allowed to gain entry into the EU market and EU must have in place procurement legislations and policies directed towards not buying non FLEGT-licensed timber or from countries without a VPA with EU. Without a correction to the imbalance of power, it is believed that Malaysia as a whole, and Sarawak in particular, stand not to reap the promised advantages, but will instead lose their competitive edge.

ANNEXURE ONE

NATIVE CUSTOMARY LAWS AND NATIVE RIGHTS OVER LAND IN SARAWAK

1. PREAMBLE

1.1 Native Customary law system prevailing in Sarawak is peculiar to our State. What is 'native customary law' must be determined with reference to the laws of the State, and what constitutes 'native customary rights' over land must also be determined with reference to the relevant State laws.

1.2 Native Customary Rights to land is also a system which recognises the rights of the native community to occupy and use land which by law belongs in the old days to the Crown, but nowadays by reason of Section 12 of the Land Code, belongs to the State.

1.3 The system of native customary rights over land had evolved over near one and half centuries; since 1841 when the Rajah James Brooke decided to make his first pronouncement pertaining to Land. Through this process of evolution, native rights to land were recognised, under certain conditions spelt out in the various Proclamations and Orders made by the Rajahs and subsequently, in various legislations passed by the Council Negeri (now Dewan Undangan Negeri of Sarawak).

1.4 As such, land occupied by natives under native customary tenure, are untitled i.e. there is no

document of title to show ownership. Whether a native has rights to such land would depend on whether he or his forefathers fulfilled certain requirements under the laws **prevailing at the time** which rights to the land were said to have been created.

1.5 Native customs which could create rights over land had been modified in Sarawak by laws made by the Rajahs and subsequently by the Council Negeri. At this juncture, it ought to be pointed out that in all legal systems, indigenous rights may be modified or extinguished by legislative or executive action. Professor Douglas Sanders in his Paper on 'Indigenous and Tribal Peoples: The Right To Live On Their Own Land' (presented at the 12th Commonwealth Law Conference held in Kuala Lumpur in September, 1999) stated:

'A leading Australian constitutional text summarises the basic rule from the **Mabo** decision as follows:

The indigenous population had a pre-existing system of law, which along with the rights subsisting thereunder, would remain in force under the new sovereign except where specifically modified or extinguished by legislative or executive action.'

1.6 It must be emphasised that the evolution of our laws on native customary rights over land over more than 1 ½ centuries was a peaceful and orderly process, without any serious discord amongst the various communities in Sarawak or between them and the Government, and has

enabled the Government of the day to improve the social and economic position of these communities and bring about overall development and progress to the rural areas.

2. NATIVE CUSTOMS AND NATIVE CUSTOMARY LAW

2.1 It is pertinent to observe there is a significant difference between **native customs (Adat)** and **native customary law.**

2.2 AJN Richards (a former Resident and acknowledged authority on this subject) in his book **Land Law and Adat** at page 9, stated:

> 'As was pointed out by Mooney, as Crown Counsel and Hickling, the law does not, in fact, gives effect to any customs whatsoever except the codified law of delicts,…'

2.3 The Land Code and its predecessor defines '**customary law'** to mean '**a custom or body of customs to which the law of Sarawak gives effect**'.

2.4 The natives of Sarawak may have and in fact do have many customs, but for these customs to have effect as 'customary laws', they must have the sanction of the Law. This is what characterised the difference between **native customs** and the **customary laws**; and this differentiation is acknowledged by the definition of 'Adat' in the Majlis Adat Istiadat Sarawak Ordinance, Ord. No. 5 of 1977 where '**Adat**' is defined as '**native custom or body of native**

customs to which lawful effect has not been given thereto.'

2.5 Thus, in relation to land, the practice of native custom does not necessarily give rise to rights over land. It is only the practice of those customs which are part of the customary law of Sarawak, which can create rights to land and this is evident by the provisions of Section 5(1) of the Land code which provides, inter alia, that native customary rights over land may be created 'in accordance with native customary law'. '**Native customary rights**' to land, however, received its first statutory definition in the Land Settlement Ordinance (also known as Rajah Order L-7 of 1933), enacted on 22.6.1933. It is defined by Section 66 of that Ordinance as follows:

'**Native customary rights** shall be recognised in respect of –

(a) land **planted with fruit trees**, when the number of fruit trees amounts to twenty and upwards to each acre;

(b) land that is in **continuous occupation** or had **been cultivated** or built on within three years;

(c) burial grounds or shrines;

(d) usual rights of way for men and animals from rivers, roads, or houses to any or all of the above.' (*emphasis added*)

2.6 However, the Government has always respected the Adat of the natives in Sarawak and established the Majlis Adat Istiadat to codify the Adats of the various communities and established a Native Courts System to see that native customs are enforced. So far the following Adats have been codified.

(i) Adat Iban Order, 1993 (Swk. L.N. 18/93);

(ii) Adat Bidayuh Order, 1994 (Swk. L.N. 27/94); and

(iii) Adet Kayan-Kenyah Order, 1994 (Swk. L.N. 28/94)

Those Adats which have been codified would constitute the native customary law of the State. The uncodified customs and traditions can be practised by the native communities but they do not form part of the native customary law of the State.

3. PRE-1993 LEGAL POSITION ON NATIVE RIGHTS TO LAND

3.1 Although the Land Settlement Ordinance provides the first statutory recognition to native customary rights over land, the exercise of rights over land, the exercise of rights by natives over land were regulated by various pronouncements and orders made by the Rajahs prior to 1933.

3.2 In fact, the exercise by the natives of customary rights over land had been recognised since the

days of the first Rajah. Writing in his journal in 1840, the first Rajah stated:

'The fruit trees about the Kampong, and as far as the jungle around, are private property, and all other trees which are in any way useful, such as bamboo, various kinds for making bark-cloth, the bitter kony… and many others. Land, likewise, is individual property, and descends from father to son; so, likewise, is the fishing of particular rivers, and indeed most other things..'

3.3 Legislation was subsequently introduced to deal with specific aspect of customary law. In 1899, the second Rajah issued the *Fruit Trees Order*. Section 1 reads:

'Such fruit trees which have chiefly sprung up from seeds thrown out of and about houses, and have become common property of the inhabitants of a long house or village, are in no cases to be sold or in any way transferred or claimed by individuals leaving such houses or villages.'

And section 2 reads:

'Any Dayak removing from a river or district may not claim, sell, or transfer any farming ground in such river or district, nor may he prevent others farming thereon, unless he holds such land under a grant.'

3.4 The significance of this Order is that it sets out the manner in which claims to native customary tenure may be made by a native community through the cultivation of fruit trees on land

which was deemed to belong to the State. Another important characteristic of native customary tenure was apparent, i.e. rights so created through native customary tenure may be lost if a native moved from one river system to another.

3.5 The next development occurred in 1920 when the Rajah's Order No. VIII, 1920 was published on 21.10.1922, the relevant parts of which reads as follows:

'22.(i) Under this part lands may be occupied by Native free of all charges for the cultivation of fruit trees, padi, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws **provided that where possible claims to fruit groves and farming lands shall be registered.** Records of such claims shall be kept by all Native Headman and also in the Land Office in each district.

(ii) A certificate in the form of Schedule A of Notification No…. of 1920 may be issues to registered land holders under this part.' (*emphasis added*)

A supplement to the Order reads:

'2.(i) Native land reserves shall be made in suitable situations and **these shall be divided into lots of three acres and any native born subject of His Highness the Rajah shall be permitted to occupy one such lot free of all charges** (excepting fees for demarcation) provided that no person not being a native of the

Country shall occupy land in such reserves and further that no one person shall occupy more than one lot at one and the same time.

(ii) A record of the names of those occupying land under this section shall be kept by all *Tuah Kampong* and also in the Land Office in each district.

(iii) A certificate in the form of Schedule A may be granted to each native land holder on application.' (*emphasis added*)

3.6 From these Orders and the Land Settlement Ordinance (formerly known as Rajah Order L-7 of 1993), it is obvious that the only recognition , given by written laws as pronounced by the Rajahs, requires physical occupation of an area before a native can establish his rights over the same. As AJN Richards noted in Land law and Adat at page 8 – 'Occupation under custom appears to have been generally regarded as 'lawful occupation' and 'lawful ownership'. The 1920 Order and the 1933 Ordinance even required some form of registration of such rights to accord natives protection of their claims over land. Additionally, it is to be observed that the Rajah did place a limitation on the amount of land that a native could occupy by the exercise of rights under his Adat. **At that point in time, the Rajah only allowed each native to occupy one lot of three (3) acres**. Also, under the 1933 Ordinance, land claimed on the basis of cultivation by a native must be in continuous occupation or had been cultivated on 'within three years'.

3.7 In 1939, the Rajah realised a need to prevent some communities from moving into territories occupied by other native communities. Hence, the Prohibited Areas Ordinance was passed to prevent some communities from moving into areas already occupied by others. In other words, native communities do not have absolute licence to move into any area, clear virgin jungles and settle thereon. The Restricted Areas Notification (see: Vol. VII of the Revised Edition of the Laws of Sarawak page 153) prohibits Sea Dayaks (Ibans) from remaining in the then Baram Administrative District for an aggregate period of more than 60 days in any calendar day without the permission in writing of the District Officer, Baram or District Officer, Limbang.

3.8 After the 1933 Land Settlement Ordinance, rules and administrative circulars were introduced to reinforce the requirement for natives to occupy and clear their land before they could have rights over the same. This is illustrated by the Appendix made to the Tusun Tunggu (Third Division) Order, published in Vol. VII of the Revised Edition of the Laws of Sarawak 1958, as a '**guide to Judges, Magistrates and other on adoption, divorce, the acquisition and disposition of property as practised amongst Sea Dayaks of the Third Division, ratified at the Penghulus' Conference, held at Sibu on 15 July 1952**'. The relevant portions thereof read:-

'**7. Theoretically all untitled land whether jungle or cleared for padi farming (Temuda) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for**

the site of their padi farms confers on them a restricted right of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes *temuda*. It is a recognised custom that *temuda* is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance.

In former days, there were no restrictions on anyone felling jungle provided that he did not destroy valuable commercial trees such as gutta, jelutong and engkabang. But it is not so now. Since the introduction of the Forest and Erosion Ordinance no one is allowed to fell jungle without permission from the proper authority.

No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land. It would be an infringement of the right of the Crown if they did so, and they may be prosecuted in view of the fact that selling of untitled land is prevalent in this division, and Dayaks seem to forget this custom.

There are no other ways in which Dayaks can part with possession of untitled land other than by gift or on death. When a Dayak abandons his land *temuda* and moves to another district he loses all his rights to it. The land that has been farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise lacking in land. In such a case the original owner has no right to prevent

others from making use of the land and the user acquires the right.' (*emphasis added*)

3.9 It ought to be pointed out that what is set out above has been made an **Appendix** to the Tusun Tunggu (Third Division) Order and was also adopted by the Tusun Tunggu (Fourth Division) Order and Tusun Tunggu (Fifth Division) Order. It therefore has the effect and authority and constitutes the customary laws of the Sea Dayak (Iban) in Sarawak.

3.10 What is contained in this **Appendix** is also consistent with what was contained in **Secretariat Circular No. 12/1939** which briefly outlined the creation of rights over land through native customary tenure as follows:-

(i) The right to cultivate cleared land vests in the community with priority to the heirs of the original faller of the big jungle. **This right must be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community.** The cycle is, in their eyes, not a matter for rule of thumb but for expert native opinion.

(ii) Where not inconsistent with the above, the existence of permanent cultivation of a reasonable density is evidence of customary ownership as opposed to customary rights of user.

(iii) Individual ownership is limited by the customary right of the community to a say in the matter of disposal to anyone outside the community.

(iv) **No community or individual may hold up land in excess of requirements** and, the extreme case, removal to another district automatically extinguished all rights of user. The old Order (a) dated 10.8.89 is an excellent exposition of this principle.

3.11 What has been stated in paas 3.8, 3.9 and 3.10 above is reaffirmed by the following passage in the Report on The Iban of Sarawak by J. D. Freeman in 1955 under the caption 'Principles of Land Tenure among the Iban':-

'As already noted the territory allotted to a long-house community is not held in communal ownership, but rather all the bilek families of the community have equal rights of access to the land. That is, these rights of access are held in common as against the members of all other long-houses. Actual family ownership is established by the felling of primary jungle (kampong), and this is always undertaken by individual bilek families. **By clearing the virgin forest from a tract of land, a bilek family secures full discretionary rights over the secondary jungle (damun) which springs up within a few months of the first padi harvest, and thereafter, for as long as it remains in the local community, this bilek family retains ownership of all land, for the initial cultivation of which it has been responsible.**

Once land has been acquired in this way it becomes part of the general property of the bilek, and is inherited in the same way as are the other valuables of the family. That is, land is inherited by the bilek family as such, and all those who remain members of this local group possess parcenary rights in the land which it has acquired.'

(See: p133 of Dayak Adat Law by AJN Richards (1963))

3.12 In summary, the creation and exercise of native rights over land, prior to the present Land Code which came into force on 1st January 1958, were regulated by laws or Orders made by the Rajah or Council Negeri and not just by the customs and traditions of the natives. These laws or Orders have the effect of modifying or overriding customs or traditions practised by the natives, and they set out the customary laws for creation or exercise of rights to land. They laid down the conditions and restrictions for the creation of native rights to land and limited the size of the land, without title, which natives may occupy and claim 'ownership'.

3.13 Subsequent to 1958, native customary rights may be created over Interior Area Land upon these 2 conditions, viz:

(a) a permit is obtained under Section 10(3) of the Land Code from the Superintendent; and

(b) by deploying any of these methods –

(a) felling of virgin jungle and occupation of land thereby cleared;

(b) planting of land with fruit trees;

(c) occupation or cultivation of land;

(d) use of land for burial ground or shrine;

(e) use of land of any class for rights of way; or

(f) any other lawful method.

3.14 Other lawful methods must refer to the Appendix to the Tusun Tunggu – see paragraph 3.8 above i.e. by gift or inheritance. It is necessary to note that fishing or collection of jungle produce do not create rights over land. To reinforce this point, I refer to the Notes prepared by A.B. Ward, 1915 on Sea Dayak (Iban) Fines and Customs recognised in the Court at Simanggang (Sri Aman – a major centre of Iban population) which was reproduced at p.100 of the book 'Dayak Adat Law' in the Second Division compiled by A.J.N. Richards:-

"XV FISHING

1. No native is allowed to claim ownership of any stream or waterway, and there is no prohibition to anyone fishing anyway in any of the usual recognised modes.'

(See: Sarawak Museum Journal Vol. X, 17-18 December, 1961 p.82)

4. **RELATIONSHIP BETWEEN NATIVE CUSTOMARY LAW AND OTHER STATE LAWS**

4.1 As the definition of **customary law** implies, the written laws of the State must take precedence over native customs. This is because for native customs to have the status of customary laws, they must be those which the laws of Sarawak give effect. This is further reinforced by the provisions of Section 9 of the Native Customs (Declaration) Ordinance 1996, which reads:-

'**If any provision of a code is found to be repugnant to or is inconsistent with a provision of any written law, the latter shall prevail.**'

4.2 This is further reinforced by Section 10(4) of the Land Code which re-enacted Section 8(4) of the Land (Classification) Ordinance 1948. Section 10(4) reads:-

'The occupation of Interior Area Land by a native or native community without a permit in writing from a Superintendent shal not, **notwithstanding any law or custom to the contrary**, confer any right or privilege on such native or native community and, in any such case, such native or native community shall be deemed to be in unlawful occupation of State land and section 209 shall apply thereto.' (*emphasis added*)

4.3 The legal position taken by the State with regards to the relationship between customs and written law is no different from the adopted

in any other common law jurisdiction; that is, customs may be overridden by statutes.

5. COLLECTION OF FOREST PRODUCE, FISHING AND HUNTING BY NATIVES

5.1 Although natives have been collecting timber and other jungle produce from forests for their domestic or personal use, such as for firewood, building of houses and boats, the exercise of such rights by natives have been regulated by law since the end of the 19th century. The following are the relevant legislations governing the taking of timber or forest produce:-

(a) The **Rajah's Order dated 22.6.1899** states, inter alia, that 'any person wishing to work and collect timber for whatever purpose shall first obtain a permit at the Resident's Office.

Any person working timber without a licence on and after the 1st day of August, 1899 will render himself liable to a fine not exceeding $25.

(b) **Order No. 1, 1912** states that, inter alia, 'it is hereby ordered that the felling of *Engkabang* and *Ketio* trees is strictly forbidden.'

(c) **Order No. IX, 1912** provides, inter alia, that –

'Whenever any person or persons are desirous of planting plots of marsh land which have been cleared within three

years previously or hill land which has been cleared within seven years previously, such person or persons will be permitted to destroy all kinds of *Engkabang, Ketio* and *Jelutong* trees found on such lands when necessary without penalty, but when a person or persons desire **to clear marsh land covered with jungle of a growth of more than three years old or hill land covered with a growth of more than seven years old where such trees are growing, permission must be first obtained of the Officer in Charge of the district; otherwise the penalty will be enforced.**' (*emphasis added*)

(d) Similarly, **Order XIV, 1921** provides, inter alia, as follows:-

'2.(i) Except as provided in rules 9 and 10 below no person shall –

(a) cut, saw, convert or remove any tree, timber or firewood on or from State land; or

(c) cut, collect or remove on or from State land any of the kinds of forest produce mentioned in Schedule I, except under and in accordance with the conditions of a licence in Form 1 under the hand of a Forest Officer or other Officer duly authorised in that behalf.

9 (i) With the written permission of the Conservator **permits** in Form 17 may be issued under the hand of a Forest Officer to cut, collect and remove on or from State land any forest produce therein specified.

11(i) Notwithstanding anything in this Order contained it shall be lawful for any subject of H.H. the Rajah of Sarawak to cut and remove from State land any timber or forest produce required by him for his own use and not for sale, exchange or profit' (*emphasis added*)

(e) **Section 108 of the Land Ordinance (Cap. 27)** provides inter alia, that any person who shall be found unlawfully occupying any Crown land either by cultivating any part thereof or **cutting timber or produce thereon** shall be **guilty of an offence** against the Ordinance.

(f) **The Forests Ordinance (Cap. 31) of 1934 and Forests Rules, 1947**

Collection of forest produce from State land forests or **communal forests** were also regulated by the **Forests Ordinance of 1934** which has been superseded by the Forests Ordinance (Cap. 126) of 1953 which came into force on 1.1.1954. Section 37 of the Forests Ordinance of 1934 provides that **when the Resident is satisfied that it is the**

desire of a majority of the members of a community that a communal forest shall be constituted he shall, with the approval of the Chief Secretary, publish a proclamation in the requisite form.

Once a communal forest has been duly gazetted, section 43(1) of the Forests Ordinance of 1934 provides that subject to any conditions imposed in writing by the District Officer under section 42, any member of the community may remove free of royalty or fee any forest produce for his own use and not for sale, exchange or direct profit. Section 43(2) provides that no other person shall remove forest produce for whatever purposes.

(g) **The Forests Ordinance (Cap. 126) of 1953**

This Ordinance came into force on 1.1.1954 and further regulates the taking of timber or forest produce, even by natives. For instance, section 65 allows any inhabitant of Sarawak to remove, from State land which is not a forest reserve, timber produce exclusively for his own use and not for trade or barter or profit.

5.2 (a) It is to be noted that under both the Forests Ordinance 1934 and the current Forests Ordinance 1953, the Government has the right to constitute Protected Forests, Forest

Reserves and Communal Forests. In constituting Protected Forests, the Government would acknowledge and concede certain rights or privileges to the affected native communities. For instance, when the Lemiting Protected Forest (216, 800 acres) was constituted on 15 September 1951, the Government acknowledged the rights of the communities expressly named therein 'to farm their secondary forest (*temuda*) but it shall be an offence to clear high forest except with the authority of the Conservator of Forests. The persons named shall have the right to cultivate the rubber and fruit gardens named with the provisos that no tree may be felled and no more trees may be planted' (*emphasis added*)

(b) Thus the rights of the natives within a particular protected forest are strictly regulated by the Notification constituting the same e.g. G.N.S. 881/1951 constituting the Lemiting Protected Forest.

5.3 (a) In the case of forest reserves, the amount of jungle produce that could be taken therefrom are controlled. For instance, in constituting the Binatang Forest Reserve (vide L.N. 791 dated 3.7.1951), it is stated, inter alia, that:

'The Forest Reserve is constituted for the benefit of the following longhouses and kampongs who shall have the right to take jungle produce for their own use and not for sale or barter. Provided that the quantity that may be taken annually shall be subject to the control of the Conservator of Forests.'

(b) Not only the taking of jungle produce but also fishing and hunting would be regulated when, for instance, National Parks are constituted. A typical example is the Gunong Mulu National Park Proclamations (G.N. 2852 and 2853 of 3.10.1974) which confined fishing and hunting by the communities named therein to certain specified areas of the Gunong Mulu National Park.

5.4 Where there is a need to maintain a forest area for the benefit of a local community, the Government could declare an area as Communal Forest, see for instance, the Kabong Communal Forest (2,500 acres) (G.N.S. 96/61) which is for the benefit of the inhabitants of Kampongs Kabong and Paloh.

5.5 All these show that the right of the natives to take timber and jungle produce have been regulated, even before Malaysia Day, by laws and are controlled by the Conservator (now Director) of Forests. Although the natives may have their own customs, such as, *pemakai menoa* and *pulau galau*, these customs are not part of the Tusun Tunggu or the Adat Iban or any other Codes produced by the Majlis Adat Istiadat Sarawak. Hunting, fishing and collection of jungle produce, therefore, do not create rights over land (see: Appendix to the Tusun Tunggu and Section 5 of the Land Code and Section 66 of the Land Settlement Ordinance). The natives unfortunately have a wrong perception that it is their customs, though not part of native customary law, which gives them right sto land, the jungles and in some cases, the streams and rivers near their

longhouses. But, the written laws which have evolved over 160 years do not recognise certain of their customs as customary laws upon which they could create rights over untitled State land.

5.6 It must be noted that the natives do not have proprietary interests over forest areas where they go to collect jungle produce, fishing etc. In the **Nor ak Nyawai** case, the Court of Appeal approved the following passage of a Judgement of the Selangor High Court in Sagong bin Tasi v. Kerajaan Neger Selangor, viz:

'Therefore, in keeping with the worldwide recognition now being given to aboriginal rights, I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land. ***However, this conclusion is limited only to the area that forms their settlement, but not to the jungle at large where they used to roam to forage for their livelihood in accordance with their tradition. As to the area of the settlement and its size, it is a question of fact in each case. In this case, as the land is clearly within their settlement, I hold that the plaintiffs' proprietary interest in it is an interest in and to the land.*** *(emphasis added)*

5.7 The decision of the Court of Appeal in **Nor ak Nyawai** (which overruled and set aside the Judgement of Ian Chin J. in the High Court), establishes that proprietary rights over land accrued only over area where natives had

settled. This principle is consistent with the native customs and practice of **Temuda** as set out in the Tusun Tunggu (Third Division) Order at pages 8 & 9 of this Paper, and what is noted in the Rajah Oder IX of 1875 as '**a common practice among the native community to make large clearings of old jungle**' and if they abandon their land they have cleared, they '**will lose all claim or title to such land**'. The Federal Court in Superintendent of Lands & Surveys, Miri & Anor vs. Madeli bin Salleh (Civil Appeal No. 01-1-2006 (Q)) (yet unreported) held that the words 'claim title to such land' show that the Rajah gave 'due recognition to native rights over land'. But such rights, as evident in the Rajah Order IX of 1875 attached to land 'where native community made large clearings' i.e. brought under cultivation and NOT to land where the natives roamed and foraged.

5.8 Since Ian Chin J's judgement in **Nor ak Nyawai's** case had been overturned by the Court of Appeal, the concepts of 'pemakai menoa' and 'pulau' referred to by Ian Chin J cannot be basis for creation of proprietary rights over land[*].

5.9 It must be noted that the term 'customary law' has been defined in the context of creation of rights over land pursuant thereto. For instance, the Land Code of Sarawak defines 'customary law' to mean '**a custom or body**

[*] Leave to appeal to the Federal Court against the Court of Appeal Judgment was refused in 2008.

of customs to which the law of Sarawak gives effect'.

5.10 '**Temuda**' as a 'custom' for the creation of rights over land has been given effect to by the various Tusun Tunggu Orders [1]. But, the term or expressions 'pemakai menoa' and 'pulau' have never been given any effect by the laws of Sarawak, not even by the Adat Iban Order 1993 (Swk. L.N. 18/93), the Adat Bidayuh Order 1994 (Swk. L.N. 27/94), the Adat Kayan-Kenyah Order 1994 (Swk. L.N. 28/94 amended by Swk. L.N. 44/94) and the Adat Lun Bawang Notification 2004 (Swk. L.N. 47/2004) which were made pursuant to the Native Customs (Declaration) Ordinance 1996 (Cap. 22) or the earlier Native Customary Laws Ordinance (Cap. 51 - Laws of Sarawak Revised 1958). Accordingly, 'pemakai menoa' and 'pulau' cannot be considered as part of 'native customary law' for the purposes of creation of rights over land even though they may be part of the traditions and practices of some of the native communities.

6. THE COMMON LAW

6.1 Recent Malaysian Courts rulings confirmed that 'the common law' respects the pre-existence of rights under native laws or customs'. The common law referred to by our Courts in the Sarawak context, could only

[1] See: (1) The Tusun Tunggu (Third Division) Order 1955
(2) The Tusun Tunggu (Fourth Division) Order 1957
(3) The Tusun Tunggu (Fifth Division) Order 1956

mean the common law of England[2]. In 1928, the Law of Sarawak Ordinance was passed[3] and section 2 thereof reads:

'The Law of England **in so far as it is not modified** by Ordinances enacted by the Rajah (later substituted with the word 'Governor') with the advice and consent of the Council Negeri, and **in so far as it is applicable to Sarawak having regard to native customs and local conditions**, shall be the laws of Sarawak.' *(emphasis added)*

6.2 The 1928 Law of Sarawak Ordinance was replaced on 12.12.1949 by the Application of Laws Ordinance and section 2 of this latter Ordinance reads:-

'2. Subject to the provisions of this Ordinance and save in so far as other provision has been or may hereafter be made by any written law in force in Sarawak, the **common law of England** and the doctrines of equity, together with statutes of general application, ad administered or in force in England at the commencement of this Ordinance, shall be in force in Sarawak:

Provided that the said common law, doctrines of equity and statutes of general application shall be in force in Sarawak **so far only as the circumstances of Sarawak and of its inhabitants permit** and subject to **such**

[2] See: definition of 'Common Law' in the Interpretation Ordinance (Cap 1 – revised 1958 Ed) effective from 23.5.1953.
[3] This Ordinance was revised in 1946.

qualifications as local circumstances and native customs render necessary.'

6.3 Both these 2 Ordinances show categorically that pre-Malaysia Day and pre-enactment of the current Land Code, there was never any whole-sale application of English common law principles in Sarawak. English common law principles, if applied, would be subject to modifications and only so far as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary.' Any Court applying English common law principles in Sarawak is **duty bound** to examine if local customs and native customs render 'their application necessary and whether these principles have been modified by Sarawak laws.

6.4 Malaysian Courts' decision on the common law recognition of 'pre-existence rights' of natives over land, are consistent with decision of Courts in some Commonwealth jurisdiction such as the Court of Appeal in New Zealand in Ngati Apa, Ngati Koata & Ors vs Ki Te Tau Ihu Trust & Ors [2003] NZCA 117. The NZ Court of Appeal held:

'That the common law recognised pre-existing property after a change in sovereignty was affirmed by the Privy Council in Amodu Tijani vs Secretary, Southern Nigeria.'[4]

[4] Amodu Tijani's case was referred to by the Federal Court in Madeli's case (supra).

6.5 Rights created by the natives before sovereignty over Sarawak was assumed by the Rajah are recognised by common law. But after assumption of sovereignty, the Rajah could modify, extinguish or regulate the creation or exercise of such rights. In support of this proposition, reference is made to **Mabo vs Queensland [No. 2]** (1991 – 1992) CLR 1 at p.69.

'Native title to land survived the Crown's acquisition of sovereignty and radical title. The rights and privileges conferred by native title were unaffected by the Crown's acquisition of radical title but **the acquisition of sovereignty exposed native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title**.' *(emphasis provided)*

6.6 But, the common law on 'pre-existence' has no application in cases where native customary rights are claimed to have been created **after** the Rajah assumed sovereignty and made laws governing the creation of native rights. This view point is firmly supported by the following passages of the Federal Court in Madeli's case (supra):

'We are of the view that what section 66 of the Land Settlement Ordinance 1933 purported to do was to stipulate **new** conditions before native customary rights could be recognised **after the coming into force of the said Ordinance**.'

And

> 'Reading the 1921 Order we are of the view that its effect is merely to reserve a specified area for the purpose of the operations of the Sarawak Oilfields Limited. **Future use of the land** so reserved are governed by the said Order…The Order could not be construed to have the effect of extinguishing the rights of the native over such land which have been in existence prior to the coming into force of the said Order.'

6.7 Therefore, in the Sarawak context, new legislation may impose new conditions for creation of native customary rights. For instance, the High Court found Nor ak Nyawai's ancestors migrated from Kanowit to the Bintulu area in the 1930s. Those native migrants were subject to the laws governing the creation of native customary rights when they moved into and settled in the Bintulu area. **Common law had no application to him, as his 'rights' were not 'pre-existing' rights enjoyed or created by him before the Rajah gained sovereignty over Sarawak.** Today, for instance, no native could, on the basis of common law privileges, claim or acquire State land (untitled) in Sarawak.

6.8 Application of common laws as decided by Australian, New Zealand and other Commonwealth courts in dealing with native claims over State land in Sarawak, must be done with care as the decisions of these

Courts outside England are not likely to be truly reflective of English common law and may not be applicable to the local circumstances nor consistent with customs of the peoples in Sarawak. In support of this, the following passage of the NZ Court of Appeal in the **Ngati Apa** (supra) is important:-

'The laws of England were applied in New Zealand only 'so far as applicable to the circumstances thereof'. The English Laws Act 1858 later recited and explicitly authorised this approach. But from the beginning the common law of New Zealand as applied in the courts differed from the common law of England because it reflected local circumstances.'

6.9 If the decision of the NZ Court of Appeal on common law principles in this case were to be applied by a Malaysian Court in Sarawak, our Court will be in fact importing NZ common law into the country which is not authorised by the aforesaid Law of Sarawak Ordinance and Application of Laws Ordinance and section 3(1) of the Civil law Act 1956.

7. GOVERNMENT POLICIES AND PRACTICES REGARDING RECOGNITION OF NATIVE RIGHTS TO LAND

7.1 When the Government introduced the Land Code (Amendment) Bill 2000, the Government's firm intention is to recognise native rights **lawfully** created over land. That is still the objective of the Government.

7.2 This means that the Government can only recognise those rights of natives which have been lawfully created. In other words, these rights must have been created in accordance with the native customary law i.e. law that gives force to native customs.

7.3 All land belongs to the State. In the case of native customary land, with no titles, natives, with legitimate customary rights to the land, (i.e. created in accordance with the law), occupy the land as licencees of the Government – Sections 5(2) & 44 of Land Code.

7.4.1 The Government intends to survey the land, settle or confirm their rights to the land and have their interests or rights registered and ultimately, grant them titles to the land. This process is bound to take time. Additionally, in the meantime, the Government wants the NCR land to be developed into plantation estates. In this regard, the Government has started the NCR land bank concept whereby the native NCR claimant can 'pool' their land together into a large estate and enter into joint ventures with established plantation companies for the development thereof into oil palm plantations or the large scale cultivation of other cash crops. Under this scheme, the natives will have shares in the joint venture companies which would be granted leases over the NCR land for a term of 60 years. Upon expiry thereof, the land will either be reverted back to the natives or their heirs or if the natives agree, the lease to the joint venture companies can be extended. In this

manner, the Government intends to facilitate the development of the NCR land and to bring better economic returns or value for such land to the natives.

7.4.2 Up to December 2006 the State Task Force on NCR Land Development had approved 58 NCR land areas for development under the New Concept. Thirty-one (31) of these areas that have been verified by the Department of Land & Survey comprise of approximately 292, 247 hectares of NCR Land.

7.4.3 Currently, field developments are taking place in 23 of these projects, which cover a total gross area of 188, 347 hectares. By 31 October 2006 picket survey of 57, 413 hectares had been completed out of which 41, 916 hectares had been cleared for field development. Of the area already cleared 33, 193 hectares had been planted out of which 21, 082 hectares were in production.

7.4.4 To-date there are 11, 952 landowners participating in the 23 projects where field development is on-going.

7.5 The objective mentioned in paragraph 6.4 is difficult to achieve if the native communities make claims which are not consistent with the laws governing the creation of native customary rights over land or where there are disputes between the natives themselves as to the size or boundaries of their respective holding.

7..6 As regards claims to forests (*pulau*), the Government will maintain the stand that the *pulaus* are not '*temuda'* (farming land) as they are never brought under cultivation. The natives have **no proprietary** rights to the *pulaus* and no legal rights to the land therein. If there is a need by any community for jungle produce etc. from a forest area for their own subsistence or use, the Government could declare such a forest area as a communal forests. The native community ought not to claim jungles which they have never brought under cultivation as their NCR land.

7.7 The Government maintains that what a native could claim as his NCR land must be for his own farming requirement and must be limited to what he needs or is capable of cultivating based upon traditional farming methods. In other words, the size of his NCR land must not exceed what he needs for himself and his family, and using the conventional or traditional method of farming, able to bring under cultivation.

7.8 What a native claims as rights under native customary law must be restricted to what the laws over the last 1 ½ centuries permit. If he requires more land than what he could obtain through the native customary law system, he may apply, like any other Sarawakian, to the Government to alienate him land. He should not attempt to increase the size or area of his land by pleading that he is entitled to have more land because of certain customs which are not recognised as, or not part of, the customary law of the State. The law on NCR

which has evolved more than a century must be respected. For instance, the principle that NCR land is *temuda* land (i.e. land cleared of virgin jungles for cultivation) and occupied by the natives or used as burial ground or right of way, has been part of the native customary law since the Rajah Order of 1875 (See: Federal Court Judgement in Madeli's case (supra)) and reinforced by the Secretariat Circular of 1939 and declared as part of the Tusun Tunggu of the Ibans and restated in Section 5 of the Land Code. The Government cannot agree to any change in this fundamental concept which has governed land utilisation, planning and development for nearly 1 ½ centuries.

7.9 NCR land like titled or alienated land may be required for public purpose. Under the Land Code, if NCR land is needed for public purposes, the lawful holder of such land will be paid compensation. NCR land claimants will not be treated differently from registered proprietors of land; consistent with the relevant provisions in the Federal Constitution for the protection of property and against discrimination.

8. CONCLUSION

8.1 The Government will always respect all native rights to land, lawfully acquired in accordance with the native customary laws of the State all these native customs in relation to creation of rights and ownership to land have been properly and well documented as shown hereinabove. Likewise, the Government

expects the natives to respect such native customary laws evolved in a peaceful and orderly manner over more than 1 ½ centuries.

8.2 The Government will continue to facilitate the development of NCR land with a view to enabling the natives who lawfully have rights over such land, to enjoy better economic returns and value for their landed assets; and in the process, also to enhance development of the rural areas to improve the living standards of the rural communities.

8.3 The Government will respect and honour the constitutional protections accorded to the natives by awarding recognition of their legitimate rights to their NCR land and if such land are required for public purposes, to pay the due compensation.

8.4 The Government recognises the need of the natives to maintain their traditional way of life and farming and the need to take timber and jungle produce from, and to hunt and fish, in our forests. Where there is a need for the natives to take timber or timber products from a forest area, the Government will declare that area as a communal forest. In cases where a particular native community needs to be settled in a specified area which suit their traditional way of life and farming, the Government would, pursuant to section 6 of the Land Code, declare the area as a Native Communal Reserve. Examples of Native Communal Reserves declared recently are:

(a) The Native Communal (Agriculture) Reserve Order, 2001 (Swk. L.N. 77/2001);

(b) The Native Communal (Kampung) Reserve Order, 2001 (Swk. L.N. 65/2001);

(c) The Native Communal (Community Hall) Reserve Order, 2001 (Swk. L.N. 28/2001)

(d) The Native Communal (Surau) Reserve Order, 2001 (Swk. L.N. 93/2001); and

(e) The Native Communal (Agriculture) Reserve Order, 1992 (Swk. L.N. 21 (1992))

8.5 But the natives must at the same time understand and respect the rights of the Government to realise, for the benefit of the country, the full economic potentials of the resources of our forests and land which are not part of our national parks, natural reserves and wildlife sanctuaries.

8.6 In a democratic society where the Rule of Law must be upheld, the interests and rights of any individual should be exercised or advanced without any disregards for the Law and the interest of the State and Nation. No one should not take the law into their own hands by setting up blockades or intimidating those undertaking development projects in their areas. Their rights, if any, to land can always be enforced by proceedings either before the Civil Court or the Native Courts which are set up, amongst other reasons, to adjudicate on disputes or claims to NCR land. All non-Government bodies should encourage the

people to uphold and respect the Law and help to explain the Law to those who are supposed to observe and abide by the Law.

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