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Research Proposal

Preliminary Title

Impacts and Benefits

A Comparison between Agreements of Indigenous Peoples and Resource Extracting Companies in Canada and Malaysia

Submitted by

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1 Object of Research

In a world of increasing globalisation and industrialisation the struggles over natural resources do not stop at the territories of indigenous peoples. Areas, which have been sustainably and peacefully used for centuries have become the target of the extractive industry: Busy roads pass through traditional hunting grounds, forests are being cleared for large-scale plantations and mines being built within ancestral lands of native communities. The local people have to face exploitation, dispossession and resettlement and their traditional lifestyles and knowledge, passed down from generation to generation for centuries, may soon disappear. A major cause for this development is the policies of economically emerging countries, which think of indigenous lands merely as potential economic capital.

Until the 20th century governments could legally and almost without any barriers exploit these territories, dispossess native communities and force them to assimilation. It was in the middle of the 20th century that indigenous people slowly became politically active, formed movements and gained recognition of their unique culture and rights. They were supported by many NGO's and advocacy groups, but the major advances came with the work and conventions of the International Labour Organization[1] and most recently the United Nations' Declaration on the Rights of Indigenous Peoples.[2]

These acts and the work of International Organisations[3] put the lights on the situations of indigenous peoples worldwide and led to considerable improvements in their recognition and support. However, much progress is of rather theoretical than practical nature. The majority of indigenous peoples live in developing or emerging nations,[4] which frequently ignore indigenous rights for the benefit of their own economic growth. Particularly the companies in the extractive industries appear to be only interested in the land and its resources and pay little attention to the local communities, their land rights or traditional lifestyles and customs.

This dissertation intends to explore how cultural-sensitive and sustainable interaction with indigenous peoples can be combined with commercial developers' urge to use and extract natural resources most efficiently.

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[1] See *International Labour Organization (ILO)*: Indigenous and Tribal Populations Convention, C107 and Indigenous and Tribal Peoples Convention, C169, which are legally binding conventions stating minimum rights for indigenous peoples.

[2] *United Nations*: Declaration on the Rights of Indigenous Peoples, which as a declaration is not legally binding.

[3] Like the UN-Proclamation of the First (1995-2004) and Second (2005-2014) Decade of the World's Indigenous Peoples, see *International Work Group for Indigenous Affairs*: Second International Decade of the World's Indigenous Peoples (2005-2014).

[4] See *International Work Group for Indigenous Affairs*: The Indigenous World: Regions.

For this purpose the thesis investigates agreements between indigenous communities and companies in the extractive industries in Canada and Malaysia.
The main objectives of these agreements are enabling resource extracting companies to use the land of indigenous peoples, minimising the impacts of the specific projects on nature and the lifestyle of local communities and providing further benefits. These benefits may come in various forms, ranging from financial compensation, creation of education and training facilities to job opportunities or shares.
In Canada, the contracts are referred to as *Impact and Benefit Agreements*, while the *Orang Asal*[5] of Malaysia conclude *Joint Venture Agreements* with the corporations.

The two countries and their indigenous peoples are utterly different and so are the objective agreements. However, there are several reasons to compare the agreements in these two nations. The preeminent arguments for the selection of Canada and Malaysia were as follows:

The Discrepancies The differences between the two countries are one major criteria. On one side Canada: a highly developed, prosperous state with a long history of different relations and approaches towards its aboriginal peoples. On the other side Malaysia: an emergent, industrialising nation, whose indigenous communities started mobilising against political repression and exploitation only in recent decades.
Both follow their own goals in conducts concerning indigenous peoples: In Canada, reconciliation is one of the most important underlying motives for continuous developments regarding aboriginal peoples, while in Malaysia the primary reason is fighting and reducing poverty within the traditional communities.[6]

British Roots and Common Law Both Canada and Malaysia were colonies of the British Empire. This period had a huge impact on their cultures and especially their legal systems, as both countries adopted the Common Law and are members of the Commonwealth of Nations. As *Mohamad/Trakic* point out for Malaysia:

> *"English law, which includes the common law, rules of equity and legislation, is the predominant source of the Malaysian law. It remains the source and one of the greatest contributors to Malaysian jurisprudence even today."*[7]

[5] The term *Orang Asal* means "Original Peoples" in Malay and refers to all indigenous peoples of Malaysia, including the *Orang Asli* of Peninsular Malaysia and the native inhabitants of Sabah and Sarawak (*Dayak*); see *International Work Group for Indigenous Affairs*: The Indigenous World 2016; *Ooi*: Historical Dictionary of Malaysia.

[6] See *Majid Cooke*: In the name of poverty alleviation: Experiments with oil palm smallholders and customary land in Sabah, Malaysia.

[7] *Mohamad/Trakic*: The reception of English law in Malaysia and development of the Malaysian common law, p. 124.

The Common Law system provides a basis of comparison for the agreements and related regulations. Furthermore, the ties to Great Britain affect the rights of indigenous peoples in both countries in various other forms: In Canada, for example, the *Honour of the Crown* is an important principle guiding the government's policies towards aboriginal peoples.[8] In Malaysia some laws from the British colonial rule concerning land rights of native peoples are still in force and vital to them.[9]

The courts of Commonwealth nations sometimes refer to each other, thereby refining and spreading Common Law principles and milestone decisions all over the globe. The recent development of the Aboriginal Title doctrine provides an excellent example of this practice.[10]

Extractive Industries and Cooperation Difficulties Malaysia and Canada are rich in natural resources and have enormous extractive industries sectors. In both countries companies in this sector conclude agreements with indigenous communities to operate within their territories. While the form of cooperation between native peoples and companies as well as the agreements might be different, the involved indigenous communities are facing similar problems. These include alcoholism, drug abuse, refusal of contracted benefits and significant impacts on their traditional lifestyle and customs.[11]

Relevance of Agreements The companies' and nations' economical interest in the resources within aboriginal territories is one of the biggest threats to indigenous peoples all over the world. But:

> *"A new phase is emerging in the relationship between energy and resource activities and the communities that are affected by them.* [. . .] *Effects on local communities now may cover a spectrum from negative consequences such as environmental damage, loss of amenity, social and cultural dislocation, and economic disruption, to more*

[8] For example, see *Sanderson/Bergner/Jones*: The Crown's Duty to Consult Aboriginal Peoples: Towards an Understanding of the Source, Purpose, and Limits of the Duty; and the Supreme Court's decisions R. v. Sparrow, Haida Nation v. British Columbia (Minister of Forests), Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), Beckman v. Little Salmon/Carmacks First Nation.

[9] Of particular relevance for this research project are the land laws in the federal states of Sarawak and Sabah, where most of Malaysia's indigenous peoples live (i.e. Sabah Land Ordinance 1930; Sarawak Land Code 1958).

[10] In the 1990s, Canadian and Australian courts recognized the existence of an Aboriginal Title in their landmark-decisions Mabo and Others v. Queensland and Delgamuukw v. British Columbia. In 2002, this principle was adopted by the Malaysian High Court in its *Sagong Tasi*-decision (Sagong Tasi & Ors v. Kerajaan Negeri Selangor & Ors 2002), which directly referred to these cases. See also *Gilbert*: Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title.

[11] See, for example, *Colchester* et al.: Land is Life: Land Rights and Oil Palm Development in Sarawak; *Colchester/Jalong/Alaza*: Chapter 10: Sabah: Genting Plantations and the Sungai and Dusun Peoples; *Weitzner*: "Dealing Full Force": Lutsel K'e Dene First Nation's Experience Negotiating with Mining Companies.

positive outcomes such as benefit packages promoting health, education and cultural outcomes, revenue flows, and jobs."[12]

By comparing the agreements in Canada and Malaysia, this research project intends to highlight the assets and drawbacks of each country's legal framework and policies regarding the relationship between indigenous peoples and resource extracting companies. With these findings the thesis will discuss well-working and accepted principles for fair cooperation between the parties, which could be used for further research on improving the relationship of indigenous peoples and companies in other countries.

2 Research Questions

This dissertation seeks to address the following questions:

- What are the indigenous peoples' and companies' perspectives on the agreements, their main reasons for concluding them and their expectations?
- Which impacts and consequences from the agreements can be observed?
  - Is it possible for local communities to maintain their unique culture and lifestyle even if they cede parts of their traditional territory to companies and participate in commercial activities?
  - Are the stipulated benefits actually provided and can they be fully enjoyed by the indigenous parties?
- Which law systems and regulations are decisive for the Impact and Benefit Agreements and Joint Ventures?
  - How is Native Customary Law reflected in the negotiation process and the final agreements?
  - Which Common Law principles are relevant and how has the Aboriginal Title doctrine affected the process?
  - To what extent are such agreements mandatory or just economical for the companies to realise specific projects?
- Which procedures regarding the negotiation process and the implementation of agreements tend to work well and could form a basis for future developments in other countries?

[12] *Barrera-Hernández* et al.: Sharing the Costs and Benefits of Energy and Resource Activity : Legal Change and Impact on Communities, Chapter 1, p. 1.

3 State of Research

Several fields of law have to be investigated to conduct a comprehensive comparison of the situation in the two countries:

- The Common Law, as it provides a legal basis of comparison for the agreements.
- Aboriginal Rights and Title, since they constitute for a major part of the negotiation process and agreements.
- Native Customary Law and Indigenous Legal Traditions, for they play significant roles within indigenous communities concerning the regulation of land ownership, dispute settlement and contract negotiations.
- The Impact and Benefit and Joint Venture Agreements themselves.
- International acts and agreements, such as the UNDRIP and ILO Conventions, because they stipulate minimum standards for their member states and thereby shape the relationship between indigenous peoples, states and companies.

A considerable amount of literature has been published on the Commonwealth of Nations, the Common Law and their impacts on former colonies and indigenous peoples.[13]

In Canada, the rights of aboriginal peoples are being extensively analysed, enhanced and refined, both by researchers[14] and the Canadian courts.[15]
Indigenous Legal Traditions have also been investigated by several scientists.[16]
The academic interest in Impact and Benefit Agreements is increasing constantly and numerous experts and researchers have published about them.[17]

[13] See, for example, *Daniels/Trebilcock/Carson*: The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies; *MacHugh*: Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-determination; *Gilbert*: Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title; on Commonwealth relations to indigenous peoples: *Burger*: Indigenous Peoples in Commonwealth Countries: The Legacy of the Past and Present-day Struggles for Self-determination; *Whall*: The challenges of indigenous peoples: The unfinished business of decolonization; *Matson*: The Common Law Abroad: English and Indigenous Laws in the British Commonwealth.

[14] Recently even in German language and in great detail by *Göcke*: Indigene Landrechte im internationalen Vergleich; as well as various other researchers, e.g. *Samson*: Canada's Strategy of Dispossession: Aboriginal Land and Rights Cessions in Comprehensive Land Claims; *Scholtz*: Negotiating claims: The emergence of indigenous land claim negotiation policies in Australia, Canada, New Zealand, and the United States.

[15] The most recent landmark decision by the Supreme Court of Canada concerning the Aboriginal Title was Tsilhqot'in Nation v. British Columbia, which led to the historical *Tsilhqot'in Nation*: Affirmation of the Nemiah Declaration.

[16] Most recently and at length by John Borrows, see *Borrows*: Recovering Canada: The Resurgence of Indigenous Law; *Borrows*: Indigenous Legal Traditions in Canada; furthermore see *Secher*: Jones v Public Trustee of Queensland [2004] QCA 269 (6 August 2004) - Recognition of Aboriginal Customary Law and the MABO Principle; *Svensson*: On Customary Law: Inquiry into an Indigenous Rights Issue.

[17] See, for example, *Gogal/Riegert/Jamieson*: Aboriginal Impact and Benefit Agreements: Practical Considerations; *Cameron/Levitan*: Impact and Benefit Agreements and the Neoliberalization of Resource Governance and Indigenous-State Relations in Northern Canada; *Isaac/Knox*: Canadian Aboriginal Law: Creating Certainty in Resource Development; *Papillon/Rodon*: Proponent-Indigenous agreements and the implementation of the right to free, prior, and informed consent in Canada.

In terms of Malaysia, there is a comparatively small body of English literature investigating the rights and agreements of the *Orang Asal*. Nevertheless, there are still several studies to be found concerning indigenous land rights,[18] Malaysian Common Law,[19] Native Customary Law,[20] and Joint Venture programmes.[21]

Regarding arrangements between indigenous communities and resource developing companies, numerous studies have been undertaken in recent years and the scientific interest is growing rapidly.[22] However, Malaysian companies' agreements with indigenous peoples received only little attention, since most of the research focuses on Canada, Australia, New Zealand and the USA.

Up to now, there has no direct comparison been conducted between agreements of indigenous peoples and companies in the extractive industries in eastern and western Common Law countries, nor Canada and Malaysia specifically.

3.1 Methodology

The first step in this research project is to analyse the legal systems and their historical backgrounds of each country. Emphasis will be on the Common Law and its provisions towards indigenous peoples. In addition to literature research, relevant legislature and judicature in Canada and Malaysia will be explicated.[23]
Instruments and methods used will include historical, systematical and teleological interpretations as well as exegesis in terms of international standards and common

[18] See, e.g., *Aiken/Leigh*: Seeking Redress in the Courts: Indigenous Land Rights and Judicial Decisions in Malaysia; *Doolittle*: Property & Politics in Sabah, Malaysia: Native struggles over Land Rights.

[19] See *Mohamad/Trakic*: The reception of English law in Malaysia and development of the Malaysian common law; *Hoffstaedter*: Asia-Pacific: From one law to many: Legal pluralism and Islam in Malaysia.

[20] For example, see *Nelson/Muhammed/Rashid*: Native Customary Rights: Does It Hold the Future of Sarawak's Natives?; *Azima/Lyndon/Akmal*: Understanding of the Meaning of Native Customary Land (NCL) Boundaries and Ownership by the Bidayuh Community in Sarawak, Malaysia; *Bulan/Locklear*: Legal Perspectives on Native Customary Land Rights in Sarawak.

[21] Especially Professor Dr. Majid Cooke of the Universiti Malaysia Sabah (UMS) has undertaken extensive research in Palm Oil Joint Ventures, e.g. *Majid Cooke*: Vulnerability, Control and Oil Palm in Sarawak: Globalization and a New Era?; *Majid Cooke/Toh/Vaz*: Community-investor business models: Lessons from the oil palm sector in East Malaysia; *Majid Cooke/Toh/Vaz*: Making an informed choice: A review of oil palm partnerships in Sabah and Sarawak, East Malaysia.

[22] See, for example, the recent and elaborate work of *Barrera-Hernández* et al.: Sharing the Costs and Benefits of Energy and Resource Activity : Legal Change and Impact on Communities; further *O'Faircheallaigh*: Community development agreements in the mining industry: an emerging global phenomenon; *O'Faircheallaigh*: Shaping projects, shaping impacts: community-controlled impact assessments and negotiated agreements; *Godden* et al.: Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability; *Sawyer/Gomez*, eds.: The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations and the State.

[23] For example, the Malaysian Aboriginal Peoples Act, 1954 (No. 134) and Environmental Impact Assessment-Process (see *Briffett/Obbard/Mackee*: Environmental assessment in Malaysia: a means to an end or a new beginning?) and other resources listed in *Noordin*: Legal Research Facilities in Malaysia. Regarding Canada: the Canadian Charter of Rights and Freedoms, the Indian Act, RSC 1985, c I-5 and the Canadian Environmental Assessment Act, 2012 (S.C. 2012, c. 19, s. 52).

principles (such as the United Nations' Declaration on the Rights of Indigenous Peoples and ILO Conventions).

After investigating the legal frameworks, the agreements between indigenous communities and companies can be analysed by using the aforementioned methods. Resources will include databases and materials from governments and private companies,[24] as well as specific case studies.[25]

With the methods of the discipline of comparative law a comparison will be conducted between Canadian Impact and Benefit Agreements and Malaysian Joint Venture Agreements. This comparison will include the legal framework, the commonalities and shared principles as well as benefits and drawbacks of each state's agreements and policies.

In the final stage of the project, obtained results will be evaluated, research questions answered and conclusions drawn.

In addition, contact will be established to relevant special interest groups, NGO's and societies, which work in the area of indigenous peoples and rights.[26] Researchers and experts in the field of indigenous rights will also be contacted in order to include latest progress and developments, which might not be available in written or digital form or only in Malaysian languages.[27]

Research trips to Malaysia and Canada will be arranged to approach experts and special interest groups as well as professors and students at federal states' universities.[28] If possible, conferences concerning indigenous issues will be attended.

[24] For example, the IBA Database (`http://www.impactandbenefit.com/IBA_Database_List/`); The Atlas of Canada – Indigenous Mining Agreements (`http://atlas.gc.ca/imaema/en/`); *Laidlaw/Passelac-ross*: Alberta First Nations Consultation and Accommodation Handbook; *International Council on Mining & Metals*: Good Practice Guide: Indigenous Peoples and Mining.

[25] In matters of Canada, e.g., *Weitzner*: "Dealing Full Force": Lutsel K'e Dene First Nation's Experience Negotiating with Mining Companies; *Klink* et al.: Enabling Community Well-being Self-Monitoring in the Context of Mining: The Naskapi Nation of Kawawachikamach; concerning Malaysia *Aiken/Leigh*: Dams and Indigenous Peoples in Malaysia: Development, Displacement and Resettlement; *Colchester/Jalong/Alaza*: Chapter 10: Sabah: Genting Plantations and the Sungai and Dusun Peoples; *Schwartzman*: Developing Indigenous Rights: Indigenous Peoples, Ethnic Groups and the State; Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples; Forest Dwellers, Forest Protectors: Indigenous Models for International Development.

[26] For example, *Jaringan Orang Asal SeMalaysia (JOAS)*, (The Indigenous Peoples Network of Malaysia); an umbrella organisation for 21 Malaysian NGO's, `http://orangasal.blogspot.co.at/`; and *Center for Orang Asli Concerns (COAC)*, `http://www.coac.org.my/`; as well as to the globally active *Forest Peoples Programme*, `http://www.forestpeoples.org/`.

[27] Including, e.g., Ben Bradshaw from the University of Guelph; Professor Ciaran O'Faircheallaigh from Griffith University and Prof. Dr. Fadzilah Majid Cooke from Universiti Malaysia Sabah (UMS).

[28] In Malaysia, e.g., the University of Malaya in Kuala Lumpur (`http://www.um.edu.my/`), Universiti Malaysia Sabah in Kota Kinabalu (`http://www.ums.edu.my/`) and Universiti Malaysia Sarawak in Kota Samarahan (`http://www.unimas.my/`).

4 Timetable

Completion of obligatory Lectures and Workshops	
Winter semester 2015	VO Rechtswissenschaftliche Methodenlehre KU System und wissenschaftliche Methode: Spinozas Ethik SE Indigenous Legal Studies: International and Comparative Developments
Summer semester 2016	KU Diskriminierungsschutz – Implementierung, Bewusstsein und Argumentationstechnik
Winter semester 2016	SE Indigenous Legal Studies: Der arktische Raum SE DissertantInnenseminar aus Religionsrecht, Kulturrecht und Rechtsanthropologie
Summer semester 2017	TS Academic Writing in English TS Publication Strategies in the Academic Publish or Perish Competition TS English Pronunciation and Typical Mistakes TS Gute wissenschaftliche Praxis – Scientific Misconduct
Winter semester 2017	KU Grundlagen der Rechtsvergleichung

Composing of Dissertation	
2017	**Commonwealth of Nations and Common Law** Legal history, Aboriginal Title and Customary Law
2017/18	**Canada** Legal development and situation, legislation, case law Analysis of Impact and Benefit Agreements Research trip to Canada
2018	**Malaysia** Legal development and situation, legislation, case law Analysis of Joint Venture Agreements Research trip to Malaysia
2018/19	**Comparison** of Canadian and Malaysian Agreements Evaluating in context of international standards Elaborating commonalities, differences and common principles Conclusio
2019	Submission Defensio

5 Provisional Structure

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  4.4 Assessment in accordance with International Standards (UNDRIP, ILO Conv.)
  4.5 Common Principles
  4.6 Assets and Drawbacks
5 Conclusio

6 Provisional List of References

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