

# Timber Legality Risk Assessment Malaysia - Sabah

Version 1.3 | May 2018



COUNTRY RISK  
ASSESSMENTS



This risk assessment has been developed by NEPCon with support from the LIFE programme of the European Union, UK aid from the UK government and FSC™.



NEPCon has adopted an “open source” policy to share what we develop to advance sustainability. This work is published under the *Creative Commons Attribution Share-Alike 3.0 license*. Permission is hereby granted, free of charge, to any person obtaining a copy of this document, to deal in the document without restriction, including without limitation the rights to use, copy, modify, merge, publish, and/or distribute copies of the document, subject to the following conditions: The above copyright notice and this permission notice shall be included in all copies or substantial portions of the document. We would appreciate receiving a copy of any modified version.

## Disclaimers

This Risk Assessment has been produced for educational and informational purposes only. NEPCon is not liable for any reliance placed on this document, or any financial or other loss caused as a result of reliance on information contained herein. The information contained in the Risk Assessment is accurate, to the best of NEPCon’s knowledge, as of the publication date

The European Commission support for the production of this publication does not constitute endorsement of the contents which reflect the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

This material has been funded by the UK aid from the UK government; however, the views expressed do not necessarily reflect the UK government’s official policies.

The contents of this risk assessment is based on the risk assessments developed for FSC™. This risk assessment is not equal to the approved FSC risk assessments when implementing the controlled wood standard FSC-STD-40-005. Only formally approved FSC risk assessments shall be used for the implementation of the FSC standards.

FSC is not otherwise associated with the project Supporting Legal Timber Trade.

For risk assessment conducted according to the FSC-STD-40-005, ONLY entries (or information) that have been formally reviewed and approved by FSC and are marked as such (highlighted) can be considered conclusive and may be used by FSC candidate or certified companies in risk assessments and will meet the FSC standards without further verification. You can see the countries with approved risk assessment in the FSC document: FSC-PRO-60-002b V2-0 EN List of FSC-approved Controlled Wood documents 2015-11-04. “

The original document of FSC can be accessed here <https://ic.fsc.org/en/document-center>

## Contents

<b>A. Introduction</b> .....	<b>1</b>
<b>B. Overview of Legality risks</b> .....	<b>3</b>
<b>C. Overview of the forest sector in Malaysia - Sabah</b> .....	<b>5</b>
<b>D. Legality Risk Assessment</b> .....	<b>11</b>
LEGAL RIGHTS TO HARVEST .....	11
1.1. Land tenure and management rights .....	11
1.2. Concession licenses.....	15
1.3. Management and harvesting planning .....	19
1.4. Harvesting permits.....	22
TAXES AND FEES .....	28
1.5. Payment of royalties and harvesting fees .....	28
1.6. Value added taxes and other sales taxes .....	32
1.7. Income and profit taxes.....	35
TIMBER HARVESTING ACTIVITIES .....	40
1.8. Timber harvesting regulations .....	40
1.9. Protected sites and species .....	43
1.10. Environmental requirements.....	48
1.11. Health and safety.....	53
1.12. Legal employment.....	58
THIRD PARTIES' RIGHTS .....	67
1.13 Customary rights .....	67
1.14. Free prior and informed consent .....	72
1.15. Indigenous/traditional peoples' rights .....	74
TRADE AND TRANSPORT .....	80
1.16. Classification of species, quantities, qualities .....	80
1.17. Trade and transport .....	84
1.18. Offshore trading and transfer pricing .....	88
1.19. Custom regulations .....	91
1.20. CITES.....	96
1.21. Legislation requiring due diligence/due care procedures.....	99
<b>Annex I. Timber source types</b> .....	<b>101</b>

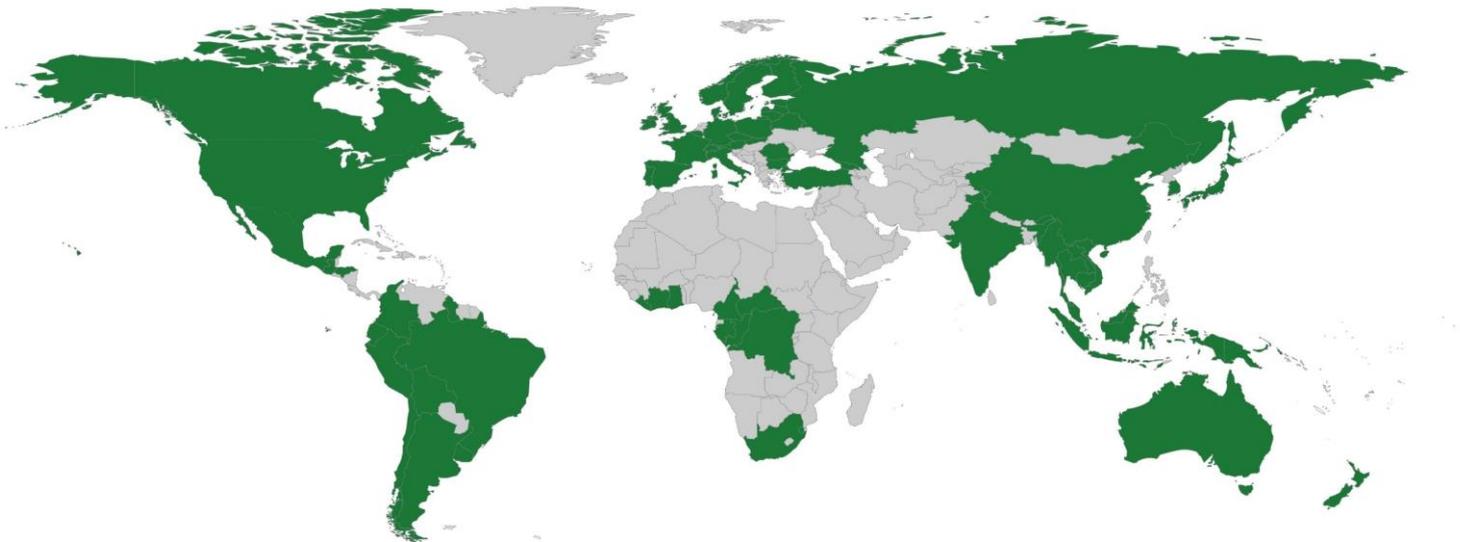
---

*This page has been left intentionally blank*

## A. Introduction

This Timber Legality Risk Assessment for Sabah in Malaysia provides an analysis of the risk of sourcing timber from areas of illegal harvesting and transport. NEPCon has been working on risk assessments for timber legality, in partnership with a number of organisations, since 2007.

In that time, NEPCon has developed timber risk assessments for more than 60 countries, illustrated in Figure 1.



Map created by StatSik (2016). StatPlanet: Interactive Data Visualization and Mapping Software.://www.statistik.com

*Figure 1. Countries for which NEPCon have developed a legality risk assessment for timber*

The risk assessments are developed in collaboration with local forest legality experts and use an assessment methodology jointly developed by FSC and NEPCon. A detailed description of the methodology can be found on the [NEPCon Sourcing Hub](#).

For risk assessment conducted according to the FSC-STD-40-005, ONLY entries (or information) that have been formally reviewed and approved by FSC and are marked as such can be considered conclusive and may be used by FSC candidate or certified companies in risk assessments and will meet the FSC standards without further verification.

You can see the countries with approved risk assessment in the FSC document: [FSC-PRO-60-002b V2-0 List of FSC approved Controlled Wood documents](#).

All FSC Risk Assessments can be downloaded in the [FSC Document Centre](#).

This risk assessment was prepared by NEPCon between 2014 and 2018 as follows:

<b>Draft prepared by NEPCon:</b>	December 2014.
<b>Stakeholder consultation</b>	July – August 2018
<b>Final approval by FSC:</b>	8 May 2018

---

**FSC CW effective date:** 8 May 2018

NEPCon originally published the Timber Legality Risk Assessment for Sabah Malaysia in August 2017. Since then, amendments to the Assessment have been made. These changes have been made to align the risk assessment with the final FSC version, which NEPCon have worked with FSC to update based on stakeholder feedback received in September 2017.

## B. Overview of Legality risks

**Timber Risk Score:** 23 / 100 in 2017

This report contains an evaluation of the risk of illegality in Sabah for five categories and 21 sub-categories of law. We found:

- **Specified risk for 16 sub-categories.**
- **Low risk for 4 sub-categories.**
- **No legal requirements for 1 sub-category.**

The Timber Risk Score for Sabah is 23 out of 100. The key legality risks identified in this report concern legal rights to harvest, timber harvesting activities, taxes and fees, third parties' rights, and trade and transport.

For **Legal Rights to Harvest**, there is a risk that:

- Local communities lose their customary rights to land when it is gazetted as a forest reserve or is alienated for development projects (1.1).
- People wanting to register native land are wrongfully informed by the Lands and Survey Department about the procedure (1.1).
- Concession licenses and harvesting permits for PFR are awarded corruptly because of unfair competition, nepotism and cronyism (1.2, 1.4)
- Management and harvesting regulations are not followed during the harvest of rubberwood (1.3)

For **Taxes and Fees**, there is a risk that goods and services tax (GST) is not paid (1.6)

For **Timber Harvesting Activities**, there is a risk that:

- Reduced Impact Logging is not practiced in PFR as legally required (1.9).
- Protected areas, and protected species in PFR, are harvested (1.9).
- Mitigation measures identified in environmental impact assessments are not implemented (1.10).
- Health and safety requirements, such as those related to the provision and use of personal protective equipment and first aid kits, are not followed (1.11).
- Legal rights of migrant workers are violated (e.g. non-payment of wages, wrongful deduction of wages to cover work permits, long working hours, sub-standard living conditions or unfair dismissal) (1.12).
- Short-term workers without documentation and contracts (e.g. forest pass, immigration papers or employment contract) are employed (1.12).

For **Third Parties' Rights**, there is risk that:

- 'Free, prior, and informed consent' is not obtained from local indigenous communities prior to gazettal of land or harvesting and customary rights are violated (1.13 – 1.15)
- Communities lose their customary rights to land when it is gazetted as forest reserve or other protected area (1.13).

For **Trade and transport**, there is a risk that:

- Timber species are classified incorrectly (1.16)

- Transfer pricing occurs (1.18)
- Fraudulent CITES permits are used (1.20)
- *Gonystylus* spp., *Aquilaria* spp. and *Dalbergia* spp. are harvested illegally (1.20)

### Timber source types and risks

There are four main source types of timber in Sabah. The below table sets out the types of timber. Knowing the “source type” that timber originates from is useful because different source types can be subject to different applicable legislation and have attributes that affect the risk of non-compliance with the legislation. All timber producing land in Sabah is classified as either the *Permanent Reserve Forest*, *State Land* or *Alienated Land*.

We have analysed the risks for all source types and found the risks differ between them, usually by the classification of land.

<b>Managed natural forest timber</b>	Timber that comes from the Permanent Reserve Forest (PRF), State Land or Alienated land that is being managed for the purpose of producing timber (i.e. forests are regenerated after the harvest).
<b>Conversion natural forest timber</b>	In the Permanent Reserve Forest, clearance takes place under a Timber Plantation Concession Licence, the natural forests can be cleared to make way for a timber plantation.  On State land and Alienated land, the natural forests can be cleared for non-forest uses, usually agriculture with appropriate permits.
<b>Plantation timber</b>	Industrial timber plantations (e.g. Acacia, Eucalyptus, Teak) commonly occur in the Permanent Reserve Forest.  On State land and Alienated land, plantations are rare, occurring when timber plantations established in the PRF are later excised to state land.
<b>Rubber wood</b>	Rubber wood is either a by-product from Replanting Operations (i.e. when the trees have stopped producing the latex and are cleared to make way for new rubber trees) or when rubber trees are planted for wood production. Rubberwood is grown in the PRF, on State Land and on Alienated land (that has been classified as ‘ <i>Agricultural Land</i> ’)

This table summarises the findings of the timber legality risk assessment by source type.

Legal Category	Sub-category	Permanent Reserve Forest			State Land			Alienated Land		
		MNF	ITP	RB	MNF	ITP	RB	MNF	ITP	RB
Legal rights to harvest	1.1 Land tenure and management rights	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
	1.2 Concession licenses	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Not applicable
	1.3 Management and harvesting planning	Low risk	Low risk	Specified risk	Low risk	Low risk	Specified risk	Not applicable	Not applicable	Not applicable
	1.4 Harvesting permits	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
Taxes and fees	1.5 Payment of royalties and harvesting fees	Low risk	Low risk	Low risk	Not applicable	Low risk	Low risk	Not applicable	Not applicable	Not applicable
	1.6 Value added taxes and other sales taxes	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
	1.7 Income and profit taxes	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
Timber harvesting activities	1.8 Timber harvesting regulations	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk
	1.9 Protected sites and species	Specified risk	Specified risk	Specified risk	Not applicable					
	1.10 Environmental requirements	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
	1.11 Health and safety	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
	1.12 Legal employment	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
Third parties' rights	1.13 Customary rights	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
	1.14 Free prior and informed consent	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
	1.15 Indigenous/traditional peoples rights	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
Trade and transport	1.16 Classification of species, quantities, qualities	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk
	1.17 Trade and transport	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk	Low risk
	1.18 Offshore trading and transfer pricing	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
	1.19 Custom regulations	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
	1.20 CITES	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk	Specified risk
	1.21 Legislation requiring due diligence/due care procedures	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable	Not applicable

KEY
Managed Natural Forests (MNF)
Industrial Timber Plantations (ITP)
Agricultural plantations or land, producing rubberwood (RB)
Low risk
Specified risk
Not applicable

## C. Overview of the forest sector in Malaysia - Sabah

According to the most up to date statistics available from the Ministry of Natural Resources and Environment (NRE), Malaysia's total land area is 33.08 million hectares, of which 18.2 million hectares (55.01%) forested (MNRE 2014). This data is for 2014. Of these 18.2 million hectares, the forested area is divided into:

- Totally protected area / protected area: 2.57 million hectares (14.12%);
- Permanent reserved forest/ permanent forest estate/ permanent forest estates: 11.6 million hectares (63.73%)
- State land forest: 3.8 million hectares (20.87%)

Under the Malaysian Constitution, forestry comes under the jurisdiction of the respective State Governments. As such, each State is empowered to enact laws on forestry and to formulate forestry policy independently. The executive authority of the Federal Government only extends to the provision of advice and technical assistance to the States, training, the conduct of research, and in the maintenance of experimental and demonstration stations. Forest Management-related issues are governed at the Federal level by two Ministries; the Ministry of Natural Resources and Environment and the Ministry of Plantation Industries and Commodities.

In Malaysia there are 3 geographical regions: Peninsular Malaysia, Sabah and Sarawak. The State Governments of these three demarcations have jurisdiction over agriculture, land and soil conservation, rivers, water and forest resources.

Peninsular Malaysia is made up of 11 states and two federal territories. These individual states have a fairly uniform set of laws and regulations for forest management. The states of Sabah and Sarawak are autonomous, and each have differing laws and regulations. A common approach to forest management for the three regions was facilitated through the National Forestry Council (NFC). The NFC harmonised Sustainable Forest Management (SFM) policies and practices between Federal and State Governments. However, it must be noted that the National Forestry Council no longer exists and forestry matters are now incorporated into the meetings of the National Land Council. Generally, while forestry matters are managed by State governments, under the Constitution the Federal government can enact laws to harmonise and standardise State enactments. To this end, the National Forestry Act 1984 was formulated and later adopted by the individual States and Territories in Peninsular Malaysia.

Legally, land in Malaysia is divided into State Land, Alienated Land (i.e. state land that has been alienated for development) and the Permanent Reserved Forest (PRF which includes forest reserves, protected forests, National Parks/Wildlife & Bird Sanctuaries). These legal categories can include various types of forests including unlogged virgin forests, selectively logged forests, forests that have been cleared and regenerated naturally, and planted forests (including plantations of rubber, acacia and other exotic species).

Logging and land clearance/conversion is permitted on most State Land and Alienated Land. Logging and land clearance is also permitted in those parts of the PRF that have been zoned for timber production, however the land must be replanted with timber species. No logging is permitted in those parts of the PRF that have been zoned for protection (including water catchment forests, national parks, wildlife reserves and bird sanctuaries). The state governments have the power to remove any area from the PRF should they wish to use the land for some other purpose.

On these land types, different use permits and licenses can be issued, depending on the State (Timber Trade Portal, 2016; MNRE 2014a; MNRE 2014b; Australian Government Department of Agriculture and Water Resources 2017; Australian Government Department of Agriculture and Water Resources 2017a and Australian Government Department of Agriculture and Water Resources 2017b). The main types are natural forest concession, plantations and agricultural use permits:

1. Permanent Reserved Forest

- a. Natural forest, being managed for long term timber production.
- b. Natural forest being cleared as part of, or to establish, a timber plantation concession.
- c. Timber plantation (e.g. Acacia, Eucalyptus, Latex Timber Clones Rubberwood) in forest reserves.
- d. Agricultural plantations (primarily rubberwood, but also some other fruit woods etc....), that has reach the end of its productive life and is being cleared to make way for a new agricultural/forest plantation NB: very rare in the PRF.

2. State Land

- a. Natural forest, being managed for long term timber production.
- b. Natural forests being cleared for future potential land use the land is zoned for possible future use for agriculture, housing, etc. but no private title to the land has yet been issued.
- c. Timber plantation (NB: rare). Occasionally, timber plantations established on forest reserves are later excised to state land. This land is usually more profitably used for growing oil palm or rubber, not trees for timber.
- d. Agricultural plantation (primarily rubberwood, but also some other fruit woods etc....), that has reach the end of its productive life and is being cleared to make way for a new agricultural or forest plantation.

3. Alienated Land

- a. Natural forest, being managed for long term timber production.
- b. Natural forests being cleared for future potential land use – land holders are given the rights to log the area which will be converted into another use.
- c. Timber plantations are rare (usually used for growing oil palm or rubber, rather than trees for timber). A harvest permit or license is required.
- d. Timber from private “agricultural” estates. This is mainly rubberwood plantations that are being cleared for oil palm or for another rotation of rubber (i.e. grown primarily for latex and not primarily for timber). Includes the cultivation of trees their produce, i.e. fruit and rubber.

In some cases, Malaysian law recognises the existence of native customary rights (NCR) over State Land, Alienated Land and the PRF. In such cases, common law requires that the State obtain the consent of the NCR holders prior to any activity on that land. This is a grey area in the law and there remains significant ambiguities on the extent to which NCR can be claimed. The majority of NCR claims are not recognised by the State Governments. There are no specific

restrictions in the statutes regulating the harvesting of timber on indigenous reserves or areas for where there are communal property rights. Consequently, the authorities manage such areas no differently from areas without such rights. Thus these areas are not distinguished in the table on timber source types.

The forestry and timber agencies in Malaysia ('upstream') who issue harvesting permits, licenses and log transport documents are:

- Forestry Department Peninsular (FDPM) and the State Forestry Departments under the authority of the National Forestry Act 1984, guided by the National Forestry Policy 1978 (revised 1992).
- Sabah Forestry Department (SFD) under the Forest Enactment 1968
- Sarawak Forestry Corporation (SFC) under the Sarawak Forestry Corporation Ordinance, 1995 & Forest Department Sarawak (FDS) under the Forest Ordinance, 1958 (Cap. 126).

The licensing authorities issuing export and import licenses for timber products, as provided for under Schedule 2 of the Customs (Prohibition of Export) Order 2012 and (Prohibition of Import) Order 2012:

1. Malaysian Timber Industry Board (MTIB) for Peninsular
2. Sabah Forestry Department; and
3. Sarawak Timber Industry Development Corporation (STIDC)

In 2016, Malaysia had a Corruption Perception Index of 49 (2015:50). There are several reports of corruption in the forestry sector in Malaysia, and corruption is an issue of relevance to the legality of timber grown there. According to the World Bank Worldwide Governance Indicators Malaysia receives a ranking of 0,64 in Rule of law; 0,48 in Control of Corruption; 0,84 in Regulatory Quality and 1,14 for Government Effectiveness on a scale of -2,5 to 2,5.

The Malaysian Timber Certification Scheme (MTCS) is a voluntary, PEFC-endorsed and state-supported third-party certification scheme for PRFs in Malaysia. It does not apply to State Land and Alienated Land. In Peninsular Malaysia, MTCS is implemented with each state as a single Forest Management Unit. As of 31st May 2017, the PRFs of six out of the eleven states in Peninsular Malaysia are certified under MTCS (Forest Management); three concessions in Sarawak; and one concession in Sabah (MTCS, 2017). In Sabah, the Sabah Timber Legality Assurance System (TLAS) is a third-party certification scheme made mandatory by Sabah state government for all timber licensees regardless of land type (PRF, State Land or Alienated Land) with annual audits taking place.

The list of sources provided in FSC-PRO-60-002a, section 3.3.3 has been reviewed for relevance regarding the national legality risk assessment of Malaysia. The following sources have been used:

- a) Chatham House: <http://www.illegal-logging.info/>;
- b) Environmental Investigation Agency: <http://www.eia-international.org/>;
- c) EU FLEGT process:  
[http://ec.europa.eu/comm/development/body/theme/forest/initiative/index\\_en.htm](http://ec.europa.eu/comm/development/body/theme/forest/initiative/index_en.htm);
- d) Government reports and assessments of compliance with related laws and regulations;

- e) Independent reports and assessments of compliance with related laws and regulations, e.g., the Royal Institute of International Affairs:  
<http://www.illegallogging.org>;
- f) Interpol: <http://www.interpol.int/Crime-areas/Environmental-crime/Projects/Project-LEAF>;
- g) Justice tribunal records;
- h) Transparency International Corruption Perceptions Index:  
[http://www.transparency.org/policy\\_research/surveys\\_indices/cpi](http://www.transparency.org/policy_research/surveys_indices/cpi);
- i) World Bank Worldwide Governance Indicators:  
<http://data.worldbank.org/datacatalog/worldwide-governance-indicators>;
- j) In cases where other sources of information are not available, consultations with experts within the area shall be conducted.

Where relevant, they have been specifically referenced under “sources of Information” for each applicable indicator. The remaining sources were found not to be relevant for the legality risk assessment for Malaysia.

Consultation with in-country experts was carried out throughout the drafting of this assessment in 2015-2017, including face to face consultation meetings held in Malaysia. A broad range of experts were consulted, including representatives from Non-government organizations, a number of relevant Government Ministries and enterprises. Due to confidentiality issues, the experts consulted have not been named specifically in this report, but a full list of experts was provided to Policy and Standards Unit (PSU) of the FSC International Center.

Internet based research has been carried out for each indicator in English.

## References

Where possible, links to sources of information and applicable legislation have been included in this assessment. Note that links to legislation in particular can change frequently, and the links in this report, that were correct at the time of preparation, may no longer be viable.

- Australian Government Department of Agriculture and Water Resources (2017). Country specific guideline for Malaysia (Sabah) - Department of Agriculture and Water Resource and Ministry of Plantation Industries & Commodities. Available at: <http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/illegal-logging/malaysia-sabah.pdf>, accessed 8 February 2017.
- Australian Government Department of Agriculture and Water Resources (2017a). Country specific guideline for Malaysia (Sarawak) - Australian Government and the Government of Malaysia. Available at: <http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/illegal-logging/malaysia-sarawak.pdf>
- Australian Government Department of Agriculture and Water Resources (2017b). Country specific guideline for Malaysia (Peninsular), [pdf] Australian Government and the Government of Malaysia. Available at: <http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/illegal-logging/malaysia-peninsula.pdf>

- 
- European Timber Trade Federation (2016). Timber Trade Portal – Malaysia. Accessed 6 April 2016 at <http://www.timbertradeportal.com/countries/malaysia/>.
  - Malaysian Ministry of Natural Resources (2014). Official Portal Ministry of Natural Resources and Environment (NRE) "Negaraku, Alam Sekitarku" - Total Forested Areas in Malaysia (1990-2014). Accessed 6 April 2018 at <http://www.nre.gov.my/en-my/Forestry/Pages/Statistics-Forest.aspx>.
  - Malaysian Ministry of Natural Resources (2014a). Official Portal Ministry of Natural Resources and Environment (NRE) "Negaraku, Alam Sekitarku" - Forest Types In Permanent Reserved Forest (1990-2014). Accessed 6 April 2018 at <http://www.nre.gov.my/en-my/Forestry/Pages/Forest-Types-In-Permanent-Reserved-Forest.aspx>
  - Malaysian Ministry of Natural Resources (2014b). Official Portal Ministry of Natural Resources and Environment (NRE) "Negaraku, Alam Sekitarku" - Forestry facts. Accessed 6 April 2018 at <http://www.nre.gov.my/en-my/Forestry/Pages/Forestry-fact.aspx>.

## D. Legality Risk Assessment

### LEGAL RIGHTS TO HARVEST

#### 1.1. Land tenure and management rights

*Legislation covering land tenure rights, including customary rights as well as management rights that includes the use of legal methods to obtain tenure rights and management rights. It also covers legal business registration and tax registration, including relevant legal required licenses. Risk may be encountered where land rights have not been issued according to prevailing regulations and where corruption has been involved in the process of issuing land tenure and management rights. The intent of this indicator is to ensure that any land tenure and management rights have been issued according to the legislation.*

##### 1.1.1. Applicable laws and regulations

- Sabah Land Ordinance, 1930 (Sabah Cap.68) <http://sabah.gov.my/phb/wp-content/uploads/2011/05/LandOrdinance.pdf>
- Sabah, Native Court Enactment 1992 <http://www.sabah.gov.my/mlgh/nativecourtsenactment1992.pdf>
- Sabah Forest Enactment, 1968 (Part IV Section 41) <http://faolex.fao.org/docs/pdf/mal10907.pdf>
- Land Acquisition Ordinance, 1950 <http://sabah.gov.my/phb/wpcontent/uploads/2011/05/LandAcquisitionOrdinance.pdf>
- Forest Rules 1969. Available at: <http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/Forest1968%28Rules1969%29.pdf>
- Local Government Ordinance, 1961. Available at: <http://www.sabah.gov.my/mlgh/LocalGovernmentOrdinance1961.pdf>

##### 1.1.2. Legal authority

- District Office
- Sabah Forestry Department
- Lands and Surveys Department

##### 1.1.3. Legally required documents or records

- Sustainable Forest Management License Agreement (SFML) or Long term timber License agreement
- Record on decision by the Civil Court and Native Court
- Contract agreement with local communities with use rights for use of land.

- For Alienated land, a valid land title or a letter of confirmation on the status of the land application from the Assistant Collector of Land Revenue and a receipt of payment of land premium.

#### 1.1.4. Sources of information

##### *Government sources*

- forest.sabah.gov.my (N.Y.) Sabah Forestry Department – official Portal. [online] Available at: <http://www.forest.sabah.gov.my/>
- Department of Environment. (2010). Environmental Requirements: A Guide for Investors. Kuala Lumpur: Government of Malaysia.
- Sabah Forestry Department, (2017). Annual Report 2016 – Chapter 11: Enforcement, Investigation & Prosecution. Available: <http://www.forest.sabah.gov.my/ar2016/11.pdf>, accessed 8 February 2018

##### *Non-government sources*

- Chan, J. (2016, March 1). To prevent fraud, Sabah MACC wants to reissue native certificates. Retrieved from: <http://www.themalaymailonline.com/malaysia/article/to-prevent-fraud-sabah-macc-wants-to-reissue-native-certificates> .
- Colchester, M., Jalong, T., Alaza, L. (2013). 'Conflict or Consent?' Chapter 10: Sabah: Genting Plantations and the Sungai and Dusun Peoples. [online]. Forest Peoples. Available at: <http://www.forestpeoples.org/sites/fpp/files/private/publication/2013/12/conflict-or-consent-chapter-10-sabah-genting-plantations-and-sungai-and-dusun-peoples.pdf> [Accessed 2 March 2015]
- Daily Express, (2015). Natives must be told, rules court. Available at: <http://www.dailyexpress.com.my/news.cfm?NewsID=96067> [Accessed 31 January 2017].
- Expert consultation conducted by NEPCon, (2015) including personal communication 4.
- forestlegality.org (2009). TTAP Legality Checklist - Malaysia. Available at: <http://www.forestlegality.org/risk-tool/country/malaysia>
- sourcing.gftn.panda.org (N.Y.). WWF Global Forest Trade Network: Common Framework for Assessing Legality of Forestry Operations, Timber Processing and Trade - Principles, Criteria and Indicators for Malaysia. [online]. WWF-GFTN. Available at: [http://sourcing.gftn.panda.org/files/PDF/legal\\_documentation\\_malaysia.pdf](http://sourcing.gftn.panda.org/files/PDF/legal_documentation_malaysia.pdf) and [http://sourcing.gftn.panda.org/files/PDF/legality\\_framework\\_malaysia.pdf](http://sourcing.gftn.panda.org/files/PDF/legality_framework_malaysia.pdf)
- theborneopost.com (2014). Govt urged to give priority to the natives in land disputes. [online] Sept. 29, 2014. Available at: <http://www.theborneopost.com/2014/09/29/govt-urged-to-give-priority-to-natives-in-land-dispute/> [Accessed 2 March 2015]
- Toh, S. M. and Grace, K. T. (2006). Understanding forest tenure in South and Southeast Asia, Case study: Sabah Forest ownership. [online]. FAO. Available at: <ftp://ftp.fao.org/docrep/fao/009/j8167e/j8167e10.pdf>

- World Resources Institute (WRI) (2013). Forest Legality Alliance Risk Tool, 2013: Malaysia: <http://www.forestlegality.org/risk-tool/country/malaysia#tab-management>.

#### 1.1.5. Risk determination

##### *Overview of Legal Requirements*

Land matters in Sabah are controlled by the State Government, and claims to land ownership must be approved and registered by the State. Formal tenures are always related to land, and not to forest or mineral resources.

To obtain land ownership in Sabah, the most common way is via a land application to the State government through the Land and Survey Department. However, sections 9(1), 76 and 78 of the Sabah Land Ordinance (SLO) opens for alternative routes for native ownership in Sabah. In addition, the SLO provides some protection of indigenous customary rights, as it introduces a strict set of conditions that must be followed to claim customary land (Toh & Grace, 2006, p. 254). The Land Ordinance is administered by the Land and Survey Department.

Property rights in Sabah fall into three categories:

- State property rights: Permanent Reserved Forests and State Land forest come under this category
- Private property rights: apply where the State has Alienated Land for development, usually oil-palm or other plantations owned by private companies. The Land Ordinance, Part IV, provides private ownership rights for individuals (indigenous title) and communal property rights (communal title) for community ownership. Companies can buy land from the government Alienated Land or indigenous title holders. The owner of the Alienated Land is required to supply a certified copy of the land title to SFD for issuance of a Form 1 Licence for timber harvesting (Toh & Grace, 2006).
- Communal property rights: Communities can also gain communal property rights through applying for an indigenous reserve. This differs from communal title in that the community cannot transfer these rights to other parties. There are also restrictions on land use, and a Board of Trustees must be established to manage the indigenous reserve. Although communal property rights are enshrined by law, only a very small area is currently gazetted under them (Toh and Grace, 2006).

To formalize the presence of communities in forest reserves, Sabah Forestry Department has recently introduced the use of Occupation Permits (OPs) that can be on PRF and SL. Although the community participates in deciding the duration of and total area covered by the permit, the final decision remains with Sabah Forest Department (Toh and Grace, 2006).

##### *Description of risk*

There is a risk of insecure land tenure, especially related to community and indigenous land rights. The risk relates to land right disputes between communities and state/private sector for timber regardless of source (PRF, SL or AL).

- Land conflict in Sabah is common. Native communities are often unaware of their rights under the SLO and are unfamiliar with the legal process of claiming land, often

leading to conflict with the State, which is quick to gazette resource-rich land to other purposes (Toh and Grace, 2006).

- Land disputes in Sabah exists when indigenous communities fail to register and claim their traditional lands and the State gazettes this land for other purposes, such as designating it as a forest reserve or alienating it for development purposes (Toh & Grace, 2006).
- According to Toh and Grace (2013) "Communities tend to have only limited understanding of their indigenous rights as provided in the Land Ordinance, and many communities have not formally registered their traditional claims through Occupation Permits (OP)." However, these issues relate to State Land, and to a lesser extent to Forest Reserves although there are a few issues on land tenure right disputes between forest enterprise/private sector and local community."
- There are examples where Natives wanting to register native land have been wrongfully informed by the Lands and Survey Department about the procedure. The wrong forms have instead been provided, with the result that communities have given up their land. Courts have ruled that mistakes have been made and should be corrected by the Lands and Survey Department, but according to a local social NGO this has not yet taken place (Expert consultation, 2015, personal communication 4).
- There are reports that insufficient notice is given of the gazettal of areas gazettal. This, as well as the reported failure to properly consult forest communities – has resulted in communities losing their customary rights to land when it is gazetted as forest reserve or other protected area or when it is alienated for development projects (Toh and Grace, 2006).
- In early 2015 a ruling was made by the High Court that a proposed alienation of land was withdrawn because the Lands and Survey Department had not given sufficient notice to the Natives claiming native land under Section 13 of the Sabah Land Ordinance (Daily Express, 2015).
- In Sabah, the greatest risk in land tenure appears to be fraud in the issuance of native licenses. In the spring of 2016, the Malaysian Anti-Corruption Commission (MACC) estimated that thousands of fake native licenses have been bought by non-natives through criminal syndicates (Chan, 2016). Several prominent cases of land fraud in Sabah have surfaced in 2016, where it was revealed that foreigners had purchased large areas native customary land; one non-native held more than 300 native titles (Chan, 2016). The extent of the fake licenses is so large that the MACC have called for a complete recall of all native certificates and revaluation of the system of issuance, including the introduction of a new and improved certificate (Chan, 2016).
- According to the 2016 Annual Report of the Sabah Forestry Department (NB: this is the most recent report available), of the 234 forestry offences detected in 2016, 2 were Illegal Entry of Forest Reserve and 26 were Illegal Cultivation in Forest Reserve (Sabah Forestry Department, 2017).

Based on the available information relating to the risk of dispute between FMEs and native community rights, this indicator has been assessed as Specified for all sources.

*Risk Conclusion*

This indicator has been evaluated as specified risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### 1.1.6. Risk designation and specification

Specified

#### 1.1.7. Control measures and verifiers

- The organisation shall ensure claims to land ownership have to be approved and registered by the State.
- The organisation shall ensure there are Sustainable Forest Management License Agreements (SFMLAs) in place on PFRs.
- The organisation shall ensure that where there are communities present in forest reserves (either PFRs or SL), the Sabah Forestry Department has issued Occupation Permits (OPs) for the communities.
- The organisation shall ensure that proper consultation has taken place with the communities on all types of land.

### 1.2. Concession licenses

*Legislation regulating procedures for the issuing of forest concession licenses, including use of legal methods to obtain concession license. Especially bribery, corruption and nepotism are well-known issues in connection with concession licenses. The intent of this indicator is to avoid risk related to situations where organizations are obtaining concession licenses via illegal means such as bribery, or where organizations or entities that are not eligible to hold such rights do so via illegal means. Risk in this indicator relates to situations where due process has not been followed and the concession rights can therefore be considered to be illegally issued. The level of corruption in the country or sub-national region is considered to play an important role and corruption indicators (e.g., Corruption Perception Index, CPI) should therefore be considered when evaluating risks.*

#### 1.2.1. Applicable laws and regulations

- Forest Rules, 1969  
<http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/Forest1968%28Rules1969%29.pdf>
- Director of Forestry Circular: FD26/2009
- Forest Enactment 1968 [Section 15 & 24]. Available at:  
<http://www.lawnet.sabah.gov.my/Lawnet/SabahLaws/StateLaws/ForestEnactment1968.pdf>

#### 1.2.2. Legal authority

- Sabah Forestry Department

#### 1.2.3. Legally required documents or records

- Concession permits

- Harvest permits/license
- SFMLA
- Approval of forest harvesting area
- Letter of approval for issuance of licence from NRO (PF & SL – short term licence).
- Approved EIA study / PMM where applicable
- Demarcation of harvesting area.
- Approved Inventory Report
- Payment of licence fees and other charges imposed
- Letter of approval for issuance of harvesting
- Licence in AL from DoF.

#### **1.2.4. Sources of information**

##### *Government sources*

- Sabah Forestry Department Annual Report 2013 (Forest Resource Management). Available at:  
<http://www.forest.sabah.gov.my/images/pdf/publications/AR2013/Chap18.pd>
- Sabah Forestry Department, (2017). Annual Report 2016 – Chapter 11: Enforcement, Investigation & Prosecution. Available:  
<http://www.forest.sabah.gov.my/ar2016/11.pdf>, accessed 8 February 2018.

##### *Non-governmental sources*

- sarawakreport.org, (2012). Malaysian foreign Minister Named in MACC Investigation into Sabah Timber Corruption. [online]. Available at:  
<http://www.sarawakreport.org/2012/04/malaysian-foreign-minister-named-in-macc-investigation-into-sabah-timber-corruption-national-expose/>
- NEPCon, (2013). Evaluation and revision of the Sabah TLAS standard and audit checklists 2013. [online].
- Sarawak Report, (2012). Malaysian Foreign Minister Named in MACC Investigation into Sabah Timber Corruption – NATIONAL EXPOSE. Available at:  
<http://www.sarawakreport.org/2012/04/malaysian-foreign-minister-named-in-macc-investigation-into-sabah-timber-corruption-national-expose/>
- NEPCon expert consultation 2015, including NEPCon expert consultation 2015, Personal Communication 1; -NEPCon expert consultation 2015 Personal Communication 2 and NEPCon expert consultation 2015-Personal Communication 7.

#### **1.2.5. Risk determination**

##### *Overview of Legal Requirements*

Any registered company, company with trading license or qualified individual (Sabahan) who intends to harvest forest produce from permanent forest (PF) and State Land (SL)

must obtain an approval from the Secretary of Natural Resources (SUHB) under the Chief Minister's Department or the Director of Forestry (DoF) for Alienated Land (AL).

Forest Resource Management Division (FRM) of Sabah Forestry Department (FDS) ensures that areas gazetted for specific purposes, including Native Customary Right (NCR) land are excluded from the area to be approved for harvesting in PF and SL.

FRM Division of FDS ensures that there is approval to enter and occupy SL.

The licenses are valid for a period stated within them (for example, for Alienated Land, licenses can be issued for a period of 100 years in areas that average 100 000 ha), but the licenses for the PRF cannot exceed 5 years, but can be renewed for a further two years.

For State Land, a *Temporary Occupation License* is also required under the Land Ordinance (per 24(4) of the Land Enactment).

Licenses issued for Alienated Land must be issued to the owner/lessee of that land only, or with the written permission of the owner/lessee (per 24(5) of the same act).

Licenses are not transferable.

These licenses are either Sustainable Forest Management License Agreements (SFMLA)/Long-term-license (LTL) or concession licenses.

Concessions in Forest Reserves are subject to the following requirements (NEPCon, 2013):

- The licence (SFMLA/LTL) shall have an approved Annual Work Plan containing maps and description of areas and types of operations to be carried out during the year and approved by Sabah Forest Department.
- The licensee shall have a Comprehensive Harvesting Plan (CHP) containing total and net production areas; harvesting volumes, diameter, limits, species and protected areas that are approved by Sabah Forest Department.
- Letter of approval for issuance of licence from Natural Resources Office (NRO) (Permanent Reserved Forest & State Land) under the Chief Minister's Department. - Approval of forest harvesting area
- Approved EIA study / PMM (Proposal of Mitigation Measures) where applicable
- Demarcation of harvesting area
- Approved Inventory Report
- Payment of licence fees and other charges imposed

In a concession, there are many compartments known as coupes. Under the principle of SFM, one company is permitted to harvest only a few coupes at any given time in accordance to the Forest Management Plan, CHP and Annual Work Plan.

The coupe permit validity is normally 15 years depending on the conditions of the license. The company is not permitted to operate in any area for which it has not yet been issued a coupe permit even though that area may be within its concession.

#### *Description of risk*

There is a risk of corruption in the allocation of concession licenses in Sabah:

- In 1997, Sabah Forestry Department (SFD) divided the Permanent Reserved Forest of Sabah into 27 FMUs. The Sabah Forest Department then allocated areas within these FMUs (as 100-year concession license agreements) to private forest enterprises under 19 Sustainable Forest Management License Agreements (SFMLA). Eleven concession licenses were issued between 1993 and 2011. (Sabah Forestry Department 2013).
- Since 2012, some concessions have been suspended due to lack of compliance with the license agreements, some of these have been re-allocated in a process of companies submitting applications that are reviewed by the Forestry Department. Successful applicants must pay a RM5 million bond for the agreement. If the conditions of the concession license agreement are not fulfilled and then revoked, the money will be withheld. The latest SFMLA was issued in 2012, and the latest concession license was issued in 2011.
- Sabah has long been suspected of corruption in relation to the issuance of licenses. In 2012, the Sarawak Report unveiled how the MACC was in possession of evidence linking then Foreign Minister Anifan Aman to millions of ringgits achieved through corruptly issued logging licenses by his brother, then Sabah Chief Minister, Musa Aman (Sarawak Report, 2012).
- According to the 2016 Annual Report of the Sabah Forestry Department (NB: this is the most recent report available), of the 234 forestry offences detected in 2016, 2 were Illegal Entry of Forest Reserve and 26 were Illegal Cultivation in Forest Reserve (Sabah Forestry Department, 2017). These offences are related to a lack of concession license.

The process of issuing concession licenses is clearly defined and well known, but there is a lack of transparency when issuing the permits and as there are indications of corruption the risk is considered specified.

The concession licensing system applies to the PRF, State Land and Alienated Land, these sources are deemed to be specified risk. This licensing system does not apply to 'agricultural land' which occurs on Alienated Land, and as such is deemed not applicable.

#### *Risk Conclusion*

Not applicable to Agricultural Land on Alienated Land.

'Specified risk' for all other source types. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.2.6. Risk designation and specification**

Not applicable to Agricultural Land on Alienated Land.

Specified risk for all other source types.

#### **1.2.7. Control measures and verifiers**

- The organisation shall ensure that a valid concession license is in place which meets all the legal requirements.
- The organisation shall ensure that any public allegations of corruption in awarding of concession licence have been rebutted publically.

- Independent stakeholder consultation shall confirm that legal procedures for obtaining concession licenses have been followed

### 1.3. Management and harvesting planning

*Any legal requirements for management planning, including conducting forest inventories, having a forest management plan and related planning and monitoring, as well as approval of these by competent authorities. Cases where required management planning documents are not in place or are not approved by competent authorities should be considered. Low quality of the management plan resulting in illegal activities may be a risk factor for this indicator as well.*

#### 1.3.1. Applicable laws and regulations

- Sabah Forest Enactment 1968, Part IIIA-Section 28A and 28B  
<http://faolex.fao.org/docs/pdf/mal10907.pdf>

#### 1.3.2. Legal authority

- Sabah Forestry Department

#### 1.3.3. Legally required documents or records

- Forest Management Plan
- Comprehensive Harvesting Plan (CHP)
- Plantation Development Plan (PDP)
- Record of demarcated boundaries
- EIA

#### 1.3.4. Sources of information

##### *Government sources*

- SFD Publications. "Forestry in Sabah" Commemorative Edition, In Celebration of the Sabah Forestry Department Centennial time capsule sealing (2005-2105).
- Sabah Forestry Department, (2013). Forest Resource Management. Available at: <http://www.forest.sabah.gov.my/images/pdf/publications/AR2013/Chap18.pdf>.

##### *Non-Governmental Sources*

- Expert consultation conducted by NEPCon in 2015, Personal Communication 1 and 2.
- Lim, T. W. (2013). Malaysia: Illegalities in Forest Clearance for Large-Scale Commercial Plantations – report prepared for Forest Trends. Accessed 24 February 2015 at [http://www.forest-trends.org/publication\\_details.php?publicationID=4195](http://www.forest-trends.org/publication_details.php?publicationID=4195).

#### 1.3.5. Risk determination

##### *Overview of Legal Requirements*

In accordance with section 28A of the Sabah Forest Enactment, all forest licenses for areas exceeding 1000 hectares in the PRF or on State Land, must be preceded by the

preparation of both (a) a forest management plan or forest harvesting plan, as the case may be; and (b) a reforestation plan.

Concessions (i.e. under either a Sustainable Forest Management License Agreement/Long-term License Agreement (SFMLA/LTL)) can be issued for natural forest and plantations only on Permanent Reserved Forest (PRF), and are subject to the following requirements:

- The licensee (SFMLA/LTL) shall have an approved Annual Work Plan (AWP) containing maps and description of areas and types of operations to be carried out during the year. The licensee is required to obtain approval for the AWP based on the 10-year Forest Management Plan (FMP) and/or 10-year Plantation Development Plan (PDP). The Forest Management Plan describes the long-term management approach for the SFMLA areas based on forest types, terrain and current conditions of the FMU. It also outlines adequate planning and site preparation for harvesting operations.
- The licensee shall have a Comprehensive Harvesting Plan (CHP) containing total and net production areas; harvesting volumes, diameter, limits, species and protected areas that are approved by Sabah Forest Department.

The Forest Management Plan describes the long-term management approach for the SFMLA areas based on forest types, terrain and current conditions of the FMU. It also outlines adequate planning and site preparation for harvesting operations.

The CHP must comply with the Reduced Impact Logging (RIL) Operation Guide Book requirements for harvesting and operations (roads, density and location of skid tracks and log landings, harvestable tree marking and stream buffer zone identification). The CHP must be developed by a registered CHP contractor.

In 2013, 40 CHP were approved, covering an area of 10,764.83 ha. This is a downward trend compared to the CHP approved area in 2011 of 24,006.90 ha (Sabah Forestry Department 2013).

The reduction of CHP coverage in some licenses in Natural Forest Management (NFM) areas was due to a change in priorities to concentrate on salvaging timbers on Integrated Timber Plantation (ITP) areas for plantation activities on Forest Reserves (FR) (Sabah Forestry Department 2013, p. 181)

For commercial logging on Alienated Land, companies do not need to prepare CHPs. The only requirements for planning logging activities in such areas are using a registered logging contractor, submitting quarterly logging progress reports and a closing inspection report. These are not considered applicable to this indicator and are addressed elsewhere in this report at indicator 1.8 Timber harvesting regulations.

*Regarding Agricultural Land (i.e. rubberwood), where the agricultural land occurs within the PRF (very rare), or on State Land, the planning requirements apply.*

Where the rubber wood is grown on Alienated Land (the most common type of rubber wood plantation), there are no planning requirements (Lim 2013).

The concession licences of the Sabah Foundation's (agency set up by the Government) Concession Areas were agreed in the 1960s before the requirement for management plans and detailed harvesting plans, and as such they are not required to produce planning

documents. However, the Foundation has started voluntarily producing harvesting plans (NEPCon Expert Consultation 2015).

#### *Description of Risk*

- According to the experience of the authors, and the experts consulted in the preparation on this report, the requirements relating to harvesting plans are considered implemented and followed. The mandatory Sabah TLAS has been implemented by the Sabah Forestry Department and FMEs across the PRF, and State Land is audited annually whereby the requirements relating to harvesting plans are inspected (Expert consultation 2015). There is sufficient control on requirements relating to harvesting plans across these land types in Sabah.
- Extensive internet research, conducted in the preparation of this report, has not turned up any information indicating a specified risk in this indicator. As there has been quite thorough research conducted into the timber industry in Sabah, the lack of information about a risk in this indicator is considered relevant to the designation of the risk.
- For rubberwood (grown on Agricultural Land on either SL or the PRF), because there is no royalty charged at the time of harvesting, there is little incentive for the forestry department to monitor logging in rubber plantations actively (Personal Communication 1 and 2). As such, the lack of monitoring and enforcement reportedly leads to lower levels of compliance in rubberwood plantations (Expert consultation, 2015). Note that there is ver
- For timber harvesting concession above the 1000 ha thresholds in either State Land or Permanent Reserved Forest (PRF), based on the experience of the authors and experts consulted in the preparation of this report, the risk is considered low.
- For Agricultural Land (occurring on either State Land or the PRF), based on the experience of the authors and experts consulted in the preparation of this report, the risk is considered specified.
- As there are no requirements for management and harvesting planning for Alienated Land, this indicator is not applicable to all timber sourced from that land type (NB: including rubberwood).

#### *Risk Conclusion*

'Specified risk' for rubberwood grown in the PRF and State Land. Threshold (2) is met. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

'Low risk' for the Permanent Reserved Forest (PRF) and State Land. Threshold (1) is met. Identified laws are upheld. Cases where law/regulations are violated are efficiently followed up via preventive actions taken by the authorities and/or by the relevant entities.

Not applicable for Alienated Land.

#### **1.3.6. Risk designation and specification**

Specified risk for rubberwood grown in the PRF and State Land.

Low risk for the Permanent Reserved Forest (PRF) and State Land.

Not applicable for Alienated Land.

#### 1.3.7. Control measures and verifiers

- Maps showing harvesting areas (in compliance with the harvesting plan)
- Document review: approved harvesting plan and management plan
- Field visits to verify that the contractors have a Timber Extraction Contract
- Approved forest management plans shall exist for the FMU where the harvesting is taking place.
- Forest management plans shall contain all legally required information and procedures.
- Annual operating or harvesting plans shall be in place and approved by legally competent authorities.
- Annual operating or harvesting plans shall contain information and procedures, according to all legal requirements.
- The contents of the operating and harvesting plans shall be consistent with approved forest management plans.
- Plans for carrying out harvesting operations shall be subject to public disclosure and objections prior to commencement if legally required.
- Harvesting restrictions shall be identified in management plan and maps if legally required.
- Harvesting inventories shall be conducted according to legal requirements.
- Field verifications shall indicate that the contents of the harvesting plans are adhered to in the field.
- Stakeholder consultation shall indicate that the forest management plan has been approved according to legally prescribed process.

#### 1.4. Harvesting permits

*Legislation regulating the issuing of harvesting permits, licenses or other legal document required for specific harvesting operations. It includes the use of legal methods to obtain the permit. Corruption is a well-known issue in connection with the issuing of harvesting permits. Risk relates to situations where required harvesting is carried out without valid permits or where these are obtained via illegal means such as bribery. In some areas, bribery may be commonly used to obtain harvesting permits for areas and species that cannot be harvested legally (e.g., protected areas, areas that do not fulfil requirements of minimum age or diameter, tree species that cannot be harvested, etc.). In cases where harvesting permits classify species and qualities to estimate fees, corruption and bribery can be used to classify products that will result in a lower fee. The level of corruption in a country or sub-national region is considered to play an important role and corruption indicators should therefore be considered when evaluating risks. In cases of illegal logging, harvesting permits from sites other than the actual harvesting site may be provided as a false proof of legality with the harvested material.*

##### 1.4.1. Applicable laws and regulations

- RIL Operation Guidebook. Code of Practice for Harvesting in Sabah. Available at: [http://www.fao.org/fileadmin/templates/rap/files/meetings/2012/120503\\_reduced\\_impact.pdf](http://www.fao.org/fileadmin/templates/rap/files/meetings/2012/120503_reduced_impact.pdf)
- Environment Protection Enactment 2002. Available at: <http://www.sabah.gov.my/jpas/laws/EPE/EPE02.pdf>
- Director of Forestry Circular: FD26/2009
- Parks Enactment 1984. Available at: <http://sabah.gov.my/phb/wp-content/uploads/2011/05/ParksEnactment1984.pdf>
- Water Resources Enactment 1998. Available at: <http://sabah.gov.my/phb/wp-content/uploads/2011/05/SabahWaterResourcesEnactment1998.pdf>
- Sabah Land Ordinance, 1930 (Sabah Cap.68). Available at: <http://sabah.gov.my/phb/wp-content/uploads/2011/05/LandOrdinance.pdf>
- Sabah Forest Enactment, 1968. Available at: <http://faolex.fao.org/docs/pdf/mal10907.pdf>
- Forest Rules 1962. Available at: [http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/Forest1968\(Rules1969\).pdf](http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/Forest1968(Rules1969).pdf)

#### **1.4.2. Legal authority**

- Sabah Forestry Department

#### **1.4.3. Legally required documents or records**

##### Permanent Forest Reserve:

- Sustainable Forest Management Licence Agreement, or:
- Long term timber licence agreement

##### Non-PFR:

- Approval or harvesting license from SFD
- Form 2 (b) licence for alienated land
- Form 1 licence
- Short-term license: Schedule III, Form 1.

#### **1.4.4. Sources of information**

##### *Government sources*

- forest.sabah.gov.my (N.Y.) Sabah Forestry Department – official Portal. [online] Available at: <http://www.forest.sabah.gov.my/>
- Sabah Forestry Department, (2017). Annual Report 2016 – Chapter 11: Enforcement, Investigation & Prosecution. Available: <http://www.forest.sabah.gov.my/ar2016/11.pdf>, accessed 8 February 2018.

##### *Non-government sources*

- Transparency International, (2017). Corruption Perception Index 2016. Available: <https://www.transparency.org/country/MYS>. Accessed 5 February 2018.
- theborneopost.com (2014). *Govt urged to give priority to the natives in land disputes*. [online] Sept. 29, 2014. Available at: <http://www.theborneopost.com/2014/09/29/govt-urged-to-give-priority-to-natives-in-land-dispute/> [Accessed 2 March 2015]
- Toh, S. M. and Grace, K. T. (2006). *Understanding forest tenure in South and Southeast Asia, Case study: Sabah Forest ownership*. [online]. FAO. Available at: <http://www.fao.org/forestry/10515-0462aee542d13dc983cd2bb1d09c073fa.pdf>
- World Resources Institute (WRI) (2013). Forest Legality Alliance Risk Tool, 2013: Malaysia: <http://www.forestlegality.org/risk-tool/country/malaysia#tab-management>.
- sourcing.gftn.panda.org (N.Y.). *WWF Global Forest Trade Network: Common Framework for Assessing Legality of Forestry Operations, Timber Processing and Trade - Principles, Criteria and Indicators for Malaysia*. [online]. WWF-GFTN. Available at: [http://sourcing.gftn.panda.org/files/PDF/legal\\_documentation\\_malaysia.pdf](http://sourcing.gftn.panda.org/files/PDF/legal_documentation_malaysia.pdf) and [http://sourcing.gftn.panda.org/files/PDF/legality\\_framework\\_malaysia.pdf](http://sourcing.gftn.panda.org/files/PDF/legality_framework_malaysia.pdf)
- forestlegality.org (2009). TTAP Legality Checklist - Malaysia. Available at: <http://www.forestlegality.org/risk-tool/country/malaysia>
- Colchester, M., Jalong, T., Alaza, L. (2013). *'Conflict or Consent?' Chapter 10: Sabah: Genting Plantations and the Sungai and Dusun Peoples*. [online]. Forest Peoples. Available at: <http://www.forestpeoples.org/sites/fpp/files/private/publication/2013/12/conflict-or-consent-chapter-10-sabah-genting-plantations-and-sungai-and-dusun-peoples.pdf> [Accessed 2 March 2015].
- Sarawak Report, (2012). Malaysian Foreign Minister Named in MACC Investigation into Sabah Timber Corruption – NATIONAL EXPOSE. Available at: <http://www.sarawakreport.org/2012/04/malaysian-foreign-minister-named-in-macc-investigation-into-sabah-timber-corruption-national-expose/>
- The Borneo Project, (2012). Malaysian Foreign Minister Named in MACC Investigation into Sabah Timber Corruption. Available at: <https://borneoproject.org/updates/malaysian-foreign-minister-named-in-macc-investigation-into-sabah-timber-corruption>
- Expert consultation conducted by NEPCon, (2015). Including NEPCon expert consultation 2015, personal communication.

#### 1.4.5. Risk determination

##### *Overview of Legal Requirements*

Any company or person who intends to harvest forest produce from a forest area must have a valid harvesting licence. The issuance of a harvesting licence for PRF, SL, AL (whether on natural forest or on plantations) is subject to:

- Letter of approval for issuance of licence from Natural Resources Office (NRO) (PF & SL) under the Chief Minister's Department, or the Director of Forestry (DoF) for Alienated Land (AL)
- Approval of forest harvesting area
- Approved EIA study / PMM where applicable
- Demarcation of harvesting area
- Approved Inventory Report (for selective logging inside forest reserves only)
- Payment of licence fees and other charges imposed

In Sabah a harvesting license can be in the form of:

- Sustainable Forest Management License Agreement/Long-term License Agreement (SFMLA/LTL) for concessions on PRF
- Form I license: short-term license for logging activities on forest reserve or State land.
- Form IIB: Normally issued for harvesting from Alienated Land, where timber can be harvested for land clearance for agricultural purposes (mostly oil palm, rubber and other short-term crops).

For forest reserves, the National Resources Office decision is based on the SFD recommendation of Class II (commercial forest). Once approval is received from the National Resource Office, the Sabah Forestry Department informs the successful applicant, stating conditions of approval (including the need for Environmental Impact Assessment (EIA) or Proposal for Mitigation Measures (PMM), if necessary).

In the case of State Land, the National Resource Office verifies the application for harvesting rights. Eligible applications are forwarded – together with maps showing the relevant area – to the Lands and Survey Department (LSD) to ascertain availability of the area. (Use of the land can lead to its privatisation). The NRO decision is based on the recommendation made by the LSD, covering availability of the area, and ensuring that any designated water catchments or kampong reserves are excluded from the area.

For Alienated Land or in the situation where a company is authorized by the owner, and regarding permission to remove forest produce under licence: The District Forestry Officer (DFO) verifies the status of the land and its ownership and then submits the application to the Director of Forestry for approval. The Director of Forestry issues a letter of approval to the DFO for removal of forest produce.

#### *Description of Risk*

There is a risk of corruption in the process of issuing harvesting permits, and a lack of harvesting permits.

- The licensing process in Sabah for any permits is not based on a tender process and is thus not transparent. Historically, there have been strong indications of license holders having ties with the Chief Minister in Sabah (see for example Sarawak report 2012 and Borneo Project 2012). However, the process of issuing permits is clear and well known. In 2012 there were reports (through documents leaked from MACC) of the Chief Minister allocating concessions to his brother despite a conflict of interest (Sarawak

Report 2012). The case was not brought to court, but indicates a risk of nepotism/cronyism in the issuing of licenses (Sarawak Report 2012)

- Form IIB has earlier been abused by contractors, mainly for extraction of timber in areas meant for conversion, to include volumes of timber logged outside the clear-felling area, and thus including illegal timber into the timber chain. This abuse has been minimized and better regulated by the Sabah Forest Department. However, there are no evidence to prove no such actions no longer occurs (Expert consultation 2012, Personal Communication 1 and 7).
- According to the 2016 Annual Report of the Sabah Forestry Department (NB: this is the most recent report available), of the 234 forestry offences detected in 2016, 22 were Illegal Felling (Section 20 Forest Enactment 1968) in forest reserve; 25 were Illegal Felling in State land (Section 23 Forest Enactment 1968); and 65 were Illegal Possession under section 30(1)(g) Forest Enactment 1968 (Sabah Forestry Department, 2017). The annual report states:

*'The year 2016 marked an increase of 62 cases compared to 2015 largely due to better enforcement throughout the state with special teams assessed in discharging their duties diligently and professionally. During the year under review, there was an increase in offences of illegal felling in forest reserves and state lands due to illegal land clearing for oil palm plantations. Another main threat is an increase in the illegal harvesting of Agarwood (gaharu) by foreigners in particular as indicated from the cases encountered in Keningau and Sandakan regions. Cases in forest reserves may have increased, but they mainly involved small timber extraction, which if not countered, can add up the extent of forest loss. Unfortunately, forest clearing has not yet been sufficiently addressed. We need to do better in 2017.'*

- In 2016, Transparency International gave Malaysia a Corruption Perception Index score of 49 out of 100 (on a scale from 0 to 100 where 100 is lowest level of corruption). Malaysia was ranked 55 out of the 167 countries assessed. The score of 49 see's Malaysia losing points compared to 2015, where they scored 50 and 2014 where they scored 52.
- The process of issuing concession licenses is clearly defined and well known, but there is a lack of transparency when issuing the permits and as there are indications of corruption. Furthermore, misuse of Form IIB licenses has been reported and the risk is thus considered Specified for all timber sources.

#### *Risk Conclusion*

This indicator has been evaluated as specified risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.4.6. Risk designation and specification**

Specified risk

#### **1.4.7. Control measures and verifiers**

- Field visits shall verify that maps are in compliance with reality
- Harvesting permits shall exist
- Harvesting limits shall be clearly defined based on maps and quantities
- Authorities shall confirm the validity of harvesting permit
- Field inspection shall confirm that harvesting takes place within limits given in the harvesting permit.
- Field inspection shall confirm that information regarding area, species, volumes and other information given in the harvesting permit is correct and within limits prescribed in the legislation.

## TAXES AND FEES

### 1.5. Payment of royalties and harvesting fees

*Legislation covering payment of all legally required forest harvesting specific fees such as royalties, stumpage fees and other volume-based fees. It also includes payments of the fees based on correct classification of quantities, qualities and species. Incorrect classification of forest products is a well-known issue often combined with bribery of officials in charge of controlling the classification.*

#### 1.5.1. Applicable laws and regulations

- Forest Enactment 1968 [Sections 24C & 42(d), (e)]  
<http://faolex.fao.org/docs/pdf/mal10907.pdf>
- Forest Rules 1969, Rule 12(1)
- CF Circular 1/81 Measurement of Timber for Royalty Assessment-CF No 1/81 2006 Version, 1st Revision

#### 1.5.2. Legal authority

- Sabah Forestry Department

#### 1.5.3. Legally required documents or records

- Royalty paid logs will have the following documents and markings:
- Logs bear Property Hammer Marks
- Logs bear Forestry Department Inspection Mark
- Logs bear Forestry Department Revenue Hammer Mark.
- All logs have species symbol and serial number incised at both ends.
- Timber Disposal Permit (TDP) which provides details of logs, including: the licence where the logs were extracted, the serial number, log specification by species, log diameter and length, date of scaling and reference to the royalty payment receipt.

#### 1.5.4. Sources of information

##### *Government sources*

1. Sabah Forestry Department, Forest Legislation, Available at:  
<http://www.forest.sabah.gov.my/discover/policies/forest-legislation>
- Sabah Forest Department 2013: Chapter 12, Enforcement, Investigation & Prosecution. Available at:  
<http://www.forest.sabah.gov.my/images/pdf/publications/AR2013/Chap12.pdf>
- Sabah Forestry Department, (2017). Annual Report 2016 – Chapter 11: Enforcement, Investigation & Prosecution. Available at:  
<http://www.forest.sabah.gov.my/ar2016/11.pdf>, accessed 8 February 2018.

- Australian Government, (2017). Country specific guideline for Malaysia (Sabah) [pdf]. Department of Agriculture and Water Resource and Ministry of Plantation Industries&Commodities. Available at: <http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/illegal-logging/malaysia-sabah.pdf>, accessed 8 February 2017.
- Sabah Forestry Department, (2013). Sabah TLAS document (revised as at 06 March 2013). Available at: <http://www.forest.sabah.gov.my/images/pdf/en/flegt/TLAS4.pdf>, Accessed 13 February 2018.

#### *Non-government sources*

- Borneo Post, May 2017. Hike in hill timber charges negative for timber players, [online] Available at: <http://www.theborneopost.com/2017/05/12/hike-in-hill-timber-charges-negative-for-timber-players/>, [accessed 8 February 2018].
- Daily Express, (2016). Nearly 800 forestry offences in five years. Available at <http://www.dailyexpress.com.my/news.cfm?NewsID=113724> [6 April 2018].
- Hoare, A. (2015). *Illegal Logging and Related Trade - The Response in Malaysia*. [online]. A Chatham House Assessment. Chatham House, London. Available at: [http://www.illegal-logging.info/sites/default/files/CHHJ2365\\_Malaysia\\_Logging\\_Research\\_Paper\\_A4\\_01\\_15\\_WEB.PDF](http://www.illegal-logging.info/sites/default/files/CHHJ2365_Malaysia_Logging_Research_Paper_A4_01_15_WEB.PDF) [Accessed 23 February 2015]
- NEPCon Expert consultation, 2015, personal communication1 and personal communication 2.
- World Resources Institute (WRI) (2013). Forest Legality Alliance Risk Tool, 2013: Malaysia: <http://www.forestlegality.org/risk-tool/country/malaysia#tab-management> [accessed 23 February 2015]

#### **1.5.5. Risk determination**

##### *Overview of Legal Requirements*

Section 24C of the Forest Enactment 1968, and Rule 12(1) of the Forest Rules 1969, stipulate the royalty payment requirements for all harvested timber. All logs transported must have the royalty paid prior to leaving the licenced area or approved royalty assessment area. Payment of royalties must be made to the District Forestry Officer and shall include supporting documents such as the Log Summary and Log List with species, log dimension and volume. The District Forestry Officer conducts a field inspection and verifies the company's log dimensions based on the Guideline for Measurement of Timber for Royalty Assessment and assesses royalty payments based on the applicable royalty rates.

The current royalty rates are published on the Sabah Forestry Departments website: <http://www.forest.sabah.gov.my/media-centre/rapid-info/guidelines/723-fd-18-2016-sabah-timber-royalty-effective-1st-july-2016>.

Prior to the assessment of royalties, the District Forestry Officer verifies that: logs bear Property Hammer Mark, logs bear the Forestry Inspection Mark and all logs have species symbol and serial number incised at both ends of log, and volume corresponds to the company's Log List and Log Summary.

Once royalties have been paid, the District Forestry Officer will issue a receipt for royalty payments.

A Concession or Harvest permit will not be issued if relevant fees have not been paid by the forest enterprise or private land owner.

Royalty is based on volume and species. Forest managers pay all royalties, farmers and Community Forestry Cess, Forest Rehabilitation Fees and Removal Pass fees before they can remove the timber from the licensed area. Sabah Forestry Department collects payment and issues receipts, Timber Disposal Permit and Removal Pass. District Forestry Officers verify all payment receipts where the forest operations are being conducted. The Sabah Forestry Department Annual Report for 2016 states that the royalty rates of logs for export and for domestic processing were revised effective 1st July 2016, with an average increase of export royalty at RM10/m<sup>3</sup> for most species but some species namely Belian showed a significant increase at RM50/m<sup>3</sup>. The royalty for local processing showed an increase of RM5/m<sup>3</sup>. The royalty of plantation timber species for both export and import however remained unchanged. The export royalty for processed timber was also revised whereby the export royalty of plywood was raised by RM5/m<sup>3</sup> and Belian sawn timber increased by RM20/m<sup>3</sup>

According to the Sabah Country Specific Guidelines published by the Australian Government and this guideline was co-endorsed by the Malaysian governments in March 2017 "rubberwood logs produced from Alienated land in Sabah are royalty exempted, while rubberwood logs produced from PFE (Industrial Tree Plantation Zone of SFMLA) are subject to royalty payment."

According to the Sabah TLAS document, Industrial Plantation Timber (ITP) from State Land and Alienated Land is exempted from royalty payments.

In July 2017, the Sarawak Government introduced a significant increase in the timber royalties for the state. This increase, the only one since the mid-1980's, is predicted to see an increase in revenue for the state from the timber sector. According to the Borneo Post (May 2017), the hike will result in the collection of RM200 million to RM300 million per annum under the revised rate, compared to about RM15 million under the present rate.

#### *Description of Risk*

- The system is considered well implemented, with the gaps allowing abuse of the system having been minimised in recent years through improved enforcement and constant third-party surveillance (e.g. as part of the Sabah TLAS FMU monitoring programme) (Personal Communication 2).
- The SABAH TLAS annual auditing applies to all timber concessions and SFD has incentive to collect revenues, thus royalties' payment collection is considered an area of strength in Sabah's forestry enforcement (Personal Communication 2).
- According to the Forest Legality Initiative's Risk Tool (2013):

*"Most tax revenue is collected by the National Government of Malaysia, but state governments are allowed to collect land-related revenue, including timber export duties. These policies have encouraged state governments to maximize these revenues. In some cases, state taxation has jeopardized the*

*national goal of sustainable forest management. The state exit tax, among others, encourages operators to smuggle wood out of states like Sarawak and Sabah to avoid paying the fee. In Sabah, for example, there are several fees, royalties, taxes, etc., that must be paid to extract forest resources. These include: payment to a community forest cess fund, royalties based on species groupings, fees for an occupational permit, machinery registration fees, rehabilitation funds, performance bond for SFM license agreement, among a few others.”*

- According to the 2016 Annual Report of the Sabah Forestry Department (NB: this is the most recent report available), of the 234 forestry offences detected in 2016, only 1 (one) was for royalty evasion. This compares with the 2013 Annual Report, which stated that no cases of royalty evasion were noted that year (SFD 2013, p.78).
- The 2016 Annual Report notes “a slight increase in log production from the natural forest coupled with revision of royalty rates and a consistent increase in the royalty collection from agro-forestry activities, however showed much better forest revenue collection at RM 225.4 million as compared to RM 189.4 million in 2015”.
- According to Chatham House. Before a logging licence is issued, potential licensees must pay a timber premium on the area to be harvested and deposit funds with the respective forestry department to offset future royalties. The royalties due are recorded by the forest checking stations. The computerized system to register payments and harvests is considered effective, although the level of payment of royalties is not known. (Hoare, 2015, p. 4).
- Unlike Peninsular Malaysia, where specific issues of tax evasion have been raised in recent years, no information could be found in the preparation of this report to indicate that evasion of royalty payments in Sabah is a specific problem. The Daily Express reported on the statistic of the Sabah Forestry Department (SFD) in October 2016 – that article states that the SFD ‘recorded a total of 789 cases in various forestry offences over the last five years, [... of which] 197 cases of unpaid timber taxes and possession of timber without papers” were detected. Note that the Sabah FD annual report shows only one case for royalty evasion.
- In addition, the expert input into this report included specific advice that the issue of tax and royalty evasion in Sabah is strongly mitigated by the incentives for government to ensure compliance, this is because of the heavy reliance on the revenue generated from the timber sector.

Based on the available information, the risk for this indicator is considered low.

For rubberwood grown on alienated land, this indicator is not applicable as this timber source is exempt from royalty obligations.

For Industrial Plantation timber from State Land and Alienated Land, this indicator is not applicable.

#### *Risk Conclusion*

Not applicable for rubberwood grown on alienated land and Industrial Plantation Timber from State Land and Alienated Land.

This indicator has been evaluated as low risk for all other source types. Identified laws are upheld. Cases where law/regulations are violated are efficiently followed up via preventive actions taken by the authorities and/or by the relevant entities.

#### 1.5.6. Risk designation and specification

Not applicable for rubberwood grown on alienated land and Industrial Plantation Timber from State Land and Alienated Land.

This indicator has been evaluated as low risk for all other source types.

#### 1.5.7. Control measures and verifiers

N/A

### 1.6. Value added taxes and other sales taxes

*Legislation covering different types of sales taxes, which apply to the material being sold, including selling material as growing forest (standing stock sales). Risk relates to situations where products are sold without legal sales documents or far below market price resulting in illegal avoidance of taxes.*

#### 1.6.1. Applicable laws and regulations

- Goods and Services Tax Act 2014 (GST). Part I, Section 3 (Meaning of business), Section 4 (Meaning of supply); Part III, Section 9 (Imposition and scope of goods and services tax); Part V, Section 33 (Issuance of tax invoice) - [http://www.federalgazette.agc.gov.my/outputaktap/20140619\\_762\\_BI\\_ACT%20762.pdf](http://www.federalgazette.agc.gov.my/outputaktap/20140619_762_BI_ACT%20762.pdf)

#### 1.6.2. Legal authority

- Royal Malaysian Customs Department

#### 1.6.3. Legally required documents or records

- Records of payment kept by forest managers/company

#### 1.6.4. Sources of information

##### *Government sources*

- Sabah Forestry Department[online], Available at <http://www.forest.sabah.gov.my/discover/policies/forest-legislation> Malaysia-EU FLEGT VPA; <http://www.flegtvpa.my/sabah-tlas> GST industry guide on forestry [www.gst.customs.gov.my/en/rg/SiteAssets/gst\\_bill/BI ACT 762.pdf](http://www.gst.customs.gov.my/en/rg/SiteAssets/gst_bill/BI_ACT_762.pdf).
- Sabah Forestry Department, (2013). Sabah TLAS document (revised as at 06 March 2013). <http://www.forest.sabah.gov.my/images/pdf/en/flegt/TLAS4.pdf>, Accessed 13 February 2018.

##### *Non-Government Sources*

- Annuar, H. A., Salihu, I. A., & Obid, S. N. (2014). Corporate Ownership, Governance and Tax Avoidance: An Interactive Effects. *Procedia - Social and Behavioural Sciences*,

164, 150-160.[online], Available at:

<https://www.sciencedirect.com/science/article/pii/S1877042814058832>

- Borneo Post. (2013, November 22). Sabah to retain State Sales Tax when GST implemented – Musa. Retrieved from [www.theborneopost.com](http://www.theborneopost.com): <http://www.theborneopost.com/2013/11/22/sabah-to-retain-state-sales-tax-when-gstimplemented-musa/>
- Borneo Post. (2016, January 29). Waive SST until CPO price stabilises. Retrieved from [www.theborneopost.com](http://www.theborneopost.com): <http://www.theborneopost.com/2016/01/29/waive-sst-until-cpoprice-stabilises/>
- New Straits times, (2017). 2,621 companies fail to comply with GST Act: <https://www.nst.com.my/news/2016/07/159375/2621-companies-fail-comply-gst-act>
- The Malaysian Reserve, March 2017. Business warned not to cheat GST system. Available: <https://themalaysianreserve.com/2017/03/31/business-warned-not-to-cheat-gst-system/>, accessed 9 February 2018.
- The Sun Daily, (2017). Over 2,000 cases of tax evasion related to GST charged in court since 2015. Available: <http://www.thesundaily.my/news/2017/10/25/over-2000-cases-tax-evasion-related-gst-charged-court-2015>, accessed 9 February 2017.
- Ting, E. H. (2015). At a Glance – The Malaysian Goods and Services Tax Act 2014. Abdullah Chan & Co.[online], Available at: <http://www.abdullahchan.my/wp-content/uploads/At-a-Glance-The-Malaysian-GST-Act-2014.pdf>
- Transparency International Malaysia. (2011). Forest Governance Integrity Report: Peninsular Malaysia. Transparency International Malaysia.[online], Available at: <http://fgi.transparency.org.my/wp-content/uploads/sites/3/2013/09/Publication-Report-Peninsular-Malaysia.pdf>

#### 1.6.5. Risk determination

##### *Overview of Legal Requirements*

The Goods and Services Tax (GST) was implemented on a nation-wide basis April 1st, 2015 and replaced the former types of sales- and service tax. The GST is a multi-staged "... consumption based tax on goods and services" (Ting, 2015, p. 2) and as such it differs from direct taxes (RPGT, income tax etc.).

According to the *Goods and Services Tax Act 2014*, the GST applies to goods or services supplied in Malaysia, as well as on any importation of goods into Malaysia (Ting, 2015) and is rated at either 6% or 0% unless explicitly exempt by the law.

Generally upstream activities involve in a supply of logs are treated as taxable supplies and subject to GST at standard rate. Reforestation and forestation as well as forest husbandry are also part of the upstream activities. GST treatments for these activities are in accordance to the normal provision as prescribed in the GST Act, Regulations and Orders.

Generally downstream activities involve in the conversion and manufacturing of logs in primary and secondary processes and subsequently supplied are treated as taxable supplies of goods and subject to GST at standard rate.

For GST purposes, any taxable person who make a taxable supply of goods or services in

Malaysia with an annual turnover exceeding the prescribed threshold in the past 12 months, or expected to exceed the prescribed threshold within the future of 12 months, are liable to register for GST.

GST registered person, you are required to

- (a) keep your business records for 7 years.
- (b) issue a tax invoice to taxable person for provision of taxable supply;
- (c) complete and submit the GST returns and pay the Director General the amount of tax not later than the last working day of the month following the end of the specified taxable period;
- (d) provide all information and reasonable assistance as requested by the Director General in the event of an inspection;
- (e) notify the Director General in writing when you cease making taxable supplies or when you transfer your business;
- (f) If you are a voluntary registrant, you must remain registered for at least two years;
- (g) show the price as GST inclusive when you issue a receipt.

In Sabah, there has been great commotion about the implementation of the GST in 2015, because Sarawak and Sabah already had their own State Sales Taxes (SST). The SST is imposed on Crude Palm Oil (CPO), slot machines and lotteries. From the perspective of Sarawak and Sabah, the issue with the introduction of the GST is the choice between losing important state income and the prospect of 'double taxation' on e.g., CPO (Borneo Post 2016).

This is because while the SST goes in the State coffers, the GST belongs to the Federal Government. The two Bornean States chose to retain their SST and CPO is thus both subject to GST and SST; something that affects especially the mills and consequently affects the price the mills can pay farmers for their Fresh Fruit Bunches (Borneo Post, 2013; Borneo Post, 2016).

#### *Description of Risk*

- Since GST was introduced in Malaysia in April 2015, there is possibly some tax evasion in the forest products sector but no sector-specific reports highlight this as a risk.
- Based on the Customs Department's audit, most of the 417,000 GST-registered companies nationwide were not ready in terms of record-keeping, usually managed by third parties such as tax agents, accountants or consultants (New Straits Times (NST), 2017).
- In 2017, the Sun Daily reported that over 2,000 cases of tax evasion related to GST have been charged in court since 2015. The article states that Customs have opened a total of 14,578 investigation papers since the GST implementation of which some 2,097 cases were prosecuted in court. As of July, 928 of the cases were found guilty. Deputy Finance Minister Datuk Othman Aziz is quoted as saying "*one of the biggest issues we face is the failure to declare taxes by businesses.*" The article does not contain any specific information about the industries affected.

- Regarding the enforcement of the GST requirement, according to the Malaysian Reserve (March 2017), Royal Malaysian Customs is “well prepared” to detect cheats, dodgers or illegal collection of the Goods and Services Tax (GST). Businesses that may try to take advantage of loopholes have been warned that the Customs department, which is responsible for collection, has in place the technology and a highly skilled task force to detect any fraud. The Royal Malaysian Customs GST director Datuk Subramaniam Tholasy said the department is well prepared and is armed with the toughest laws to act against offenders. *“We have a system that can recognise anomalies based on the returns submissions. It will pick up the faulty ones and tag it with a red flag, if anything is suspicious”.*
- Transparency International Malaysia (2011) reports that the risks are transfer pricing (tax evasion through undervaluation) and bribery to undervalue timber. Family, government and foreign ownerships have been proven as the potential determinants of corporate tax avoidance (Annuar, 2014); these types of ownerships are also found in the palm oil plantation sector in Malaysia.

Given the general lack of GST readiness reported by the NST, and the specific corruption issues related to the timber sector, a precautionary approach has been taken to the evaluation of this indicator, and it is considered specified.

#### *Risk Conclusion*

This indicator has been evaluated as specified risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.6.6. Risk designation and specification**

Specified risk

#### **1.6.7. Control measures and verifiers**

- Sales documents shall include applicable sales taxes.
- Receipts for payment sales taxes shall exist.
- Volumes, species and qualities given in sales and transport documents shall match the fees paid.
- Sales prices shall be in line with market prices.
- Harvested species, volume and qualities shall match the sales documents.
- Authorities shall confirm that operation is up to date in payment of applicable sales taxes.
- Consultation with financial authority to verify that all required income and profit taxes have been paid

### **1.7. Income and profit taxes**

*Legislation covering income and profit taxes related to the profit derived from sale of forest products and harvesting activities. This category is also related to income from the sale of timber and does not include other taxes generally applicable for companies or related to salary payments.*

### 1.7.1. Applicable laws and regulations

- Income Tax Act 1967: Part II - Imposition and General Characteristic of the Tax, Section 3 (Charge of income tax), Section 4 (Classes of income).  
<http://www.kpmg.com.my/kpmg/publications/tax/22/a0053.htm>
- The Goods and Services Act 2014 -  
<http://www.customs.gov.my/en/pg/Documents/BI%20ACT%20762.pdf>

### 1.7.2. Legal authority

- The Ministry of Finance -  
<http://www.treasury.gov.my/index.php/en/ministrysprofile/treasurys-profile.html> The ministry in charge of formulating and implementing monetary policies and further in charge of distribution and the management of financial resources of Malaysia.
- Inland Revenue Board of Malaysia
- Royal Malaysian Customs Department -  
[http://www.customs.gov.my/en/ci/Pages/ci\\_vmv.aspx](http://www.customs.gov.my/en/ci/Pages/ci_vmv.aspx) Responsible for the nations indirect tax

### 1.7.3. Legally required documents or records

- Receipt of payment maintained by company and IRB which normally can only be obtained from the company or from IRB with company authorisation

### 1.7.4. Sources of information

#### *Government sources*

- Inland Revenue Board official website Available at:  
[http://www.hasil.gov.my/bt\\_goindex.php?bt\\_kump=5&bt\\_skum=5&bt\\_posi=3&bt\\_unit=1&bt\\_sequ=2&bt\\_lgv=2](http://www.hasil.gov.my/bt_goindex.php?bt_kump=5&bt_skum=5&bt_posi=3&bt_unit=1&bt_sequ=2&bt_lgv=2); LAWS OF MALAYSIA ONLINE VERSION OF UPDATED TEXT OF REPRINT; Act 53 INCOME TAX ACT 1967 As at 1 October 2017 ; [online], Available at:  
<http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Pindaan%20Act%2053%20-%2023%2011%202017.pdf>

#### *Non-Government sources*

- Annuar, H. A., Salihu, I. A., & Obid, S. N. (2014). Corporate Ownership, Governance and Tax Avoidance: An Interactive Effects. *Procedia - Social and Behavioural Sciences*, 164, 150- 160., [online], Available at:  
<https://www.sciencedirect.com/science/article/pii/S1877042814058832>
- Chin, M. (2011). *Biofuels in Malaysia: An Analysis of the Legal and Institutional Framework*. Bogor, Indonesia: CIFOR., [online], Available at:  
[https://books.google.dk/books?id=mkNLPmZC0eoC&printsec=frontcover&source=gbs\\_ge\\_summary\\_r&cad=0#v=onepage&q&f=false](https://books.google.dk/books?id=mkNLPmZC0eoC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false)
- Josephine Hilary Dom, Inland Revenue Board, Malaysia, (2013). *Enforcement Trend and Compliance Challenges: Malaysia's Experience*. The Fourth IMF-Japan High-Level Tax Conference for Asian Countries. Available:

<https://www.imf.org/external/np/seminars/eng/2013/asiatax/pdfs/malaysia2.pdf>, accessed 9 February 2018.

- Nor Shaipah Abdul Wahab, 2015a: Corporate Tax In Malaysia: Revenue, Collection And Enforcement  
<https://worldconferences.net/proceedings/icssr2015/full%20paper/IC%20035%20CORPORATE%20TAX%20IN%20MALAYSIA.pdf>.
- Nor Shaipah Abdul Wahab, 2015b. Corporate Tax in Malaysia: Revenue, Collection and Enforcement - E-Proceeding of the International Conference on Social Science Research, ICSSR 2015. Available:  
<https://worldconferences.net/proceedings/icssr2015/full%20paper/IC%20035%20CORPORATE%20TAX%20IN%20MALAYSIA.pdf>, accessed 9 February 2018.
- PWC 2016/2017 Malaysia Tax Booklet, 2017:  
<https://www.pwc.com/my/en/assets/publications/2017-malaysian-tax-booklet.pdf>- Nor Shaipah Abdul Wahab, 2015: Corporate Tax in Malaysia: Revenue, Collection and Enforcement,[online], Available at:  
<https://www.pwc.com/my/en/assets/publications/2017-malaysian-tax-booklet.pdf>
- PwC. (2016). 2015/2016 Malaysian Tax and Business Booklet. Kuala Lumpur, Malaysia: 24 Palm oil Risk Assessment – Malaysia - Peninsular PricewaterhouseCoopers Taxation Services Sdn Bhd.,[online], Available at:  
<https://www.pwc.com/my/en/assets/publications/2016-malaysian-tax-business-booklet.pdf>
- Transparency International (2011). *Forest Governance Integrity Report - Peninsular Malaysia*. Accessed 24 February 2015 at <http://transparency.org.my/wp-content/uploads/sites/3/2013/09/Publication-Report-Peninsular-Malaysia.pdf>.
- Transparency International, (2017). Corruption Perception Index 2016. Available at:  
[https://www.transparency.org/whatwedo/publication/corruption\\_perceptions\\_index\\_2016](https://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2016) . [Accessed 5 February 2018.]

#### **1.7.5. Risk determination**

##### *Overview of Legal Requirements*

Income taxation is managed and enforced centrally by the Federal Government in Malaysia.

In Malaysia, the standard taxation of corporate income is at 25% percent. This level of taxation applies to all sectors, except for the following: banking, insurance, air transport and shipping. Taxable income is all earnings derived from Malaysia and covers gains from dividend, royalty and land trading. Companies with annual earnings below 2,500,000MYR is classified as 'Small to-Medium Enterprise' (SME) and qualifies for a 5% tax decrease for the first 50,000MYR (PWC, 2017). All related records and receipts must be maintained for inspection by the Inland Revenue Board staff/inspector whenever needed (Inland Revenue Board). Even small-scale farmers and small companies must pay tax. If they do not have a registered company, they must declare tax as individual income (Abdul Wahab, 2015).

##### *Description of Risk*

- There is a risk of manipulation of the taxable amount (giving extra bonus, buying assets that can be deducted). However, all companies are subject to tax audits, and are audited by tax agencies, ensuring transparency and that tax deduction takes place according to the tax regulations and rules. Income tax is well-monitored and enforced (Abdul Wahab, 2015).
- Between year 2000 and year 2013, the composition of direct taxes to the Malaysian government's total revenue is made up by corporate tax at the largest, followed by individual tax, petroleum tax and others. This trend is consistent and significant for the 14-year period, and is expected to continue for future years due to effective enforcement policy of the tax authority (Abdul Wahab, 2015a).
- The main risk in relation to taxation is related to corruption. In 2016, Transparency International gave Malaysia a Corruption Perception Index score of 49 out of 100 (on a scale from 0 to 100 where 100 is lowest level of corruption). Malaysia was ranked 55 out of the 167 countries assessed. The score of 49 see's Malaysia losing points compared to 2015, where they scored 50 and 2014 where they scored 52.
- Transparency Internationals corruption index and thus corruption is an issue in Malaysia. In relation to forestry and oil palm plantation development, Transparency International Malaysia (2011) reports that the risks are transfer pricing (tax evasion through undervaluation) and bribery to undervalue timber. Family, government and foreign ownerships have been proven as the potential determinants of corporate tax avoidance (Annuar, 2014).
- Chin (2011), who reports that there have been several complaints from the palm oil industry about the heavy taxation and this can thus be considered a prime motivation for tax evasion. It is likely that this observation can also apply to the timber sector.
- In the paper *Corporate Tax in Malaysia: Revenue, Collection and Enforcement*, Abdul Wahab (2015b) states that the 'loophole[s] in the tax system may create opportunities for firms to avoid or evade the corporate tax. Studies in corporate tax field find evidence on tax planning opportunities created by ambiguity of the tax laws and firms' specific characteristics. Tax planning interpretation is basically referring to tax avoidance and evasion. Tax planning activities among firms are mainly triggered by the availability of the opportunity to avoid tax.' The paper concluded by recommending the 'government [...] levy sufficient corporate tax and respond to the increase administrative and compliance costs in its current enforcement strategies.'
- Josephine Dom of the IRB, in a presentation at the Fourth IMF-Japan High-Level Tax Conference for Asian Countries in 2013 listed the following as the key compliance challenges for the IRB:
  - Improving voluntary compliance;
  - Tax evasion and frauds;
  - Cross-border transactions, e-commerce and aggressive tax planning
  - Limited human resources and enhancing skills of audit officers.
  - Underground economy/cash economy
  - Incomplete recordkeeping among SME and sole proprietor

- High tax arrears every year

Although there are no specific reports of income tax evasion in the forestry sector in Sabah, the well documented corruption issues are considered significant enough to warrant a specified risk finding, based on the precautionary approach.

*Risk Conclusion*

'Specified risk'. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

**1.7.6. Risk designation and specification**

Low risk

**1.7.7. Control measures and verifiers**

N/A

## TIMBER HARVESTING ACTIVITIES

### 1.8. Timber harvesting regulations

*Any legal requirements for harvesting techniques and technology including selective cutting, shelter wood regenerations, clear felling, transport of timber from felling site and seasonal limitations etc. Typically this includes regulations on the size of felling areas, minimum age and/or diameter for felling activities and elements that shall be preserved during felling etc. Establishment of skidding or hauling trails, road construction, drainage systems and bridges etc. shall also be considered as well as planning and monitoring of harvesting activities. Any legally binding codes for harvesting practices shall be considered.*

#### 1.8.1. Applicable laws and regulations

- Forest Enactment 1968 (Sabah En. No. 2 of 1968) - Section 28A and 28B
- Reduced Impact Logging (RIL) Operation Guide Book: Code of Practice for Forest [http://www.fao.org/fileadmin/templates/rap/files/meetings/2012/120503\\_reduced\\_impact.pdf](http://www.fao.org/fileadmin/templates/rap/files/meetings/2012/120503_reduced_impact.pdf)
- Harvesting in Sabah, Malaysia 2009
- RIL Operation Guide Book Specifically for Crawler Tractor Use 2001.
- Reference Manual for Timber Harvesting
- Operations in Commercial Class II Forest Reserves in Sabah 1996
- Environment Protection Enactment - Section 38 - <http://www.sabah.gov.my/jpas/laws/EPE/EPE02.pdf>

#### 1.8.2. Legal authority

- Sabah Forestry Department

#### 1.8.3. Legally required documents or records

- Sustainable Forest Management Licence Agreement (SFMLA) or Long Term Licence (LTL) conditions
- Comprehensive Harvesting Plan (CHP)
- Approved Annual Work Plan (AWP)
- Field verification report-Borang SPKP RIL01
- Production records
- Daily felling record
- Letter of approval by SFD
- EIA
- Compartment record book
- Analysis of Permanent Sample Plots (PSP) data

- Compliance report
- Post-harvest Inventory
- Closing Inspection Report
- Records of silvicultural treatments
- Permanent Sample Plot Records
- Sustainable Forest Management Licence Agreement

#### 1.8.4. Sources of Information

##### *Government sources*

- SFD Publications. "Forestry in Sabah" Commemorative Edition, In Celebration of the Sabah Forestry Department Centennial time capsule sealing (2005-2105) Available at: <http://books.mouvier.ru/#t=Forestry+in+Sabah+compiled+by+the+Sabah+Forestry+Department.+compiled+by+the+Sabah+Forestry+Department>.
- Sabah Forestry Department, (2017). Annual Report 2016 – Chapter 11: Enforcement, Investigation & Prosecution. Available at: <http://www.forest.sabah.gov.my/ar2016/11.pdf>, accessed 8 February 2018.
- Sabah Forest Department 2015 –[online], Available at: <http://www.forest.sabah.gov.my/media-centre/press-release/436-all-long-term-forest-licensees-to-be-certified-on-their-forest-management-under-any-internationally-recognised-and-accredited-system-director-of-forestry>

##### *Non-government sources*

- Expert consultation conducted by NEPCon, 2015. Personal Communication 1 and 2.

#### 1.8.5. Risk determination

##### *Overview of Legal Requirements*

There are various means of control over timber harvesting operations in Sabah, depending on the land status.

For PRFs, State Land and Alienated Land, all licensees must adhere to the following conditions as stipulated in the licence conditions:

- i. A licensee must register a Property Hammer Mark, and the Property Hammer Mark must be stamped at the end of each log produced (natural forest), and per batch for plantation timber.
- ii. A licensee must incise each extracted log with a serial number.
- iii. A logging contractor must be registered with the SFD prior to commencing operations.
- iv. The requirement to prepare daily harvesting records.
- v. Submission of Quarterly Logging Progress Report and Closing Inspection Report.
- vi. Prohibition of timber harvesting in steep slopes (25° and above) and buffer zones as stipulated in the licence conditions.

The conditions of harvesting licence stipulate several protected species of timber that are prohibited from being harvested in PRF or Natural Forest Management Areas.

In the PRF and State Land, only a licenced area is allowed for timber harvesting. For Alienated Land, timber can be felled for land clearance for agricultural purposes as the land is Alienated Land, but no timber can be removed without royalty payment and with proper markings and thereafter issuance of Form IIB licence.

For selective logging Forest Reserves (SFMLA/LTL), there are additional harvesting controls, including the use of Reduced Impact Logging, and the operation will be guided by a Comprehensive Harvesting Plan which includes requirements relating to road construction, directional felling and mapping trees for harvest. For logging involving clearance for timber plantations or clearance of plantation timber inside Forest Reserves the SFMLA requires that a Plantation Development Plan be completed.

#### *Description of Risk*

- A small amount of harvesting is taking place in PRF in Sabah, as the concessions are often degraded due to earlier logging. Companies now often spend resources to restore the forest. The FMUs are being monitored under the EIA requirements by the Forestry Department through onsite audits and aerial surveys carried out 1–2 times a year (NEPCon Expert Consultation 2015.).
- The Sabah Forestry Department has 35 District Forestry Officers conducting audits paid for by the Forestry Department. Field monitoring by the authorities is complicated by the remote locations of the forests being logged. However, the requirement is generally considered well-implemented (Expert consultation 2015, personal communication 1).
- The 2016 Annual Report from the Sabah Forestry Department states that almost 40 per cent of the 234 forestry offences from that year were “breach of license conditions”. The annual report does show a significant uptick in enforcement activities. The number of people convicted and arrested for forestry offences has significantly increased over the five years leading up to 2016: In 2012 there were 61 offences, 59 in 2013, 91 in 2014, 138 in 2015 and 176 in 2016. This is not necessarily an indicator of more offences, just that more offences are being detected and prosecuted.
- According to experts consulted (2015), the harvesting requirements for SL, AL and plantations are less stringently applied, or absent. Despite the lack of information to indictate an absence of risk here, the strong advice of the experts was that the risk is not significant enough here, in the sense of scale and impact to warrant this indicator being found to be specified.
- According to Sabah Forestry Department, the implementation of third party auditing on all long-term licensees has had a positive impact on enforcement. This was introduced to ensure that forest activities comply with the terms and conditions of the Sustainable Forest Management License Agreements (SFMLAs). As of December 2014, 840,000 ha of forest were certified, and another 213,000 ha is expected to be fully certified during 2015 (SFD 2015). Forest certification is a cornerstone of the State Government Forest Policy and thus encouraged at State level.
- EIA for Sabah is more widely and consistently implemented as there is no minimum threshold of land area, meaning all harvesting project needs to conduct an EIA (Expert consultation 2015, personal communication 2). Sabah also has a dedicated department

focused on the implementation of EIA, namely the Sabah Environmental Protection Department (Expert consultation 2015, personal communication 2).

Based on the input of experts consulted, and the experience of the authors of this report, the risk is considered low for this indicator.

#### *Risk Conclusion*

This indicator has been evaluated as low risk. Identified laws are upheld. Cases where law/regulations are violated are efficiently followed up via preventive actions taken by the authorities and/or by the relevant entities.

#### **1.8.6. Risk designation and specification**

Low risk

#### **1.8.7. Control measures and verifiers**

N/A

### **1.9. Protected sites and species**

*International, national, and sub national treaties, laws, and regulations related to protected areas allowable forest uses and activities, and/or, rare, threatened, or endangered species, including their habitats and potential habitats. Risk relates to illegal harvesting within protected sites, as well as illegal harvest of protected species. Note that protected areas may include protected cultural sites, including sites with historical monuments.*

#### **1.9.1. Applicable laws and regulations**

- Forest Enactment 19688 – sections 28A & 28B
- EIA Guidelines for Logging and Forest Clearance Activities 2002
- Sabah Land Ordinance of 1930 - [https://thereddesk.org/sites/default/files/land\\_ordinance\\_1975.pdf](https://thereddesk.org/sites/default/files/land_ordinance_1975.pdf)
- Wildlife Conservation Enactment 1997. Section 9-24, 25-39, 40-53 and 54-63. Available at: <http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/WildlifeConservation1997%28Regulations1998%29.pdf>
- Biodiversity Enactment 2000. Section 9, 15, 16 and 17. Available at: <http://www.wipo.int/edocs/lexdocs/laws/en/my/my055en.pdf>
- Rhino Species Action Plan 2012-2016. Available at: [http://www.rhinosourcecenter.com/index.php?s=1&act=refs&CODE=note\\_detail&id=1367738814](http://www.rhinosourcecenter.com/index.php?s=1&act=refs&CODE=note_detail&id=1367738814)
- EIA Guidelines for Logging and Forest Clearance Activities 2002
- State Cultural Heritage (Conservation) Enactment 1997. Available at: <http://www.lawnet.sabah.gov.my/Lawnet/SabahLaws/StateLaws/CulturalHeritage%28Conservation%29Enactment1997.pdf>

- Orang Utan Action Plan 2012-2016. Available at: [http://archive.mpoc.org.my/Summary\\_of\\_the\\_Orang\\_Utan\\_State\\_Action\\_Plan\\_%28Sabah\\_Wildlife\\_Department,\\_2012\\_%E2%80%93\\_2016%29.aspx](http://archive.mpoc.org.my/Summary_of_the_Orang_Utan_State_Action_Plan_%28Sabah_Wildlife_Department,_2012_%E2%80%93_2016%29.aspx)
- Elephant Action Plan 2012-2016. Available at: [http://www.mpoc.org.my/Review\\_of\\_Sabah\\_Elephant\\_Action\\_Plan\\_2012.aspx](http://www.mpoc.org.my/Review_of_Sabah_Elephant_Action_Plan_2012.aspx)

### **1.9.2. Legal authority**

- Sabah Department of Environment (DOE): enforces the Environmental Quality Act 1974.
- Sabah Department of Director General of Lands and Mines (JKPTG): enforces land law and legislation regarding with land administration.
- Royal Malaysian Customs Department (RMC): enforces Customs Act 1967 (amended in 1988).
- Sabah Department of Fisheries (DOF): enforces Fisheries Act 1985 (Act 317).
- Sabah Forestry Department: is responsible for enforcing the Forest Enactment 1968.
- Sabah Department of Irrigation and Drainage (DID): enforces Sabah Water Resources Enactment 1998.
- Sabah Wildlife Department: enforces Wildlife Conservation Enactment 1997.
- Environment Protection Department: Advise the government of development activities, to comply with various environmental legislation and guidelines so that the process of development do not unduly degrade the environment.
- Sabah Parks: Protection and management of designated conservation areas as parks, for conservation needs and other uses. It also provides a resource for the development of various tourism related business opportunities, directly and indirectly.

### **1.9.3. Legally required documents or records**

- Forest Management Plan
- Latest list of endangered, rare and threatened species of flora and fauna
- Malaysian Red List (flora)
- IUCN Red List (fauna)
- List of protected species
- List of totally protected species
- Map depicting location of important cultural, ecological, economic or religious sites

### **1.9.4. Sources of Information**

#### *Government sources*

- wildlife.gov.my (2010) Red list of mammals for peninsular Malaysia. [online]. Available at: [http://www.wildlife.gov.my/images/stories/penerbitan/lain\\_lain/Redlist%20Final.pdf](http://www.wildlife.gov.my/images/stories/penerbitan/lain_lain/Redlist%20Final.pdf)

- Sabah Forestry Department, (2017). Annual Report 2016 – Chapter 11: Enforcement, Investigation & Prosecution. Available at: <http://www.forest.sabah.gov.my/ar2016/11.pdf> accessed 8 February 2018.
- Ministry of Natural Resources and Environment, Malaysia. (2014). Fifth National Report to the Convention on Biological Diversity. Putrajaya: Ministry of Natural Resources and Environment, Malaysia. Retrieved from <https://www.cbd.int/doc/world/my/my-nr-05-en.pdf>

#### *Non-Government sources*

- iucnredlist.org (N.Y.). The IUCN Red List of Threatened Species. [online]. Available at: <http://www.iucnredlist.org/>
- Expert consultation conducted by NEPCon, 2015, including personal communication 1, 2 and 7.
- Azhar, B., Sapari, M., Zulkifly, S., Suhailan, W. M., & Sajap, A. S. (2013). Protecting Biodiversity Outside Natural Forests: Environmental-friendly Oil Palm Plantations as an Off-reserve Strategy in Peninsular Malaysia. TROPICAL AGRICULTURAL SCIENCE.[online], Available at: [https://www.researchgate.net/publication/285580644\\_Protecting\\_Biodiversity\\_outside\\_Natural\\_Forests\\_Environmental-friendly\\_Oil\\_Palm\\_Plantations\\_as\\_an\\_Off-reserve\\_Strategy\\_in\\_Peninsular\\_Malaysia](https://www.researchgate.net/publication/285580644_Protecting_Biodiversity_outside_Natural_Forests_Environmental-friendly_Oil_Palm_Plantations_as_an_Off-reserve_Strategy_in_Peninsular_Malaysia)
- Human Rights Commission of Malaysia (SUHAKAM). (2013). REPORT OF THE NATIONAL INQUIRY INTO THE LAND RIGHTS OF INDIGENOUS PEOPLES. Human Rights Commission of Malaysia (SUHAKAM). Retrieved from <http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/SUHAKAM%20BI%20FINAL.CD.pdf>
- Lim, T. W. (2013). Illegalities in Forest Clearance for Large-scale Commercial Plantations. Forest Trends. Retrieved from [http://www.forest-trends.org/publication\\_details.php?publicationID=4195](http://www.forest-trends.org/publication_details.php?publicationID=4195)
- Clean Malaysia. (2016, February 13). Malaysia's Lax Enforcement is failing Endangered Species. Retrieved from Clean Malaysia: <http://cleanmalaysia.com/2015/08/28/5-reasons-malysias-wildlife-conservation-act-is-one-of-historys-most-important-wildlife-regulations/>
- Yong, C., SACCESS, & JKOASM. (2014). Deforestation Drivers and Human Rights in Malaysia. Forest Peoples Programme. Retrieved from <http://www.forestpeoples.org/sites/fpp/files/private/publication/2014/12/deforestation-drivers-and-human-rights-malaysia.pdf>

#### **1.9.5. Risk determination**

##### *Overview of Legal Requirements*

As a signatory of the CBD, Malaysia has an obligation to contribute to global targets for protected areas.

The Protection of Wildlife Act 1972 was repealed and replaced by the Wildlife Conservation Enactment 1997. The new Act contains significantly stricter provisions on species protection by assigning new species a protective status and raising the protection status of

several other species (Ministry of Natural Resources and Environment, Malaysia, 2014). The Act also provides for “presumptions under the law” (Ministry of Natural Resources and Environment, Malaysia, 2014). Simply by being in possession of snares, the presumption under the law is that there was the intention to hunt, trap and/or kill wildlife which is punishable by a fine of up to RM100,000 and a prison term of up to three (3) years, or both. There is also the presumption now that if any wildlife or any part or derivative or any wildlife or snare is found on any premises, the ‘occupier’ of the premises is presumed to be in possession of the above (Ministry of Natural Resources and Environment, Malaysia, 2014). The Act also provides for more punitive measures (Ministry of Natural Resources and Environment, Malaysia, 2014). For example, any person who has been convicted of an offence under the Act or any of its subsidiary legislation may be barred from holding any license, permit or special permit for a period not exceeding five (5) years from the date proceedings in respect of the conviction concludes (Ministry of Natural Resources and Environment, Malaysia, 2014). Another significant change made under the new Act relates to the power to compound offences under the previous Act (Ministry of Natural Resources and Environment, Malaysia, 2014). As a result, certain offences such as failure to obtain prerequisite special permits in relation to Totally Protected species, the female or the immature of a Totally Protected species will result in prosecution of the offence rather than an offer to compound the offence through a fine (Ministry of Natural Resources and Environment, Malaysia, 2014).

The Sabah Land Ordinance of 1930 upholds the principle of the protection of natives’ rights to their lands as well as the recognition that natives practised their own customs and laws. Administrators are required to give careful regard to those customs. Native Customary Rights land can be established through Customary Tenure, Native Title, Communal Title, and Native Reserves (Human Rights Commission of Malaysia (SUHAKAM), 2013).

In Sabah there are numerous protected areas within and outside of forest reserves. Protected areas inside forest reserves include those areas categorised as Class 1: Protection Forest Reserve, Class 6: Virgin Jungle Reserve and Class 7: Wildlife Reserve. No logging is allowed in these reserves.

There are several protected species of timber that are prohibited from being harvesting in the Natural Forest Management zones of forest reserves.

Inside forest reserves Comprehensive Harvesting Plans (for selective logging) and Plantation Development Plan shall include which areas and which timber species cannot be felled. Since 2012 this criterion is being enforced through random on-site audits by the Environmental Department.

There are no requirements for the protection of species on forested State Land or on Alienated Land.

#### *Description of Risk*

- RIL (Reduced Impact Logging) practices are supposed to be implemented for Natural Forest Management; however according to the expert consultation (2015), only a handful of companies are in fact fully implementing RIL, with most FMEs only partially implementing RIL.

- Field monitoring by the authorities is complicated by forest logging often taking place remotely; with inadequate enforcement capacity (Expert consultation. personal communication 1, 2 and 7).
- According to personal communication 1, commercial logging in protected areas is rare, but based on the inadequate enforcement capacity, this indicator is considered Specified risk.
- Malaysia's Fifth National Report to the Convention on Biological Diversity states that the country's monitoring against CBD targets is weak: "The lack of cohesive and comprehensive monitoring mechanisms/indicators towards the National Policy on Biological Diversity has posed some challenges towards measuring actual progress in certain conservation areas. Malaysia recognises the need to step up efforts on awareness raising on the importance and significance of biodiversity conservation, protection and management across all levels of society in Malaysia (Ministry of Natural Resources and Environment, Malaysia, 2014)."
- Malaysian authorities, underfunded and undermanned, continue to play catch-up with illegal wildlife traffickers (Clean Malaysia, 2016).
- Given the complexity of the natural ecosystems, environmental consultants have difficulty identifying specific mitigation measures for the protection of certain rare and threatened species. Few proponents are willing to pay for expertise that addresses the full range of species found in a natural project site. There is no central source of practical information related to the distribution of rare species in Malaysia. Given this scenario, environmental consultants often address biodiversity conservation indirectly by focusing on keeping an area of natural habitat intact via river buffers and slope protection, with the occasional addition of token set-aside areas associated with salt-licks or swampy areas that would not be operable anyway (Lim, 2013).
- There is a growing number of land dispute cases filed in courts by native landowners against oil palm plantation companies, state government and others in the industry (Yong, SACCESS, & JKOASM, 2014). Apart from loss of land, many community witnesses complained that the opening of plantations has resulted in destruction of graveyards and crops, and pollution of rivers and loss of livelihoods and traditional ways of life (Human Rights Commission of Malaysia (SUHAKAM), 2013).

Based on the reported instances of illegal encroachment and the known shortcomings of the enforcement agencies, the risk for this indicator is considered specified.

#### *Risk Conclusion*

This indicator has been evaluated as specified risk for the Permanent Forest Reserve. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

The requirements do not apply to other sources.

#### **1.9.6. Risk designation and specification**

Specified risk for the Permanent Forest Reserve

N/A for other timber sources.

### 1.9.7. Control measures and verifiers

- All legally protected areas (including species habitats) shall be included in the management plan or related documentation if required by the legislation.
- Confirm that all legally established procedures for surveying, managing and protecting endangered or threatened species within the management unit have been followed.
- Review RIL implementation guidelines and reports of RIL implementation at forest level. Verification of RIL implementation in the forest shall be confirmed, and worked shall be interview to confirm awareness of RIL requirements.
- The Forest manager shall be able to identify and record any protected species in their area and where possible to conduct inventory on number of species involved.
- The satellite data from Global Forest Watch can give a first indication if harvesting is encroaching on protected areas.
- WWF, UNEP and other institutions provide guidance on biodiversity hotspots, the locations of which should be referenced with concession location data.
- A press review can also help to identify if a company has been involved in hunting of protected species or destruction of protected areas.

### 1.10. Environmental requirements

*National and sub-national laws and regulations related to the identification and/or protection of environmental values including but not limited to those relating to or affected by harvesting, acceptable level for soil damage, establishment of buffer zones (e.g. along water courses, open areas, breeding sites), maintenance of retention trees on felling site, seasonal limitation of harvesting time, environmental requirements for forest machineries, use of pesticides and other chemicals, biodiversity conservation, air quality, protection and restoration of water quality, operation of recreational equipment, development of non-forestry infrastructure, mineral exploration and extraction, etc... Risk relates to systematic and/or large-scale non-compliance with legally required environmental protection measures that are evident to an extent that threatens the forest resources or other environmental values.*

#### 1.10.1. Applicable laws and regulations

- Forest Rules 1969 – Rule 15  
[http://www.sarawakforestry.com/pdf/laws/the\\_forest\\_rules.pdf](http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf)
- Environmental Impact Assessment (EIA) Guidelines for Logging and Forest Clearance Activities, 2002 - <https://www.elaw.org/content/malaysia-sabah-environmental-impact-assessment-eia-guidelines-logging-and-forest-clearance-a>
- Environment Protection Enactment 2002-Sec.12,13,14,20 and 37 -  
<http://ww2.sabah.gov.my/jpas/laws/EPE/EPE02.pdf>
- Environment Protection Order 2005 (Prescribed activities)  
<http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/EnvironmentProtection2002%28PrescribedActivities%28EnvironmentalImpactAssessment2005%29%29.pdf>

- Environment Protection (Environmental Impact Assessment) Order 2012  
<http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/EnvironmentProtection2002%28PrescribedActivities%28EnvironmentalImpactAssessment2005%29%29.pdf>
- Environment Protection (Registration of Environmental Consultant) Rules 2005 -  
<http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/EnvironmentProtection2002%28RegistrationOfEnvironmentalConsultants2005%29.pdf>
- Forest Enactment 1968, Section 15 & 24 and 28(A)  
<http://faolex.fao.org/docs/pdf/mal10907.pdf>
- Environment Protection (Registration of Environmental Consultant) Rules 2005.  
 Available at:  
<http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/EnvironmentProtection2002%28RegistrationOfEnvironmentalConsultants2005%29.pdf>
- Environmental Quality Act, 1974. Available at:  
<http://faolex.fao.org/docs/pdf/mal13278.pdf>

#### **1.10.2. Legal authority**

- Environment Protection Department: Advise the government of development activities, to comply with various environmental legislation and guidelines so that the process of development do not unduly degrade the environment.
- Sabah Forestry Department: is responsible to ensure that the management and development of Sabah's forest reserves are in accordance with the principles of Sustainable Forest Management under the principal forestry law in Sabah that is the Forest Enactment 1968.
- Sabah Department of Environment (DOE): is responsible to prevent, eliminate, control pollution and improve the environment, consistent with the purposes of the Environmental Quality Act 1974.
- Sabah Department of Occupational Safety and Health (DOSH): is responsible for the administration and enforcement of legislations related to occupational safety and health of the country.
- Sabah Department of Director General of Lands and Mines (JKPTG): is responsible for Amendment or improvement of any provision of land law and legislation regarding with land administration; Management of the record of Federal Government's Property in Land; Acquisition of the alienated land for Federal Project purposes; Tenancy and enforcement of Federal Government's Property in Land; and Management of Small Estate Distribution.
- Sabah Department of Agriculture (DOA): is responsible for the provision of consultation services, technical support and professional advice in various agricultural field to ensure sufficient food production that are safe for consumption and control environmental pollution.
- Sabah Department of Irrigation and Drainage (DID): is responsible to provide engineering expertise services and water resources management including river management, coastal and manage flood and drought to improve water security and environment sustainability.

- Department of Wildlife: Protection and conservation of wildlife and associated tourism products, and provide opportunities for tourism development through research, identification of potential tourism spot, eco-tourism partnership, and technical assistance.
- Sabah Parks: Protection and management of designated conservation areas as parks, for conservation needs and other uses. It also provides a resource for the development of various tourism related business opportunities, directly and indirectly.

### 1.10.3. Legally required documents or records

- Forest Management Plan
- Comprehensive Harvesting Plan
- Approved EIA Report - Preparation of EIA reports shall be undertaken by environmental consultants that are registered with the Sabah Environment Protection Department and hold valid certificates of practice.
- Approved EIA report or Approved (PMM)
- Signed Agreement of Environmental Conditions/ Mitigation Declaration
- Letter of Compliance to the Environmental Conditions/ Mitigation Declaration ♣ Letter of Compliance issued by EPD
- The Agreement of Environmental -Conditions/ Mitigation Declaration

### 1.10.4. Sources of information

#### *Government sources*

- forest.sabah.gov.my (N.Y.) Sabah Forestry Department- Official portal. Available at: <http://www.forest.sabah.gov.my/discover/policies/forest-legislation>
- Sabah Forestry Department, (2013). Sabah TLAS document (revised as at 06 March 2013). <http://www.forest.sabah.gov.my/images/pdf/en/flegt/TLAS4.pdf>, Accessed 13 February 2018.

#### *Non-government sources*

- Lim, T. W. (2013). *Malaysia: Illegalities in Forest Clearance for Large-Scale Commercial Plantations* – report prepared for Forest Trends. Accessed 24 February 2015 at [http://www.forest-trends.org/publication\\_details.php?publicationID=4195](http://www.forest-trends.org/publication_details.php?publicationID=4195).
- Malaysia Productivity Corporation. (2014). Reducing Unnecessary Regulatory Burden on Businesses: Growing Oil Palm. Malaysia Productivity Corporation. Retrieved from <http://www.mpc.gov.my/wp-content/uploads/2016/04/Recommendation-Report-RURB-Growing-Oil-Palm.pdf>
- Memon, A. (2012). Devolution of environmental regulation: Retrieved from [http://www.unep.ch/etu/publications/13\)%2045%20to%2061%20doc.pdf](http://www.unep.ch/etu/publications/13)%2045%20to%2061%20doc.pdf)
- Sharom, A. (2008). Environmental Laws in Malaysia: Time to Walk the Walk. Inaugural University of Malaya Law Conference. Kuala Lumpur. Retrieved from [http://eprints.um.edu.my/13465/1/environmental\\_laws\\_in\\_malaysia.pdf](http://eprints.um.edu.my/13465/1/environmental_laws_in_malaysia.pdf)

- Ministry of the Environment, Japan. (n.d.). Overview of Environmental Issues and Environmental Conservation Practices in Malaysia.[online], Available at: <https://www.env.go.jp/earth/coop/oemjc/malay/e/malaye1.pdf>
- Maidin, A. J. (2005, November 17). Challenges in implementing and enforcing environmental protection measures in Malaysia. Retrieved from The Malaysian Bar: [http://www.malaysianbar.org.my/environmental\\_law/challenges\\_in\\_implementing\\_and\\_enforcing\\_environmental\\_protection\\_measures\\_in\\_malaysia\\_by\\_ainul\\_jaria\\_bt\\_maidin.html](http://www.malaysianbar.org.my/environmental_law/challenges_in_implementing_and_enforcing_environmental_protection_measures_in_malaysia_by_ainul_jaria_bt_maidin.html)

#### 1.10.5. Risk determination

##### *Overview of Legal Requirements*

According to the Forest Rules 1969 – Rule 15 and the Environmental Impact Assessment (EIA) Guidelines for Logging and Forest Clearance Activities, 2002, the EIA requirements in Sabah are:

- i. The Licensee/Land owner has an approved EIA Report from the Director of Environment Protection Department (EPD) for forest related activities involving removal of timber involving an area of 500 ha and above.
- ii. The licensee/Land owner has an approved PMM from the Director of EPD for forest related activities involving removal of timber involving an area between 100 ha and 500 ha.
- iii. The licensee / land owner has an approved EIA from the Director of EPD for forest related activities involving removal of timber involving an area of 50 ha and above adjacent to any protected areas.

According to the Forest Rules 1969, the Forest Resource Management Division (FRM) of Sabah Forestry Department (FDS) determines if the harvesting area to be licensed is subject to an EIA/PMM requirement. EPD (Evaluation of EIA Report Division) evaluates EIA/PMM report submitted by a registered environmental consultant for consideration and upon approval requires Licensee/Land Owner to sign the Agreement of Environmental Condition (AEC)/Mitigation Declaration (MD). FRM Division of FDS verifies that EIA/PMM report has been approved by EPD prior to the issuance of harvesting license. iv. EPD monitors the implementation of mitigation measures on the specified area under the AEC/MD. Frequency: EPD monitors the submission of quarterly Environmental Compliance Report (ECR) by a registered environmental consultant and conduct inspection on any area upon receipt of complaint for serious non-compliance verified from the ECR.

Under the Wildlife Conservation Enactment 1977 (Section 38) it is a requirement that the licensee of any area must first notify the Director of the Wildlife Department one month prior to harvesting.

Environmental Impact Assessments (EIAs) shall be conducted for logging areas greater than 500 hectares whether in PRF, AL or SL and whether for selective logging or clearance for plantations and whether natural forest or planted timber. Forest enterprises are required to fulfil this requirement prior to harvesting being conducted. The sensitive areas are normally identified in the approved harvest map. The Forest Resources Management

(FRM) Division of the Sabah Forestry Department (SFD) determines if the harvesting area to be licensed is subject to an EIA requirement.

The Environmental Protection Department (EPD) evaluates the EIA report submitted for consideration by a registered environmental consultant and upon approval requires the licensee/land owner to sign an Agreement of Environmental Condition (AEC)/Mitigation Declaration (MD).

Forest Resource Management Division of Sabah Forest Department verifies that the EIA report has been approved by Environmental Protection Department prior to the issuance of the harvesting licence.

Logging of some areas below 500 ha may also be subject to environmental requirements if the area is deemed to be particularly sensitive by the EPD. In some cases, an EIA may be required for such logging.

#### *Description of risk*

- "In Sabah and Sarawak most forest conversion projects do produce EIAs. In Sabah, it is estimated that about 80% of oil palm plantations submit EIAs for new plantings and some companies apply for EIAs retrospectively (after the forest has been felled). Around 90% of EIAs submitted are eventually approved with several mitigation measures prescribed. However, in practice, there is considerable non-compliance with mitigation due to ambiguities regarding the implementation of these measures. [...] The environmental authorities face a number of challenges in enforcing the mitigation measures highlighted above. They recognize that streams and slopes identified by 1:50k scale maps inadequately represent the reality on the ground. However, the maximum fine for non-compliance is limited (in Sabah this is only RM20,000 per compliance audit visit). Such fines are hardly a deterrent when the additional revenue gained by noncompliance can be in the order of hundreds of millions of ringgits. Sabah's EPD has only 13 enforcement officers to monitor more than 300 active projects." (Lim 2013).
- "In Sabah, it is estimated that about 80% of oil palm plantations submit EIAs for new plantings and some companies apply for EIAs retrospectively (after the forest has been felled)." (Lim, 2013).
- According to Lim, risks thus exist where harvesting takes place on areas meant to be converted to agriculture that often do not comply with environmentally required harvesting regulations, e.g. riparian zones, HCVs, slopes. Similar risks may apply to selective logging of natural forest as well as harvesting in plantations and on agricultural land.
- Malaysia is geographically a very large territory to administer while the DOE has had limited resources to undertake its functions (Memon, 2012). Despite the significant numbers of breaches of environmental law, the proportion of prosecutions or other enforcement action is extremely low (Maidin, 2005). To date there are only five reported cases under the heading of environmental law in the law reports in Malaysia (Maidin, 2005) The local authorities and other government agencies prosecute environmental offenders using laws other than the environmental law, principally tort law (i.e. nuisance, trespass, negligence) (Maidin, 2005). The DOE, as the principal agency entrusted to implement and enforce the environmental protection legislation

has limited powers to deal with the land planning system (Maidin, 2005). This is because power to regulate land development is solely within the discretion of the State Planning Committee at the state government level and the local planning authorities at the local government level (Maidin, 2005). In Sabah, the establishment of state-level enactments and the agency Environment Protection Department to carry out EIAs for forestry and land conversion activities while the DOE covers EIAs related to other activities such as emissions from factories (Lim, 2013).

- There are also serious problems with the EIA system under the law as there is commonly conflict of interest involved with the companies hiring consultants to do the EIA, and loopholes whereby EIA is required based on the size of the project but plantation companies can easily break the project into smaller lots to avoid the EIA requirement (Sharom, 2008).
- Most officials from environment related departments including the Town and Country Planning Department and the DOE often lack sufficient expertise to vet the Development Proposals and the EIA reports submitted by the applicants seeking for grant of planning permission (Maidin, 2005). Despite the realisation of the importance of monitoring compliance of the EIA process, it is lacking due to lack of personnel and increasing numbers of newly approved development projects (Maidin, 2005).

Based on the available information the risk for this indicator has been assessed as specified for all sources.

#### *Risk Conclusion*

This indicator has been evaluated as specified risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.10.6. Risk designation and specification**

Specified risk

#### **1.10.7. Control measures and verifiers**

- Ensure an EIA has been prepared for any area greater than 500 ha.
- Conduct on-site visit to confirm logging has been done in conformance with the EIA. If not, avoid purchasing.
- Review Environmental monitoring compliance reports prepared by the EPD. Annual compliance reports, but it is not always completed for all companies every year.

#### **1.11. Health and safety**

*Legally required personnel protection equipment for persons involved in harvesting activities, use of safe felling and transport practice, establishment of protection zones around harvesting sites, and safety requirements to machinery used. Legally required safety requirements in relation to chemical usage. The health and safety requirements that shall be considered relate to operations in the forest (not office work, or other activities less related to actual forest operations). Risk relates to situations/areas where health and safety regulations are consistently violated to such a degree that puts the health and safety of forest workers at significant risk throughout forest operations.*

### 1.11.1. Applicable laws and regulations

- Occupational Safety and Health Act 1994. Section 16, 29, 30 and 31 Clause 34 and 37 of the Sustainable Forest Management Licence Agreement SFMLA. - Available at: <http://www.ilo.org/dyn/travail/docs/1628/Occupational%20Safety%20and%20Health%20Act%201994%20-%20www.agc.gov.my.pdf>
- Employees' Social Security Act 1969. Available at: <http://www.ilo.org/dyn/travail/docs/1626/Employees%27%20Social%20Security%20Act%201969%20-%20www.agc.gov.my.pdf>
- Workmen's Compensation Act 1952. Available at: [http://myhos.mohr.gov.my/eAkta/akta\\_sosial/Akta%20Pampasan%20Pekerja%201952%20\(Akta%20273\).pdf](http://myhos.mohr.gov.my/eAkta/akta_sosial/Akta%20Pampasan%20Pekerja%201952%20(Akta%20273).pdf)
- Industrial Relations Act, 1967. Available at: [http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=48066&p\\_country=MY S&p\\_count=199](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=48066&p_country=MY S&p_count=199)
- Employees Provident Fund Act, 1991. Available at: [http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=43880&p\\_country=MY S&p\\_count=199](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=43880&p_country=MY S&p_count=199)
- Pesticides Act 1974-Section 28-30. Available at: <http://www.ecolex.org/ecolex/ledge/view/RecordDetails;jsessionid=F6843ED0274B1BA2FD007560EE5296D3?id=LEX-FAOC013354&index=documents>
- Factories and Machineries Act 1967. Available at: <http://www.dosh.gov.my/index.php/en/list-of-documents/acts/26-03-factories-and-machinery-act-1967-revised-1974-acts-139/file>
- Labour Ordinance (Sabah Cap 67)-Section 118. Available at: [http://www.sabahlaw.com/Labour\\_Ordinance.htm](http://www.sabahlaw.com/Labour_Ordinance.htm)

### 1.11.2. Legal authority

- The Ministry of Human Resources (MOHR): Ministry charged with the regulation of wages as well as health and safety standards
- The Department of Occupational Safety and Health (DOSH) Sarawak is the department under MOHR responsible for the safety, health and welfare of the working people.
- Labour Department
- Sabah Forestry Department
- Social Security Department (SOCISO)

### 1.11.3. Legally required documents or records

- Safety and health records
- It is required of all employer and self-employed persons to produce a written Occupational Health & Safety policy. It is further the responsibility of the employer to advise about the content of the policy, revise it as well as alter it based on suggestions made by his employees

- Meeting minutes by safety and health Committee
- Records on equipment and maintenance
- Accident record
- Notification of accident, Dangerous occurrence, Occupational poisoning and Occupational disease.
- FD Certificate of Identity.

#### 1.11.4. Sources of information

##### *Government sources*

- Department of Occupational Safety and Health Malaysia <http://www.dosh.gov.my>
- Quarterly reports on direct employment in the logging and wood processing sectors through Shuttle Returns No. IV, V and VIII.
- Annual report on direct employment in management and administration of the forest resources.
- Annual report on injury rate in the forestry sector.

##### *Non-Government sources*

- Expert consultation 2015, including personal communication 1 and 2.
- Bahrin, J. S. (2016). Self-Regulation and Occupational Safety and Health Act (OSHA) 1994. Dinner talk between the Society of Occupational and Environmental Medicine of the Malaysian Medical Association (SOEM-MMA), the Malaysia Medical Association (MMA) and the Executive Director of Malaysian Employers Federation (MEF). (pp. 1-2). Kuala Lumpur: Malaysian Employers Federation.
- Daily Express. (2014). 94 industrial accidents in Sabah palm oil sector last year. Daily Express. 17 January 2014.  
<http://www.dailyexpress.com.my/news.cfm?NewsID=88001>
- Human Rights Watch. (2011). They Deceived Us at Every Stage: Abuse of Cambodian Domestic Workers Migrating to Malaysia. Human Rights Watch.
- ILO. (2004). Safety and Health Fact Sheet - Oil Palm. Geneva: International Programme on the Elimination of Child Labour.
- ILO. (2013). Malaysia - 2013. Retrieved from [www.ilo.org](http://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO::P1100_ISO_CODE3,P1100_YEAR:MYS,2013):  
[http://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO::P1100\\_ISO\\_CODE3,P1100\\_YEAR:MYS,2013](http://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO::P1100_ISO_CODE3,P1100_YEAR:MYS,2013)
- Kumar, M., Ismail, N.A. and Govindarajo, N.S., 2014. Way to measure the concept precarious working conditions in oil palm plantations. *Asian Social Science*, 10(21), pp.1-10.
- Villadiego, L. (2015). Palm oil: why do we care more about orangutans than migrant workers? *The Guardian*.
- US Department of Labour. (2014). List of Goods Produced by Child Labour or Forced Labour. Washington D.C.: US Department of Labour.

- US Department of State. (2016). 2015 Trafficking in Persons Report. US Department of State.
- Asia Pacific Migration Network. (2014, November 10). 'Slave labour' in Malaysia: Time to rethink migrant labour management. Retrieved from [www.apmigration.ilo.org: http://apmigration.ilo.org/news/slave-labour2019-in-malaysia-time-to-rethink-migrant-labour-management](http://apmigration.ilo.org/news/slave-labour2019-in-malaysia-time-to-rethink-migrant-labour-management)
- Business & Human Rights Resource Centre. (2015, June 10). Malaysia: Palm oil company PJP Pelita Selangau denies exploitation & abuse of 100 Indonesian workers in Sarawak. Retrieved from [www.business-humanrights.org: https://business-humanrights.org/en/malaysia-palm-oil-company-pjp-pelita-selangau-denies-exploitation-abuse-of-100-indonesian-workers-in-sarawak](https://business-humanrights.org/en/malaysia-palm-oil-company-pjp-pelita-selangau-denies-exploitation-abuse-of-100-indonesian-workers-in-sarawak)
- Al-Mahmood, S. Z. (2015, July 26). Palm-Oil Migrant Workers Tell of Abuses on Malaysian Plantations. Retrieved from [www.wsj.com: http://www.wsj.com/articles/palm-oil-migrant-workers-tell-of-abuses-on-malaysian-plantations-1437933321](http://www.wsj.com/articles/palm-oil-migrant-workers-tell-of-abuses-on-malaysian-plantations-1437933321)

#### **1.11.5. Risk determination**

##### *Overview of Legal Requirements*

The Occupational Safety and Health Act 1994 and regulations have the principal objective of providing for the prevention of harm to employees at work. This legislation applies to workers involved in harvesting timber from all forest types (forest reserves, Alienated Land and State Land). These include:

- Active management commitment: A policy statement that reflects commitment to the health and safety of employees, employers and others.
- Hazard identification and control: A systematic identification of hazards to employees in the workplace, including appropriate controls.
- Information, training and supervision: Systems in place to ensure workers have the training or supervision to do the work safely and efficiently.
- Accident reporting and investigation: Investigation and recording of employee workplace accidents (and appropriate documentation).
- Emergency procedures: A plan covering procedures during emergencies, which may occur on the job.

The Act places responsibilities on employers, self-employed people and employees to ensure that their work activities do not harm themselves or other people. For forest operations, other people include visitors, people passing the operation, and the public who may be near an operation.

Under the Act, employers are required to provide and maintain a safe working environment; provide and maintain facilities for the safety and health of employees; ensure that machinery and equipment are safe for employees; ensure that working arrangements are not hazardous to employees; provide procedures to deal with emergencies that may arise while the employees are at work; and provide information, instruction, training and supervision as is necessary.

Employers have general duties relating to the management of hazard, e.g. working at heights above three meters; activities under raised objects; earthworks and excavations; harmful noise; cleaning, maintenance and repair of machinery; protective structures of self-propelled plant; employment of young persons. Refer to Section 15, Part IV, OSHA 1994

Employers have a duty to maintain, keep clean and provide access to the following facilities, sufficient for the place of work: washing facilities; toilets; drinking water; first-aid equipment; facilities for employees who become ill at work; facilities for changing and storing clothes; facilities for meals; lighting; emergency exit plans.

#### *Description of Risk*

- There is still lack of awareness of health and safety requirements amongst Forest Management Enterprises, particularly by small business owners/private land owners. On-site workers seldom wear personal protective equipment; first aid kits are lacking; and there is no strict enforcement of these requirements (Personal communication 1 and 2).
- There is a requirement to report to DOSH regarding any accidents. DOSH has the authority to close operations until accidents have been investigated. If there is a breach, the director or CEO of the FME can be brought to court. Thus, accidents are often not reported by the FME and there is a lack of knowledge of accident statistics. Statistics from DOSH on occupational accidents by sector in 2017 up to the month of April shows that the "Agriculture, Forestry, Logging and Fishing" sector recorded the second highest number of occupational accidents among other sectors, indicating high risk in workers' health and safety in this sector (DOSH, 2017).
- While the legal requirements for OSH effectively covers the potential risks in the forestry sector, research shows several instances of alleged breaches of the OSH requirements (Al-Mahmood, 2015; Human Rights Watch, 2011; Villadiego, 2015; US Department of State, 2016). Of special interest to Peninsular Malaysia is the Wall Street Journal report by Al-Mahmood (2015), who reported grave breaches of OSH standards in FELDA plantations.
- One study conducted by Kumar, Ismail & Govindarajo (2014) suggested that OSH breaches were more common in smallholder- than large-scale (palm oil) plantations. However, this suggestion stands in contradiction to the widespread OSH breaches reported in FELDA-plantations by Al-Mahmood (2015).
- While reports of OHS breaches in the forestry sector are not as common as the palm oil sector, it does show a breakdown of the monitoring and enforcement of the requirements, which may impact the forestry sector in a similar way.
- According to the sources reviewed and stakeholders consulted, there is still a lack of awareness of health and safety requirements amongst forest enterprises, particularly by small business owners/private land owners. Common examples include on-site workers seldom wearing protective equipment, lack of first aid kit, and no strict enforcement of this requirement (Personal communication 1 and 2)

Although a number of the risks mentioned here are specific to the palm oil sector, based on a precautionary approach, the indicator has been assessed as specified for all timber

sources. Based on the description of risk, the indicator is considered Specified for all sources.

#### *Risk Conclusion*

This indicator has been evaluated as specified risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.11.6. Risk designation and specification**

Specified risk

#### **1.11.7. Control measures and verifiers**

- Monitoring on use of Personal Protective Equipment (PPE) by site workers through record on issuance of PPE and site visit.
- Checking on Health and Accident records
- Quarterly reports on direct employment in the logging and wood processing sectors through Shuttle Returns No. IV, V and VIII.
- Annual report on direct employment in management and administration of the forest resources.
- Review:
  - Policy statement
  - Work permit for foreign workers, if any
  - Employee Provident Fund (EPF)
  - Social Security Organization (SOSCO)
  - Records of insurance policies
  - Occupational Safety and health Committee
  - FD Certificate of Identity

### **1.12. Legal employment**

*Legal requirements for employment of personnel involved in harvesting activities including requirement for contracts and working permits, requirements for obligatory insurances, requirements for competence certificates and other training requirements, and payment of social and income taxes withhold by employer. Furthermore, the points cover observance of minimum working age and minimum age for personnel involved in hazardous work, legislation against forced and compulsory labour, and discrimination and freedom of association. Risk relates to situations/areas where systematic or large scale noncompliance with labour and/or employment laws. The objective is to identify where serious violations of the legal rights of workers take place, such as forced, underage or illegal labour.*

#### **1.12.1. Applicable laws and regulations**

- Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Amendment 2010) -  
<http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20670.pdf>
- Children and Young Persons (Employment) Act 1966 -  
<http://www.ilo.org/dyn/travail/docs/1529/Children%20and%20Young%20Persons%20Employment%20Act%201966.pdf>
- Employees Provident Fund Act - Part V, Section 42, 45. Available at:  
[http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=43880&p\\_country=MY S&p\\_count=199](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=43880&p_country=MY S&p_count=199)
- Employee's Social Security Act 1969 - Section 3. Available at:  
<http://www.ilo.org/dyn/travail/docs/1626/Employees%27%20Social%20Security%20Act%201969%20>
- Employment (Information) Act 1953 -  
[http://asean.org/storage/2016/06/MA8\\_Employment-Information-Act-1953.pdf](http://asean.org/storage/2016/06/MA8_Employment-Information-Act-1953.pdf)
- Employment (Restriction) Act 1968 -  
[http://myhos.mohr.gov.my/eAkta/akta\\_perburuhan/Akta%20Sekatan%20Kerja%201968%20\(Akta%20353\).pdf](http://myhos.mohr.gov.my/eAkta/akta_perburuhan/Akta%20Sekatan%20Kerja%201968%20(Akta%20353).pdf)
- Employment Act 1955. Available at:  
<http://www.ilo.org/dyn/natlex/docs/WEBTEXT/48055/66265/E55mys01.htm>
- Industrial Relations Act 1967. Available at:  
<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/48066/99440/F1841123767/MYS48066.pdf>
- Minimum Wage Order 2012. Available at:  
[http://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=96034&p\\_country=MY S&p\\_count=199](http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=96034&p_country=MY S&p_count=199)
- National Wage Consultative Council Act 2011 (section 23, 24). Available at:  
<http://www.ilo.org/dyn/travail/docs/1506/National%20Wages%20Consultative%20Council%20Act%202011%20-%20malaysianlaw.my.pdf>
- Occupational Safety and Health 1994 -  
<http://www.utar.edu.my/osh/file/OSHA%201994%20-%20Act%20514.pdf>
- Sabah Labour Ordinance -  
[http://myhos.mohr.gov.my/eAkta/akta\\_perburuhan/Ordinan%20Buruh%20\(Sabah%20Bab%2067\).pdf](http://myhos.mohr.gov.my/eAkta/akta_perburuhan/Ordinan%20Buruh%20(Sabah%20Bab%2067).pdf)
- Sabah Weekly Holidays Ordinance -  
<http://www.lawnet.sabah.gov.my/lawnet/SabahLaws/StateLaws/HolidaysOrdinance.pdf>
- Trade Unions Act 1959 (Act 262) -  
<http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20262.pdf>
- Trade Unions Act 1959 (Act 262). Available at:  
[http://myhos.mohr.gov.my/eAkta/akta\\_jheks/TRADE\\_UNION\\_ACT\\_1959%20\(ACT%20262\).pdf](http://myhos.mohr.gov.my/eAkta/akta_jheks/TRADE_UNION_ACT_1959%20(ACT%20262).pdf)

- Wages Council Act 1947 - [http://asean.org/storage/2016/06/MA10\\_Wages-Councils-Act-1947-Act-195.pdf](http://asean.org/storage/2016/06/MA10_Wages-Councils-Act-1947-Act-195.pdf)
- Workers Minimum Housing Standards and Amenities Act 1990 (Act 446) - <http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/87154/118009/F797374692/MYS87154.pdf>
- Workmen's Compensation Act 1952. Available at: [http://myhos.mohr.gov.my/eAkta/akta\\_sosial/Akta%20Pampasan%20Pekerja%201952%20\(Akta%20273\).pdf](http://myhos.mohr.gov.my/eAkta/akta_sosial/Akta%20Pampasan%20Pekerja%201952%20(Akta%20273).pdf)

### 1.12.2. Legal authority

- Department of Labour Sabah
- KWSP (EPF)
- Perkeso (Socso)
- The Ministry of Human Resources (MOHR): Ministry charged with the regulation of wages as well as health and safety standards
- Department of Labour Sabah
- Occupational Health and Safety Department – Responsible for reviewing, enforcing and promoting industrial health and safety
- The Industrial Court of Malaysia: Main functions are to "... hear and down decisions or awards in industrial disputes referred to it by the Minister or directly by the parties" (Industrial Court of Malaysia, n.d.) and to monitor the collective agreement reached between the employer/trade union of employers and trade union of employees (<http://www.mp.gov.my/en/about-us/client-s-charter>)
- Social Security Organization (SOSCO): Government Agency administering and enforcing the Employee Social Security Act 1969 and Employee Social Security General Rules 1971
- Ministry of Finance - Employees' Provident Fund (EPF): Management of mandatory savings- and retirement planning for all Malaysian workers in the private sector. To Malaysians, membership of EPF is obligatory and voluntary for non-Malaysian workers.
- Ministry of Home Affairs: Main function is "To ensure orderly management of the issue of travel documents, entry/exit of citizens and foreign nationals as well as the issue of appropriate passes to foreign nationals who reside in this country in accordance with immigration acts and regulations" (<http://www.moha.gov.my/index.php/en/maklumat-korporat/fungsi-kementerian>)
- The Immigration Department: Charged with issuance of passports and travel documents to Malaysians, visas, passes and permits to foreign nationals and management the movement of people at authorized entry and exist points (<http://www.imi.gov.my/index.php/en/corporate-profiles/introduction.html>)

### 1.12.3. Legally required documents or records

- Employment records

- Insurance records
- Payment records
- Records of number of people employed
- Employment Contract
- Migrant workers have a valid passport, valid visa as well as pass a medical exam prior to employment

#### 1.12.4. Sources of information

##### *Government sources*

- [minimumwages.mohr.gov.my](http://minimumwages.mohr.gov.my) (N.Y.) Minimum wage website. [online]. Available at: <http://minimumwages.mohr.gov.my/>
- [perkeso.gov.my](http://www.perkeso.gov.my/en/) (N.Y.) The official Website of social Security Organisation. [online]. Available at: <http://www.perkeso.gov.my/en/>
- PERKESO. (n.d.). Social Security Principles. Retrieved August 10, 2016, from [www.perkeso.gov.my: http://www.perkeso.gov.my/en/social-security-protection/social-security-principles.html](http://www.perkeso.gov.my/en/social-security-protection/social-security-principles.html)
- [kwsp.gov.my](http://www.kwsp.gov.my/portal/en/web/kwsp/home) (N.Y.) Agency under the Ministry of Finance Malaysia. [online]. Available at: <http://www.kwsp.gov.my/portal/en/web/kwsp/home>

##### *Non-government sources*

- Borneo Post. (2015, February 11). Sarawak's palm oil industry in dire need of workers. Retrieved from [www.theborneopost.com: http://www.theborneopost.com/2015/02/11/sarawaks-palm-oil-industry-in-dire-need-of-workers/](http://www.theborneopost.com/2015/02/11/sarawaks-palm-oil-industry-in-dire-need-of-workers/)
- Borneo Post. (2016, February 20). Nod for Sarawak, Sabah to recruit own foreign workers. Retrieved from [www.theborneopost.com: http://www.theborneopost.com/2016/02/20/nod-for-sarawak-sabah-to-recruit-own-foreign-workers/](http://www.theborneopost.com/2016/02/20/nod-for-sarawak-sabah-to-recruit-own-foreign-workers/)
- Business & Human Rights Resource Centre. (2015, June 10). Malaysia: Palm oil company PJP Pelita Selangau denies exploitation & abuse of 100 Indonesian workers in Sarawak. Retrieved from [www.business-humanrights.org: https://business-humanrights.org/en/malaysia-palm-oil-company-pjp-pelita-selangau-denies-exploitation-abuse-of-100-indonesian-workers-in-sarawak](https://business-humanrights.org/en/malaysia-palm-oil-company-pjp-pelita-selangau-denies-exploitation-abuse-of-100-indonesian-workers-in-sarawak)
- ICLG. (2016). The International Comparative Guide to: Employment and Labour Law 2016 (6th ed.). Global Legal Group.
- ILO. (2013). Malaysia - 2013. Retrieved from [www.ilo.org: http://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO::P1100\\_ISO\\_CODE3,P1100\\_YEAR:MYS,2013](http://www.ilo.org/dyn/legosh/en/f?p=14100:1100:0::NO::P1100_ISO_CODE3,P1100_YEAR:MYS,2013)
- Liaw, E., Vijendran Henry, R. (2011). *Country Report: Malaysia*. ILO Training Workshop on Labour Law Reforms, ILO Standards and Trade Union Agenda Bangkok, 08-12 August 2011. STIEU-BWI and MYTUC. Accessed 24 February 2015 at [61 Timber Legality Risk Assessment – Malaysia - Sabah](http://actrav-</a></li>
</ul>
</div>
<div data-bbox=)

[courses.itcilo.org/en/a3-52648/a3-52648-part-material/country-reports/malaysia/at\\_download/file](http://courses.itcilo.org/en/a3-52648/a3-52648-part-material/country-reports/malaysia/at_download/file).

- Lim, T. W. (2013). *Malaysia: Illegalities in Forest Clearance for Large-Scale Commercial Plantations* – report prepared for Forest Trends. Accessed 24 February 2015 at [http://www.forest-trends.org/publication\\_details.php?publicationID=4195](http://www.forest-trends.org/publication_details.php?publicationID=4195).
- Motlagh, J. (2013, April 8). Palm Oil for the West, Exploitation for Young Workers in Malaysia. Retrieved from [www.theatlantic.com](http://www.theatlantic.com): <http://www.theatlantic.com/international/archive/2013/04/palm-oil-for-the-west-exploitation-for-young-workers-in-malaysia/274769/>
- Othman, S. A., & Rahim, R. A. (2014). Migrant Workers in Malaysia: Protection of Employers. *Pertanika - Social Sciences & Humanities*, 271-282.
- Sapienza, S. (2013, February 12). Growing Demand for Palm Oil Drives Malaysia to Employ Child Migrant Workers. Retrieved from [www.pbs.org](http://www.pbs.org): [http://www.pbs.org/newshour/bb/world-jan-june13-palmoil\\_02-12/](http://www.pbs.org/newshour/bb/world-jan-june13-palmoil_02-12/)
- US Department of State. (2016). 2015 Trafficking in Persons Report. US Department of State.
- Villadiego, L. (2015). Palm oil: why do we care more about orangutans than migrant workers? *The Guardian*.
- Expert consultation 2015, including, personal communication 2

#### **1.12.5. Risk determination**

##### *Overview of Legal Requirements*

Rights and benefits for workers engaged in forestry are mostly covered in the Employment Act 1955, which includes wages, maternity benefits, working hours and paid leave.

- Section 8 of the Employment Act 1955 and Section 5 of the Industrial Relations Act 1967 (IRA) prescribe the inclusion in the individual worker's employment contract any condition restricting the rights of workers to organize or join a union and participate in its lawful activities. Sections 5 and 7 of the Industrial Relations Act 1967 lists Unfair Labour Practices such as intimidation, dismissal or threat of dismissal for joining a trade union or becoming an office bearer, discrimination against a union member regarding employment, promotion, conditions of employment and working conditions. However, the IRA also states explicitly that an employer may dismiss, demote, transfer or refuse to promote a worker on other grounds.
- Establishment of unions is allowed only when approved by the Management of an FME before being registered by the industry. Unions are not common in FMEs and there are no unions in the FMEs in Peninsular Malaysia. The Malaysian Trade Union Act guarantees the right to form or participate in trade union activities, but it restricts the right to strike, calling for "socially responsible behaviour". Strikes are extremely rare in Malaysia for several reasons, including strong demand in the labour market and the Government's promotion of "industrial harmony" (summary of information provided by Liaw and Henry, 2011).

The Employment Act 1955 (EA) covers employees that have a monthly salary less than 2,000MYR, engage in manual labour, supervise manual labour, operate propelled machinery, or work as a domestic servant, as well as employees in certain positions in sea-going vessels (ICLG, 2016).

The coverage of manual labour means that the EA effectively covers most forestry workers and is significant to the forestry industry. Employees covered by the EA have the following minimum terms and conditions of employment:

- Maximum hours of work per day and per week;
- Overtime payment for work more than normal hours of work;
- Protection from deduction of wages;
- Paid annual leave/vacation leave;
- Paid sick leave
- Minimum 10 paid public holidays, five of which are determined by law
- Termination notice period
- Payment of termination benefits, except in cases where the termination of employment is due to misconduct or poor performance
- A minimum wage of 920MYR per month or 4.42 per hour in Sarawak (ICLG, 2016)

The EA requires all employees in the private sector to be members of the Employee's Provident Fund (EPF) and the Social Security Organization (SOCSO). EPF handles savings- and retirement- planning, while SOCSO provides medical insurance. SOCSO membership is contingent upon a salary not exceeding 3,000MYR unless the employee is a registered contributor (PERKESO, n.d.).

An important note is that foreign nationals working in Malaysia are excluded from EPF and SOCSO (ICLG, 2016). Instead, foreign workers are covered by the Workmen's Compensation Act. The EA also states that all contracts with a duration of one month or more must be in written form and contain provision for termination. Should a written contract not exist, the employment relationship and contractual terms still stand (ICLG, 2016)?

People working in the forest sector in Malaysia are covered by the EA and thus enjoy a set of minimum terms and conditions of employment, as well as implied rights to protection from unjust dismissal (ICLG, 2016). Unionizing is governed by the Trade Unions Act 1959 (TUA) and the Industrial Relations Act 1967 (IRA). Membership is restricted to certain sectors and the law prohibits migrant workers from forming a trade union, but allows for migrant workers to join an existing union. Subject to section 28(1) of the Trade Union Act, a migrant worker cannot hold an executive position in a trade union.

Malaysian law states that all job vacancies must be offered to Malaysian nationals before opening for migrant applications. An application to the Immigration Department (ID) is made by the employer and if successful, the ID will grant the employer with a license to import migrant workers. Migrant workers must then be able to show a valid visa and passport as well as pass a medical exam (Othman & Rahim, 2014). Upon expiry of the visa

(usually valid for three months), the migrant worker is terminated. Migrant labour is thus temporary and workers are tied to one Malaysian employer.

Referent to the Workmen's Compensation Act of 1952, all employers must insure all their foreign employees. In addition, it is the duty of the employer to produce a written OSH policy for the workplace, hire a safety and health officer (only in some cases) as well as provide the necessary training to the employees (ILO, 2013). Migrant labourers in Malaysia thus enjoy legal protection that is like that of Malaysians.

#### *Description of Risk*

According to the experts consulted, there is a risk that wages are below the minimum prescribed level. They reported examples of wages being lower than minimum pay, which often occurs through the contractor providing housing, water and electricity and deducting this from the minimum cost. This is an illegal practice, as housing and medical care cannot be used as an equivalent to wages.

There is also a risk that migrant workers are not afforded the correct legal working conditions

- Although the laws of Malaysia do not discriminate against migrant workers, in practice, the rights of migrant workers are not protected: workers suffer from non-payment of wages, wrongful deduction of wages to cover work permits, long working hours, sub-standard living conditions (also applicable to Malaysian forest workers); no insurance cover; travel documents withheld by employers; and unfair dismissal, etc. (Liw and Henry, 2011).
- "A significant share of the workforce in Malaysia comprises legal and illegal foreign workers from Indonesia, Bangladesh and the Philippines. One estimate indicates that there were or are more than 800,000 illegal workers in Malaysia. The presence of illegal workers often signifies that other labor-related laws are ignored. For example, the quality of the housing and amenities available to fieldworkers often falls short of the standard prescribed by law. One study finds that more than 35% of estate families live in houses that do not meet the basic minimum requirement, regulated by the Workers Minimum Standards of Housing and Amenities Act 1990." (Lim, 2013, p. 27). However, this is not widespread in the forest management area in Peninsular Malaysia and workers are often locals.
- Malaysia's legal framework is currently insufficient to protect foreign workers, because the law imposes several processing fees and levies on the employer and consequently allows these fees to be deducted from the workers' wages, thus incentivizing forced labour and debt bondage. Other common treatment of foreign workers includes passport retention, contract violations, restricted movement, wage fraud, poor housing conditions and lack of H&S training (NEPCon Expert Consultation 2015).
- Industrial growth in Malaysia has often led to an acute labour shortage in certain sectors, necessitating an influx of migrant workers. According to the 2015 Trafficking in Persons (TIP) report prepared by the US Department of State, Malaysia is a major destination for illegal trafficking and forced labour. This has been especially evident in the palm oil industry in Malaysia and Indonesia, which employs a total of some 3,5 million workers (Villadiego, 2015). In Malaysia, most of these workers are migrant workers from the Philippines, Nepal, Bangladesh and Indonesia.

- It is estimated that Malaysia currently has two million documented, and even more undocumented, foreign workers (US Department of State, 2016, p. 254).
- Malaysia's legal framework is currently insufficient to protect foreign workers, because the law imposes several processing fees and levies on the employer and consequently allows these fees to be deducted from the workers' wages, thus incentivizing forced labour and debt bondage (US Department of State, 2016).
- Common policies in the treatment of foreign workers further include passport retention (both authorized and unauthorized), contract violations, restricted movement, wage fraud and imposition of debt by both recruitment agents and employers (US Department of State, 2016, p. 255).
- In 2015, the Business & Human Rights Resource Centre concluded that: "*There have been complaints of mistreatment, exploitation by unscrupulous recruitment agencies, physical abuse and poor living and work conditions of foreign workers*" and further that these problems are exacerbated by the lack of law enforcement.
- Several reports of abuse of foreign workers in Malaysian oil palm plantations have surfaced in the media in the last couple of years. Of greatest relevance to Peninsular Malaysia is probably an article by the Wall Street Journal in 2015 that reported horrible treatment and systematic abuse of foreign workers in some plantations (Al-Mahmood, 2015). Workers reported that they did not receive their salaries, lived secluded from society in inadequate housing, lacked training in operating machinery and spraying herbicides, and had to cover their own medical costs. Because they were in Malaysia illegally, they dared not complain to the employer (Al-Mahmood, 2015). This is one of many cases of alleged abuse of foreign workers in the Malaysian palm oil industry, which have prompted the US Department of Labor to designate palm oil as a product produced by both forced- and child labour (US Department of Labor, 2014). Hence, despite enjoying legal protection close to that of Malaysian nationals, reports of abuses of foreign labour are much more prominent in the media.

While the most publicised instances of illegality in this indicator relate to the palm oil sector, and not the forestry sector, it does indicate a breakdown in governance, and inadequate monitoring and enforcement of these requirements. Available data is not sufficient to determine whether legal employment requirements are enforced in the forestry sector, so a precautionary approach has to be applied for this indicator.

In Sabah, issues with sub-contractors have been found in relation to FMEs illegally employing short-term workers, without documentation and contracts (forest pass, immigration papers, employment contract). Since regular control visits by the authorities have been introduced, this risk has been reduced. However, the risk is still considered specified Personal communication 2).

In Sabah, as in Sarawak, the issue of migrant workers is especially pertinent in the palm oil sector, as Sabah currently faces a significant shortage of labour in the oil palm industry (Borneo Post 2016). Recognizing that need for foreign labour as locals seems unwilling to take the dirty, dangerous and difficult (3D) work as oil palm harvesters, Sabah has been allowed to import its own foreign labour (Borneo Post, 2016). However, this sourcing of migrant labour is not without risks. Several reports of the use of child labour in Sabah have hit the media (Motlagh, 2013; Sapienza, 2013) and coupled with the report from the Wall Street Journal uncovering systematic abuses in the import and treatment of migrant

workers in Malaysia (though most related to Peninsular Malaysia), we have a picture of a Malaysian palm oil industry oftentimes unconcerned with most immigrants performing 3D work.

The risk is specified for all sources of timber.

#### *Risk Conclusion*

This indicator has been evaluated as specified risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.12.6. Risk designation and specification**

Specified risk

#### **1.12.7. Control measures and verifiers**

- Conduct thorough review of employment records and relevant documents; and when required conduct field verification.
- For high risk migrant workers, interviews with workers shall confirm receipt of wages (and that wages have not been deducted to cover work permits), legal working hours, adequate living conditions, insurance and that travel documents are not being withheld by employers.
- Review the records of number of people employed
  - Compliance Report
  - SFMLA
  - Work permits for foreign workers

## THIRD PARTIES' RIGHTS

### 1.13 Customary rights

*Legislation covering customary rights relevant to forest harvesting activities including requirements covering sharing of benefits and indigenous rights.*

#### 1.13.1. Applicable laws and regulations

- Aboriginal Peoples Act 1954 - [link](#)
- Environmental Protection Enactment 2002
- Forest Enactment, 1968. (Part IV Section 41) Available at: <http://faolex.fao.org/docs/pdf/mal10907.pdf>
- Land Acquisition Act 1960 - <http://www.kptg.gov.my/sites/default/files/article/Act%20486-PENGAMBILAN.pdf>
- Land Ordinance, 1930 (Sabah Cap.68). Available at: <http://sabah.gov.my/phb/wp-content/uploads/2011/05/LandOrdinance.pdf>
- Malaysia Federal Constitution - [http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20\(BI%20text\).pdf](http://www.agc.gov.my/agcportal/uploads/files/Publications/FC/Federal%20Consti%20(BI%20text).pdf)
- National Land Code (Act No. 56 of 1965) - <http://www.kptg.gov.my/sites/default/files/article/NLC1956DIGITAL-VER1.pdf>
- Native Court (Native Customary Laws) Rules 1995. Available at: <http://www.gavel-publications.com/assets/toc/9789833519330.pdf>
- Native Court Enactment 1992. Available at: <http://www.sabah.gov.my/mlgh/nativecourtsenactment1992.pdf>
- State Cultural Heritage (Conservation) Enactment 1997. Available at: <http://www.lawnet.sabah.gov.my/Lawnet/SabahLaws/StateLaws/CulturalHeritage%28Conservation%29Enactment1997.pdf>
- Sustainable Forest Management Licence Agreement – Clause 23
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) - [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

#### 1.13.2. Legal authority

- Native court
- Sabah Forestry Department
- Lands and Surveys Department

#### 1.13.3. Legally required documents or records

- Records of consultation with natives
- Long term timber licence agreement

- Sustainable Forest Management License Agreement
- Record on decision by the Civil Court and Native Court
- Contract agreement with local communities with use rights for use of land
- Established Native Customary Rights

#### 1.13.4. Sources of information

##### *Government sources*

- forest.sabah.gov.my (N.Y.) Sabah Forestry Department- Official portal. Available at: <http://www.forest.sabah.gov.my/discover/policies/forest-legislation>
- Sabah Forestry Department, (2013). Sabah TLAS document (revised as at 06 March 2013). <http://www.forest.sabah.gov.my/images/pdf/en/flegt/TLAS4.pdf>, Accessed 13 February 2018.

##### *Non-government sources*

- Chan, J. (2015, February 13). Sabah lists 42 ethnic groups to replace 'lain lain' race column. Retrieved from [www.themalaymailonline.com](http://www.themalaymailonline.com): <https://web.archive.org/web/20160601095050/http://www.themalaymailonline.com/malaysia/article/sabah-lists-42-ethnic-groups-to-replace-lain-lain-race-column>
- Colchester, M., Jalong, T., & Alaza, L. (2013). Marcus Colchester, Thomas Jalong and Leonard Alaza. In M. Colchester, & S. Chao, Conflict or Consent? The oil palm sector at a crossroads (pp. 259-282). FPP, Sawit Watch and TUK INDONESIA.
- Dailyexpress.com.my (2015). *Natives must be told, rules court*. [online]. Daily Express 2015. Available at: <http://www.dailyexpress.com.my/news.cfm?NewsID=96067>
- Expert consultation conducted by NEPCon, 2015
- Forest Peoples Programme. (2016, April 8). Tongod villagers secure settlement of land claim with palm oil developer Genting Plantations. Retrieved from [www.forestpeoples.org](http://www.forestpeoples.org): <http://www.forestpeoples.org/topics/palm-oil-rspo/news/2016/04/tongod-villagers-secure-settlement-land-claim-palm-oil-developer-9>
- Lim, T. W. (2013). *Malaysia: Illegalities in Forest Clearance for Large-Scale Commercial Plantations* – report prepared for Forest Trends. Accessed 24 February 2015 at [http://www.forest-trends.org/publication\\_details.php?publicationID=4195](http://www.forest-trends.org/publication_details.php?publicationID=4195).
- Subramaniam, Y. (2015). Ethnicity, Indigeneity and Indigenous Rights: The Orang Asli Experience. *QUT L. Rev.*, 15, 71.
- Toh, S. M and Grace, K. T. (2006). *Understanding forest tenure in South and Southeast Asia, Case study: Sabah Forest Ownership*. [online]. FAO. Available at: <ftp://ftp.fao.org/docrep/fao/009/j8167e/j8167e10.pdf>

#### 1.13.5. Risk determination

##### *Overview of Legal Requirements*

Native customary rights (NCR) are accepted as a source of law in Malaysia's constitution and have been upheld as valid by the courts. The specifics of customary laws vary among

the dozens of tribal communities in Malaysia but several general principles have widespread application. A community (kampung) claims general rights over its traditional territory (wilayah adat) up to one day's walk from the main settlement. The territory is defined along natural boundaries such as streams and ridges.

Native customary rights cover;

- a) land possessed by customary tenure;
- b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
- c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;
- d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;
- e) land that has been cultivated or built on within three years;
- f) burial grounds or shrines;
- g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

Within a community, individual fields (ladang) and orchards (dusun) are assigned to families belonging to the community that originally cleared the forest and planted the area. Certain areas (particularly village water catchments) are zoned as protected forest (hutan tagal) which is subject to various controls, with clearance not permitted. It is accepted that outsiders may enter the unprotected parts of a community's territory for hunting or the collection of forest produce. However, clearance of natural forest for plantations requires the consent of the community. Fines (sogit) can be imposed for transgressions such as unlawful entry into a protected forest and for forest clearance without the consent of the community. In Sabah and Sarawak native courts are empowered to try offences and determine the level of compensation required (Lim 2013).

Communities can gain communal property rights through applying for an indigenous reserve. This differs from communal title in that the community cannot transfer these rights to other parties. There are also restrictions on land use, and a Board of Trustees must be established to manage the indigenous reserve (Toh and Grace, 2006). Communal titles are given out to a group of Natives, with attached rules as to use, i.e. no individual title to be issued, specific land size allocation per family, specific crop to be grown, and to be managed by a Board of Trustees.

Under Section 13 of the Sabah Land Ordinance, it is specifically provided that upon receipt of any application for unalienated country land, it shall be the duty of the Collector to publish a notice calling upon any claimant to native customary rights in such land who is not yet in possession of a registered documentary title to make or send in a statement of his claim within a date to be specified in the notice. If no claim is made the land shall be dealt with as if no such rights existed.

Temporary Occupation Licences (TOL) are not allowed to be issued on areas with Native Customary Right (NCR) claims described under the Land Ordinance.

Sustainable Forest Management License Agreements (SFMLA) / Long Term License (LTL) holder or its appointed consultant must conduct a Social Baseline Survey of the licensed forest area during the preparation of a 10-year Forest Management Plan to identify or get details of the population and area of the existing village within the Licensed Area. Local community and native people living within and adjacent to the SFMLA area have free access to the forest area for hunting or fruit collection as well as using the forest enterprise's facilities such as school and clinic. They are also allowed to practice the Tagal and Sogit system along the river (a traditional way of fish farming). Ownership in forest reserves is not permitted and, to formalize the presence of communities in forest reserves, Sabah Forestry Department has introduced the use of Occupation Permits (OPs). Although the community participates in deciding the duration of and total area covered by the permit, the final decision remains with Sabah Forestry Department (Toh and Grace 2013).

The Director of Forestry may exempt Natives from payment of royalties through the issuance of Form IIA license for any of the following forest produce taken from State Land and Alienated Land: the construction or repair of a dwelling house; the construction of fences and temporary huts on any land lawfully occupied; the construction or repair of native boats; the upkeep of fishing stakes and landing places; firewood to be consumed for domestic purposes; or the construction and upkeep of clinics, schools, community halls, places of worship, bridges and any work for the common benefit (including for traditional medicine purposes) of the native inhabitants of the kampong.

Sabah is extremely diverse and currently has at least 42 ethnic groups and more than 200 sub-groups, which constitutes a majority of the population in Sabah, but is still considered minorities in a Malaysian perspective (Chan, 2015). A review of the Federal Constitution of Malaysia shows that the indigenous interests of Sabah and Sarawak is protected. Article 153(1) establishes that the Federal Government needs to safeguard the special position of natives in Sabah and Sarawak.

In addition, and in respect of the native legal system in place prior to British colonialization, a system of legal pluralism is present in Sabah and Sarawak. Native courts are present as an addition to the existing courts and hears matters regarding breaches of native laws or customs involving native parties.

In Sabah, the Native Court is established under the Native Courts Enactment 1992 and is comprised of a court of appeal, a district native court as well as a native court. However, despite a constitutional protection of native custom, it is evident that the indigenous peoples of Sabah suffer from a high level of tenure insecurity.

Governed by the Sabah Land Ordinance, the law on land tenure in Sabah is biased towards restriction of indigenous access to land and maximizing land available for private- or plantation development (Toh & Grace, 2006). As an example, this bias is exercised through the requirement of indigenous land to be continually developed to retain land rights; something which contradicts the methods of shifting agriculture and crop rotation often exercised by indigenous communities.

An important note on this subject is that Malaysia has adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and thus adheres to some level of international standards. As argued by Subramaniam (2015), while UNDRIP might not be legally enforceable as such, its adoption does bring about some moral and ethical expectations (p. 72). Hence, while perhaps not in direct opposition to the national legal

framework, the status and treatment of the indigenous peoples of Sabah in relation to land tenure is in contradiction with Malaysia's international moral obligations.

#### *Description of Risk*

- The complex nature of land tenure in Sabah and the high level of corruption has made NCR breaches one of the most prominent issues in Malaysia for many years. According to government records, in 2013 there were 32,554 cases of pending land claims in Sabah out of which 2,000 was regarding NCR (Colchester, Jalong, & Alaza, 2013). While this may not signify violations, it shows a highly inefficient system of land registration potentially causing frustration and land conflict.
- The Malaysian legal framework on the indigenes of Sabah, provides on the one side recognition and protection of the native customs legal system while also affording incontestable power over land matters to the State authority to promote private land development over NCR rights. Consequently, while there exists little doubt of the encroachment of land development projects on NCR land, both the Federal- and State governments oftentimes operate within the law to make these concessions. However, the customary right to land is increasingly recognized by the courts in Malaysia, which have ruled in favour of the indigenous groups on many disputes in Sabah and thus indicated that the government's limited interpretation of NCR rights is faulty (Forest People Programme, 2016).
- There have been several prominent conflicts ending up in the High Court and consequently attracting large amounts of public attention. However, the most famous case has been Genting Plantations vs. the Sungai and Dusun Peoples, which have lasted from 2002-2016. In April 2016, the High Court handed down the decision of the land dispute. While the details of the final settlement are unknown, the court decided to uphold the NCR claims (Forest People Programme, 2016).
- In general, the disputes between the Orang Asli and the State- and Federal government have been solved in the courts and the decisions of the courts seems to be respected by both parties. An issue here is that a court case is both protracted and expensive and consequently oftentimes out of reach for the indigenous groups of Malaysia.
- There are examples where Natives wanting to register native land have been wrongfully informed by the Lands and Survey Department about the procedure. The wrong forms have instead been provided, with the result that communities have given up their land. Courts have ruled that mistakes have been made and should be corrected by the Lands and Survey Department, but according to a local social NGO this has not yet taken place (personal communication 4; Toh and Grace 2006 and Daily Express 2015).
- Insufficient notice given of gazettal of areas gazettal – as well as failure to properly consult forest communities – has resulted in communities losing their customary rights to land when it is gazetted as forest reserve or other protected area or when it is alienated for development projects including logging (Toh and Grace, 2006). In early 2015 a ruling was made by the High Court that a proposed alienation of land was withdrawn because the Lands and Survey Department had not given sufficient notice to

the Natives claiming native land under Section 13 of the Sabah Land Ordinance (Daily Express 2015).

Risks exist for native people losing their right to ancestral land despite recognized legislative rights to keep this land. Several court cases are ongoing, but there is still need for changed practices when allocating FMEs. Thus, the risk is considered specified for all timber sources

#### *Risk Conclusion*

This indicator has been evaluated as specified risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.13.6. Risk designation and specification**

Specified risk

#### **1.13.7. Control measures and verifiers**

- Documents or records of consultations with local communities for any land or rights dispute resolutions. A community use zone (CUZ) can be set aside for communal use.
- The absence of conflicts over customary rights is a good verifier to determine how well customary rights are respected in a given case.
- Newspaper reviews and interviews can be part of the set of verifiers to assess the situation.
- Stakeholder consultation shall confirm that customary rights are observed during harvesting activities.

### **1.14. Free prior and informed consent**

*Legislation covering "free prior and informed consent" in connection with transfer of forest management rights and customary rights to the organisation in charge of the harvesting operation.*

#### **1.14.1. Applicable laws and regulations**

- Land Ordinance, 1930 (Sabah Cap.68) Available at: <http://sabah.gov.my/phb/wp-content/uploads/2011/05/LandOrdinance.pdf>
- Native Court Enactment 1992 Available at: <http://www.sabah.gov.my/mlgh/nativecourtsenactment1992.pdf>
- Forest Enactment, 1968 (Part IV Section 41) <http://faolex.fao.org/docs/pdf/mal10907.pdf>
- UN Declaration on Rights of Indigenous Peoples 2007
- Native Court (Native Customary Laws) Rules 1995
- Native Court (Native Customary Laws) Rules 1995 <http://www.lawnet.sabah.gov.my/Lawnet/SubsidiaryLegislation/NativeCourts1992%28NativeCustomaryLaws1995%29.pdf>
- Sustainable Forest Management Licence Agreement – Clause 23

- State Cultural Heritage (Conservation) Enactment 1997. Available at: <http://www.lawnet.sabah.gov.my/Lawnet/SabahLaws/StateLaws/CulturalHeritage%28Conservation%29Enactment1997.pdf>

#### 1.14.2. Legal authority

- Native court
- Sabah Forestry Department
- Lands and Surveys Department

#### 1.14.3. Legally required documents or records

- Long term timber licence agreement
- Sustainable Forest Management License Agreement
- Record on decision by the Civil Court and Native Court
- Contract agreement with local communities with use rights for use of land

#### 1.14.4. Sources of information

##### *Government sources*

- forest.sabah.gov.my (N.Y.) Sabah Forestry Department- Official portal. Available at: <http://www.forest.sabah.gov.my/discover/policies/forest-legislation>
- Sabah Forestry Department, (2013). Sabah TLAS document (revised as at 06 March 2013). <http://www.forest.sabah.gov.my/images/pdf/en/flegt/TLAS4.pdf>, Accessed 13 February 2018.

##### *Non-government sources*

- Dailyexpress.com.my (2015). Natives must be told, rules court. [online]. Daily Express 2015. Available at: <http://www.dailyexpress.com.my/news.cfm?NewsID=96067>
- Expert consultation conducted by NEPCon, 2015
- Lim, T. W. (2013). *Malaysia: Illegalities in Forest Clearance for Large-Scale Commercial Plantations* – report prepared for Forest Trends. Accessed 24 February 2015 at [http://www.forest-trends.org/publication\\_details.php?publicationID=4195](http://www.forest-trends.org/publication_details.php?publicationID=4195).
- Toh, S. M and Grace, K. T. (2006). Understanding forest tenure in South and Southeast Asia, Case study: Sabah Forest Ownership. [online]. FAO. Available at: <ftp://ftp.fao.org/docrep/fao/009/j8167e/j8167e10.pdf>

#### 1.14.5. Risk determination

##### *Overview of Legal Requirements*

Unlike in Peninsular Malaysia, the Sabah Land Ordinance has specific provisions to address the regulation of the native customary land rights related to FPIC.

Clearance of natural forest for plantations requires the consent of the community. NCR laws impose fines (sogit) for transgressions such as unlawful entry into a protected forest and for clearance (without consent of the community) of forest areas with NCR claims.

Discussion, consultation and consent from Natives are required if NCR or claims of NCR exist.

In Sabah Native courts are empowered to try offences and determine the level of compensation required (Lim 2013).

SFMLA/LTL holder or its appointed consultant conducts Social Baseline Survey of the licensed area during the preparation of a 10-year Forest Management Plan to identify or get details of the population and area of the existing village within the Licensed Area.

#### *Description of Risk*

Despite the Land Ordinance requiring communities to be informed through a formal notice of land being allocated to FMEs, this has failed to happen. An example is in early 2015 a ruling was made by the High Court that a proposed alienation of land was withdrawn because the Lands and Survey Department had not given sufficient notice to the Natives claiming native land under Section 13 of the Sabah Land Ordinance (Daily Express 15).

The Daily Express (2015) further refer to how large areas of customary land in the past has been lost due to insufficient notice to the Natives.

As there is insufficient evidence available to indicate the risk is low according to the thresholds, a precautionary approach must be applied and as such, a specified risk has been found for this indicator.

#### *Risk Conclusion*

This indicator has been evaluated as specified risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

### **1.14.6. Risk designation and specification**

Specified risk

### **1.14.7. Control measures and verifiers**

- Documents or records of consultations with local communities for any land or rights dispute resolutions.
- The absence of conflicts over customary rights is a good verifier to determine how well customary rights are respected in a given case.
- Newspaper reviews and interviews can be part of the set of verifiers to assess the situation.
- Stakeholder consultation shall confirm that customary rights are observed during harvesting activities.

## **1.15. Indigenous/traditional peoples' rights**

*Legislation that regulates the rights of indigenous/traditional people as far as it's related to forestry activities. Possible aspects to consider are land tenure, right to use certain forest related resources or practice traditional activities, which may involve forest lands.*

### **1.15.1. Applicable laws and regulations**

- Aboriginal Peoples Act 1954 -  
<http://www.kptg.gov.my/sites/default/files/article/Act%20134-Oboriginal%20Peoples%20Act.pdf>
- Environmental Protection Enactment 2002
- Forest Enactment, 1968. (Part IV Section 41) Available at:  
<http://faolex.fao.org/docs/pdf/mal10907.pdf>
- Land Acquisition Act 1960 -  
<http://www.kptg.gov.my/sites/default/files/article/Act%20486-PENGAMBILAN.pdf>
- Land Ordinance, 1930 (Sabah Cap.68). Available at: <http://sabah.gov.my/phb/wp-content/uploads/2011/05/LandOrdinance.pdf>
- National Land Code (Act No. 56 of 1965) -  
<http://www.kptg.gov.my/sites/default/files/article/NLC1956DIGITAL-VER1.pdf>
- Native Court (Native Customary Laws) Rules 1995. Available at: <http://www.gavel-publications.com/assets/toc/9789833519330.pdf>
- Native Court Enactment 1992. Available at:  
<http://www.sabah.gov.my/mlgh/nativecourtsenactment1992.pdf>
- State Cultural Heritage (Conservation) Enactment 1997. Available at:  
<http://www.lawnet.sabah.gov.my/Lawnet/SabahLaws/StateLaws/CulturalHeritage%28Conservation%29Enactment1997.pdf>
- Sustainable Forest Management Licence Agreement – Clause 23
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) -  
[http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf)

#### **1.15.2. Legal authority**

- Native court
- Sabah Forestry Department
- Lands and Surveys Department

#### **1.15.3. Legally required documents or records**

- Records of consultation with natives
- Long term timber licence agreement
- Sustainable Forest Management License Agreement
- Record on decision by the Civil Court and Native Court
- Contract agreement with local communities with use rights for use of land
- Established Native Customary Rights

#### **1.15.4. Sources of information**

*Government sources*

- forest.sabah.gov.my (N.Y.) Sabah Forestry Department- Official portal. Available at: <http://www.forest.sabah.gov.my/discover/policies/forest-legislation>
- Sabah Forestry Department, (2013). Sabah TLAS document (revised as at 06 March 2013). <http://www.forest.sabah.gov.my/images/pdf/en/flegt/TLAS4.pdf>, Accessed 13 February 2018.

#### *Non-government sources*

- Chan, J. (2015, February 13). Sabah lists 42 ethnic groups to replace 'lain lain' race column. Retrieved from [www.themalaymailonline.com](http://www.themalaymailonline.com): <https://web.archive.org/web/20160601095050/http://www.themalaymailonline.com/malaysia/article/sabah-lists-42-ethnic-groups-to-replace-lain-lain-race-column>
- Colchester, M., Jalong, T., & Alaza, L. (2013). Marcus Colchester, Thomas Jalong and Leonard Alaza. In M. Colchester, & S. Chao, *Conflict or Consent? The oil palm sector at a crossroads* (pp. 259-282). FPP, Sawit Watch and TUK INDONESIA.
- Daily Express 2015: Natives must be told, rules court. <http://www.dailyexpress.com.my/news.cfm?NewsID=96067>
- Dailyexpress.com.my (2015). *Natives must be told, rules court*. [online]. Daily Express 2015. Available at: <http://www.dailyexpress.com.my/news.cfm?NewsID=96067>
- Expert consultation conducted by NEPCon, 2015
- Forest Peoples Programme. (2016, April 8). Tongod villagers secure settlement of land claim with palm oil developer Genting Plantations. Retrieved from [www.forestpeoples.org](http://www.forestpeoples.org): <http://www.forestpeoples.org/topics/palm-oil-rspo/news/2016/04/tongod-villagers-secure-settlement-land-claim-palm-oil-developer-g>
- Lim, T. W. (2013). *Malaysia: Illegalities in Forest Clearance for Large-Scale Commercial Plantations* – report prepared for Forest Trends. Accessed 24 February 2015 at [http://www.forest-trends.org/publication\\_details.php?publicationID=4195](http://www.forest-trends.org/publication_details.php?publicationID=4195).
- Subramaniam, Y. (2015). Ethnicity, Indigeneity and Indigenous Rights: The Orang Asli Experience. *QUT L. Rev.*, 15, 71.
- Toh, S. M and Grace, K. T. (2006). *Understanding forest tenure in South and Southeast Asia, Case study: Sabah Forest Ownership*. [online]. FAO. Available at: <ftp://ftp.fao.org/docrep/fao/009/j8167e/j8167e10.pdf>

#### **1.15.5. Risk determination**

##### *Overview of Legal Requirements*

Native customary rights (NCR) are accepted as a source of law in Malaysia's constitution and have been upheld as valid by the courts. The specifics of customary laws vary among the dozens of tribal communities in Malaysia but several general principles have widespread application. A community (kampung) claims general rights over its traditional territory (wilayah adat) up to one day's walk from the main settlement. The territory is defined along natural boundaries such as streams and ridges.

Native customary rights cover:

- a) land possessed by customary tenure;
- b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
- c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or upkept and regularly enjoyed by him as his personal property;
- d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;
- e) land that has been cultivated or built on within three years;
- f) burial grounds or shrines;
- g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

Within a community, individual fields (ladang) and orchards (dusun) are assigned to families belonging to the community that originally cleared the forest and planted the area. Certain areas (particularly village water catchments) are zoned as protected forest (hutan tagal) which is subject to various controls, with clearance not permitted. It is accepted that outsiders may enter the unprotected parts of a community's territory for hunting or the collection of forest produce. However, clearance of natural forest for plantations requires the consent of the community. Fines (sogit) can be imposed for transgressions such as unlawful entry into a protected forest and for forest clearance without the consent of the community. In Sabah and Sarawak native courts are empowered to try offences and determine the level of compensation required (Lim, 2013).

Communities can gain communal property rights through applying for an indigenous reserve. This differs from communal title in that the community cannot transfer these rights to other parties. There are also restrictions on land use, and a Board of Trustees must be established to manage the indigenous reserve (Toh and Grace, 2006). Communal titles are given out to a group of Natives, with attached rules as to use, i.e. no individual title to be issued, specific land size allocation per family, specific crop to be grown, and to be managed by a Board of Trustees.

Under Section 13 of the Sabah Land Ordinance, it is specifically provided that upon receipt of any application for unalienated country land, it shall be the duty of the Collector to publish a notice calling upon any claimant to native customary rights in such land who is not yet in possession of a registered documentary title to make or send in a statement of his claim within a date to be specified in the notice. If no claim is made the land shall be dealt with as if no such rights existed.

Temporary Occupation Licences (TOL) are not allowed to be issued on areas with Native Customary Right (NCR) claims described under the Land Ordinance.

Sustainable Forest Management License Agreements (SFMLA) / Long Term License (LTL) holder or its appointed consultant must conduct a Social Baseline Survey of the licensed forest area during the preparation of a 10-year Forest Management Plan to identify or get details of the population and area of the existing village within the Licensed Area. Local community and native people living within and adjacent to the SFMLA area have free access to the forest area for hunting or fruit collection as well as using the forest

enterprise's facilities such as school and clinic. They are also allowed to practice the Tagal and Sogit system along the river (a traditional way of fish farming). Ownership in forest reserves is not permitted and, to formalize the presence of communities in forest reserves, Sabah Forestry Department has introduced the use of Occupation Permits (OPs). Although the community participates in deciding the duration of and total area covered by the permit, the final decision remains with Sabah Forestry Department (Toh and Grace, 2013).

The Director of Forestry may exempt Natives from payment of royalties through the issuance of Form IIA license for any of the following forest produce taken from State Land and Alienated Land: the construction or repair of a dwelling house; the construction of fences and temporary huts on any land lawfully occupied; the construction or repair of native boats; the upkeep of fishing stakes and landing places; firewood to be consumed for domestic purposes; or the construction and upkeep of clinics, schools, community halls, places of worship, bridges and any work for the common benefit (including for traditional medicine purposes) of the native inhabitants of the kampong.

#### *Description of Risk*

- There are examples where Natives wanting to register native land have been wrongfully informed by the Lands and Survey Department about the procedure. The wrong forms have instead been provided, with the result that communities have given up their land. Courts have ruled that mistakes have been made and should be corrected by the Lands and Survey Department, but according to a local social NGO this has not yet taken place (Expert consultation, 2015).
- Insufficient notice given of gazettal of areas gazettal – as well as failure to properly consult forest communities – has resulted in communities losing their customary rights to land when it is gazetted as forest reserve or other protected area or when it is alienated for development projects (Toh and Grace, 2006). In early 2015 a ruling was made by the High Court that a proposed alienation of land was withdrawn because the Lands and Survey Department had not given sufficient notice to the Natives claiming native land under Section 13 of the Sabah Land Ordinance (Daily Express <http://www.dailyexpress.com.my/news.cfm?NewsID=96067>).

Risk exists for indigenous people losing their right to ancestral land despite recognized legislative rights to keep this land. Several court cases are ongoing, but there is still need for changed practices when allocating FMEs. Thus, the risk is considered specified for all timber sources.

#### *Risk Conclusion*

This indicator has been evaluated as specified risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.15.6. Risk designation and specification**

Specified risk

#### **1.15.7. Control measures and verifiers**

- Documents or records of consultations with local communities for any land or rights dispute resolutions. A community use zone (CUZ) can be set aside for communal use.

- Absence of conflict and practice of self-determination is a first verifier of established Indigenous Peoples' rights.

## TRADE AND TRANSPORT

### 1.16. Classification of species, quantities, qualities

*Legislation regulating how harvested material is classified in terms of species, volumes and qualities in connection with trade and transport. Incorrect classification of harvested material is a well-known method to reduce/avoid payment of legality prescribed taxes and fees. Risk relates to material traded under illegal false statements of species, quantities or qualities. This could cover cases where this type of false classification is done to avoid payment of royalties or taxes or where trade bans on product types or species are implemented locally, nationally or internationally. This is mainly an issue in countries with high levels of corruption (CPI<50).*

#### 1.16.1. Applicable laws and regulations

- Forest Enactment 1968: Part IA, Part III-Section 24C, & 27  
<http://faolex.fao.org/docs/pdf/mal10907.pdf>
- Forest Rules, 1969 (Rule 3)  
[http://www.sarawakforestry.com/pdf/laws/the\\_forest\\_rules.pdf](http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf)
- Director or Forestry Circular FD: 21/2010 (Removal Pass for Plantation Logs) - SL/AL.
- State Forest Rules: Second schedule (premium rate), Third schedule (royalty rate), Fourth schedule (forest premium and cess), Fifth schedule (liquidated damages)
- Sabah Forest Enactment, 1968. Available at: Forest Rules 1969 - Rule 15(1). Available at: Director of Forestry Circular FD: 21/2010 Issuance of Removal Pass for Plantation Logs

#### 1.16.2. Legal authority

- Sabah Forestry Department

#### 1.16.3. Legally required documents or records

- Records of payment
- Form IIB (a license to take forest produce on prepayment of royalty)
- Timber Disposal Permit
- Removal Pass
- Removal Pass for Plantation Logs

For Alienated Land:

- Evidence of ownership (land title and other documents)
- Payment Receipt of land premium
- Letter/agreement/contract between the land owner and contractor
- Letter of confirmation of land ownership or status from the ACLR
- Form IIB
- Timber Disposal Permit

- Removal Pass

For Industrial Timber Plantations

- Quarterly Logging Progress Report
- Occupation Permit
- Registered Hammer Mark Record
- Logging Contractor Registration Certificate
- Log list for sawmill processing
- Transit Pass
- Removal Pass
- Letter of Compliance issued by EPD

#### 1.16.4. Sources of information

*Government sources:*

- Sabah Forestry Department: <http://www.forest.sabah.gov.my/discover/policies/forest-legislation>
- Sabah Forestry Department, (2013). Sabah TLAS document (revised as at 06 March 2013). <http://www.forest.sabah.gov.my/images/pdf/en/flegt/TLAS4.pdf>, Accessed 13 February 2018.
- Timber Royalty: <http://www.forest.sabah.gov.my/discover/sustainable-management/forest-ind>

*Non-government sources*

- Expert consultation conducted by NEPCon in Malaysia from 2015-2016, including personal communication 1.

#### 1.16.5. Risk determination

For Alienated Land (in accordance with Land Ordinance (Sabah Cap. 68); Forest Rules, 1969 (Rule 3); and Forest Enactment, 1968 [Section 24(5)]), once harvesting has been carried out in accordance with a Form IIB (application before felling of timber) and with proper land titles:

- i. The District Forestry Officer (DFO) carries out boundary stones inspection on the ground and measures logs volume for royalty assessment and submits report to DoF for approval.
- ii. Director of Forestry (DoF) issues approval to DFO for issuance of Form IIB (application of timber felled).
- iii. DFO issues Timber Disposal Permit (TDP) and Form IIB.
- iv. Forest Ranger/Forester issues Removal Pass (RP).

The verification procedure applies for each application to remove logs and/or wood residues.

For Industrial Timber Plantations on the PRF (Forest Rules, 1969 [Rule 15(1)]):

- i. DFO ensures that all plantations logs are extracted from an area as approved in the AWP with coupe permit issued upon commencement of harvesting operation.
- ii. Forest Ranger/Forester verifies monthly production records for all plantation logs based on volume or weight as stated in the Transit Pass.
- iii. DFO ensures that the licensee/logging contractors adhered to the harvesting license /coupe permit conditions throughout the harvesting operations.
- iv. DFO ensures that Quarterly Logging Progress Report is prepared and submitted to the DoF quarterly.
- v. DFO ensures that logging contractor has a valid annual registration certificate.
- vi. Forest Ranger/Forester verifies that all plantation logs incised with serial numbers, transported for sawmill processing are hammer marked with registered Property Hammer Mark. 15
- vi. DFO verifies that areas occupied for stumping within forest reserve have a valid occupation permit.
- vii. EPD monitors the implementation of mitigation measures on the specified area under the Agreement. EPD monitors the submission of quarterly environmental compliance report by a registered environmental consultant and conduct inspection every four months based on the consultant's recommendation:

For Industrial Timber Plantations on SL/AL (Director's Circular FD: 21/2010 (Removal Pass for Plantation Logs)):

- viii. DFO ensures that all plantations logs incised with serial numbers, transported for sawmill processing are hammer marked with registered Property hammer Mark.
- ix. Forest Ranger/Forester issues Removal Pass with the word "Royalty Exempted" stamped on it and records the approximate volume of timber removed.
- x. EPD monitors the implementation of mitigation measures on the specified area under the Agreement. EPD monitors the submission of quarterly Environmental Compliance Report (ECR) by a registered environmental consultant and conduct inspection every four months based on the consultant's recommendation.

For PF, SL & AL (excluding ITP) (Forest Rules, 1969 (Rules 20A)):

- Where the license/permit includes requirements for Reduced Impact Logging (RIL):
  - DFO verifies that all Comprehensive Harvesting Plan (CHP) conditions are met throughout harvesting operation.
  - DFO verifies that the key forest workers are properly trained with minimum competency standard as specified in Table 1.2 within the RIL Operation Guide Book prior and during the harvesting operation.
  - Forest Ranger/Forester verifies that Daily Felling Record is maintained and updated daily during harvesting operation.
  - DFO ensures that Quarterly Logging Progress Report is submitted to the DoF quarterly.

- DFO ensures that Closing Inspection Report is submitted to the DoF within six months after harvesting operation is completed.
- Where the license/permit does not mandate RIL:
  - DFO verifies that all logging contractors are registered with FDS once before the harvesting operation commences.
  - DFO ensures that Quarterly Logging Progress Report is submitted to the DoF quarterly.
  - DFO ensures that Closing Inspection Report is submitted to the DoF after completion of harvesting operation.
  - DFO ensures that Property Hammer Mark is registered with FDS once before harvesting operation commences.
  - Forest Ranger/Forester ensures that all extracted logs are inscribed with serial numbers when applying for scaling order.
  - DFO ensures that area occupied for stumping within PF has valid occupation permit or TOL for area inside SL before harvesting operation commences.
  - EPD monitors the implementation of mitigation measures on the specified area under the Agreement, through the submission of quarterly ECR by a registered environmental consultant and conduct inspection on any area, upon receipt of complaint for serious non-compliance verified from the ECR.

All natural and plantation logs shall be classified based on volume or weight, as well as species. This shall be recorded in the removal pass. Also the type of logging (RIL/non-RIL, class, helicopter-logging) shall be included in the removal passes.

#### *Description of Risk*

- Volumes and species are controlled at Forest Department Control Check points, and no timber is removed without going through the check points along the road. However, there is a reported risk of incorrect classification of timber as a means of royalty evasion (Personal communication 1 and Expert Consultation 2015-16)).
- There is no royalty payable for rubberwood or ITP on Alienated Land (see indicator 1.5), therefore the incentive for false declaration is low for these sources. There is a theoretical risk that shipments that are declared to be "rubberwood" or ITP might be some other species, so there is a risk of misclassification associated with these sources. However, it is important to take into consideration that the supply chain for rubberwood does not interact with supply chain from other forest species.
- As indicator 1.5 for Sabah has been evaluated as low risk, the associated risks in this indicator are also evaluated as low as all classification is done for the purposes of royalty calculation.

#### *Risk Conclusion*

'Low risk'. Identified laws are upheld. Cases where law/regulations are violated are efficiently followed up via preventive actions taken by the authorities and/or by the relevant entities.

#### **1.16.6. Risk designation and specification**

Specified risk

#### **1.16.7. Control measures and verifiers**

- Random samples of shipments should be assessed and verified to be of the species, quality and quantity specified.
- Verification of the Removal Pass to ensure that the species and volumes are indicated with royalty payment correctly.

### **1.17. Trade and transport**

*All required trading permits shall exist as well as legally required transport document which accompany transport of wood from forest operation. Risk relates to the issuing of documents permitting the removal of timber from the harvesting site (e.g., legally required removal passes, waybills, timber tags, etc.). In countries with high levels of corruption, these documents are often falsified or obtained by using bribery. In cases of illegal logging, transport documents from sites other than the actual harvesting site are often provided as a fake proof of legality with the harvested material.*

#### **1.17.1. Applicable laws and regulations**

- Forest Rules 1969 - Rule 15(1)  
[http://www.sarawakforestry.com/pdf/laws/the\\_forest\\_rules.pdf](http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf)
- Director of Forestry Circular FD: 21/2010 Issuance of Removal Pass for Plantation Logs
- Director of Forestry Circular FD: 31/2013 (Handling of rubber wood (log) from Alienated Land)

#### **1.17.2. Legal authority**

- Sabah Forestry Department

#### **1.17.3. Legally required documents or records**

- Daily felling and extraction form
- Log summary record
- Removal pass
- Timber disposal permit
- Log tracking system
- Check scale form
- Export declaration form
- Log Arrival Book kept at the mill by the SFD; used RPs are stamped as 'Used Removal Pass'.

#### **1.17.4. Sources of information**

*Non-Government sources*

- Sabah Forestry Department, (2013). Sabah TLAS document (revised as at 06 March 2013). <http://www.forest.sabah.gov.my/images/pdf/en/flegt/TLAS4.pdf>, Accessed 13 February 2018.

*Non-Government sources*

- Hoare (2015). Illegal Logging and Related Trade the Response in Malaysia. [online]. A Chatham House Assessment. Energy, Environment and Resources. Available at: [https://www.chathamhouse.org/sites/files/chathamhouse/field/field\\_document/20150121IllegalLoggingMalaysiaHoare.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150121IllegalLoggingMalaysiaHoare.pdf)
- Expert consultation 2015. Personal communication 1 and 2.

### 1.17.5. Risk determination

*Overview of Legal Requirements*

The movement of all commercial logs is regulated by Rule 15(1) of the Forest Rules 1969, which requires that all timber to be transported must be accompanied by a Removal Pass (RP) upon payment of the royalties to the government, or a Transit Pass for transportation of logs from the extraction area to the royalty assessment area. All logging trucks must also be registered with the Sabah Forest Department.

For timber produced on SL, PRF or AL (other than from Industrial Tree Plantations), the following requirements and procedures apply (Forest Rules, 1969 [Rule 15(1)]):

1. For logs where royalty is assessed at the Pangkalan or Weigh Bridge at the Mill Gate:
  - i. All logs transported from the Stumping Point to the Pangkalan, or weigh bridge at the mill gate bear Property Hammer Mark, FDS Inspection Hammer Mark and are accompanied by a Transit Pass and/or CS Form.
  - ii. All logs transported from the Pangkalan to the Port of loading/to the mill bear FDS Royalty Hammer Mark and are issued with Removal Passes upon payment of royalty.
  - iii. Logs transported between mills must be accompanied with Removal Passes.
2. For logs where royalty is assessed at the Stumping Point/licensed area:
  - i. All logs transported from the Stumping Point/licensed area to the mill or port of loading bear Property Hammer Mark, FDS Inspection Hammer Mark, FDS Royalty Hammer Mark and are issued with Removal Passes upon payment of royalty.
  - ii. Logs transported between mills must be accompanied with Removal Passes
  - iii. Logs transported from a designated area to another destination only allowed from 07:00 a.m. to 07:00 p.m., unless with the DoF's approval outside the stipulated time.
  - iv. The validity of Removal Pass is determined by the distance and mode of log transportation and may range from 1 to 3 days for land transportation or maximum 1 week for river/sea transportation subject to extension with a new removal pass by the DoF.

Verification of compliance takes place at the following points in the supply chain:

1. At the Pangkalan /Weigh Bridge:

- a. Forest Ranger/Forester ensures that all logs bear Property Hammer Mark, and FDS Inspection Hammer Mark and are accompanied by a Transit Pass and records log arrival at the Pangkalan/Weigh Bridge at the mill gate.
- b. Forest Ranger/Forester ensures that relevant statutory charges for all logs transported from the Pangkalan to the mill/port of loading have been collected and all logs bear FDS Revenue Mark, except for weighed logs which are randomly marked, and logs are accompanied by a Removal Pass.

Note: Logs to be weighed are randomly marked with the Inspection Hammer Mark.

2. At the mill

- a. Forest Ranger/Forester inspects logs upon arrival and "stamps" Removal Pass as "Used Removal Pass" upon verification of the consignment.
- b. Forest Ranger/Forester ensures that logs arrival have been recorded in Log Arrival Book.

3. At the Port of Loading:

- a. Forest Ranger/Forester inspects logs and verifies that the logs' details records tally with the Removal Pass as stated in the Export Declaration/export supporting documents.
- b. Forest Ranger/Forester stamps Removal Pass as "used Removal Pass" upon verification of each consignment. Frequency: The verification procedure applies for every load of logs transported.

Note: Weighed logs are small diameter and irregularly shaped logs.

For Industrial Timber Plantations (ITP) on the PRF:

1. All plantation logs transported from the harvesting area to an approved weigh bridge/weigh bridge at the mill gate for royalty assessment bear Property Hammer mark, FDS Hammer Mark (Marked randomly) and are accompanied by Transit Pass.
2. All logs transported from the weigh bridge to the Port of loading/to the mill bear FDS Property Hammer Mark (marked randomly) and are issued with Removal Passes upon payment of royalty.
3. If logs are transported to another mill, the mill must apply for another Removal Pass to be issued by a Forestry Officer.

For ITP from SL and AL

1. The land owner has a contract with the contractor to remove logs and wood residues.
2. ii. Licensee ensures that an approval to transport plantation logs to an approved weigh bridge has been obtained from the DoF (SL) or the District Forestry Officer (AL) and all logs bear Property Hammer Mark and FDS Inspection Hammer Mark (marked randomly).

3. The licensee ensures that all logs transported from the weigh bridge to the Port of loading/to the mill are issued with Removal Passes upon recording of volume (weighed volume).
4. If logs are transported to another mill, the mill must apply for another Removal Pass to be issued by a Forestry Officer.
5. Licensee transport logs from a designated area to another destination only from 7.00am to 7.00pm, unless with the DoF's approval for transportation outside the stipulated time.
6. The validity of Removal Pass is determined by the distance and mode of log transportation and may range from 1 to 3 days for land transportation or maximum 1 week for river/sea transportation subject to extension with a new removal pass by the DoF.

The verification of compliance is carried out by the Forest Ranger/Forester who verifies land title and/or letter of consent/contract/Power of Attorney to extract planted timber.

1. At the Weigh Bridge:

- a) Forest Ranger/Forester inspects logs upon arrival and records logs arrival and weighed volume.
- b) DFO issues Receipt of royalty payment.
- c) DFO issues Removal Pass for logs transported to the destination (unless exempted: Example; weigh bridge is at the mill gate).

2. At the Mill

- a) Forest Ranger/Forester inspects logs upon arrival and "stamps" Removal Pass as "Used Removal Pass" upon verification of the consignment. No Removal Pass is required for logs weighed at the mill gate.
- b) Forest Ranger/Forester ensures that logs arrival have been recorded in Log Arrival Book.

3. At the Port of Loading:

- a) Forest Ranger/Forester inspects logs and verifies that the log details as recorded in the Removal Pass tallies with the details as in the Export Declaration/export supporting documents.
- b) Forest Ranger/Forester stamps Removal Pass as "used Removal Pass" upon verification of each consignment

The verification procedure applies for every load of logs transported.

*Description of Risk*

- As the Removal Passes are paper documents, this makes the process of tracking timber slow and cumbersome (Hoare 2015). A thorough review of the literature did not call this finding into question.
- According to the experience of the authors of this report, and the experts consulted in its preparation, the manual Removal Pass system is robust in the sense that it is systematic for all shipments of timber, and this leads experts to believe that the risks

posed by a centralised electronic system (“massive fraud”) are not present in the manual system. (Personal communication 2). While there are theoretical risks associated with such a system, there is no evidence that this happening on a scale or with an impact sufficient to warrant a specific risk based on this.

- In addition to the evidences provided above, by following the logic applied in indicator 1.16 Classification of species, quantities and qualities, as the risks associated with the payment of royalties is considered low for Sabah, the associated requirements for classification and trade and transport (related to this indicator) are also considered low risk.

#### *Risk Conclusion*

‘Low risk’ Identified laws are upheld. Cases where law/regulations are violated are efficiently followed up via preventive actions taken by the authorities and/or by the relevant entities.

#### **1.17.6. Risk designation and specification**

Low risk

#### **1.17.7. Control measures and verifiers**

N/A

### **1.18. Offshore trading and transfer pricing**

*Legislation regulating offshore trading. Offshore trading with related companies placed in tax havens combined with artificial transfer prices is a well-known way to avoid payment of legally prescribed taxes and fees to the country of harvest and considered as an important generator of funds that can be used for payment of bribery and black money to the forest operation and personnel involved in the harvesting operation. Many countries have established legislation covering transfer pricing and offshore trading. It should be noted that only transfer pricing and offshore trading as far as it is legally prohibited in the country, can be included here. Risk relates to situations when products are sold out of the country for prices that are significantly lower than market value and then sold to the next link in the supply chain for market prices, which is often a clear indicator of tax laundry. Commonly, the products are not physically transferred to the trading company.*

#### **1.18.1. Applicable laws and regulations**

- Malaysia Income Tax Act, 1967 - Sec.140A  
<http://www.kpmg.com.my/kpmg/publications/tax/22/a0053.htm>
- Income Tax (Transfer Pricing) Rules 2012  
<http://www.hasil.gov.my/pdf/pdfam/MalaysianTransferPricingGuidelines2012.pdf>
- Income Tax (Advance Pricing Arrangement) Rules 2012  
<http://www.hasil.gov.my/pdf/pdfam/MalaysianAPAGuidelines2012.pdf>

#### **1.18.2. Legal authority**

- Inland Revenue Board Malaysia

#### **1.18.3. Legally required documents or records**

There are no specific transfer pricing documentation requirements in the MITA, the general provision in the MITA (specifically Section 82) requires taxpayers to maintain appropriate documentation to support their transactions. Such records must be retained for a period of seven years and include:

- Company details – Ownership structure, company organisational chart and operational aspects of the business;
- Transaction details – Summary of the related party transactions, pricing policy, price breakdown, terms of the transaction, economic conditions at the time of the transaction and any independent comparable transactions; and
- Determination of arm’s-length price – Selection of pricing methodology, functional analysis and comparability analysis.

#### **1.18.4. Sources of information**

##### *Government sources*

- hasil.gov.my (2012) Transfer Pricing Guidelines 2012. [online]. IRBM. Available at: <http://www.hasil.gov.my/pdf/pdfam/MalaysianTransferPricingGuidelines2012.pdf>

##### *Non-Government sources*

- deloitte.com (2012). Malaysia International Tax and Business Guides by Deloitte. [online]. Available at: <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-malaysiaguide-2016.pdf>
- eoi-tax.org (2012). Malaysian Advance Pricing Arrangement Guidelines. [online]. Available at: <http://www.eoi-tax.org/jurisdictions/CA#agreements>
- Global Witness (2013). Inside Malaysia’s shadow state. March 19: <https://www.globalwitness.org/campaigns/forests/inside-malaysias-shadow-state>
- pwc.com (2012). International transfer pricing. [online]. Report by PriceWaterhouseCoopers. Available at: [http://download.pwc.com/ie/pubs/2012\\_international\\_transfer\\_pricing.pdf](http://download.pwc.com/ie/pubs/2012_international_transfer_pricing.pdf)
- The Malaysian digest (2013). Lawyers in Taib Video Expose to Face Police Probe, Answer Misconduct Charges [online]. Available at: <http://malaysiandigest.com/news/174742-lawyers-in-taib-video-expose-to-face-police-probe-answer-misconduct-charges.html>

#### **1.18.5. Risk determination**

##### *Overview of Legal Requirements*

Malaysia has exchange of information relationships with 73 jurisdictions through 73 DTCs and 1 TIEA (eoi, 2012).

In Malaysia, Multinational Enterprises involved in transfer pricing must be able to provide adequate, documented proof to support their transfer pricing policies. Under the self-assessment system, the taxpayer is responsible for clearing any alleged non-compliance with transfer pricing legislation. A general anti-avoidance provision under subsection 140(1) of the Income Tax Act 1967 (ITA as amended) empowers the Director General

(DG) to disregard certain transactions which he believes have the direct or indirect effect of altering the incidence of tax, and adjust as he thinks fit, to counteract the effects of such transactions. Section 140 will also be applied in the adjustment of transfer prices. Section 140 allows the DG to disregard transactions believed not to be at arm's length and make the necessary adjustments to revise or impose tax liability on the persons concerned. Under subsection 140(6), the said non-arm's length dealings include transactions between persons one of whom has control over the other and between persons both of whom are controlled by some other person.

Upon a tax audit or enquiry, taxpayers must substantiate that their transfer prices have been determined in accordance with the arm's length principle as prescribed under the Transfer Pricing Rules 2012 and Guidelines. Control measures or factors that trigger the Inland Revenue Board (IRB) to carry out a transfer pricing audit include outstanding tax enquiries, sustained losses, use of tax havens, fluctuations in profits from year to year, third-party information and instances where a company has not been tax audited in the past six years.

Recently, the Malaysian IRB issued a new requirement relating to transfer pricing in the Corporate Income Tax Return Form ('Form') for 2014. This new 'check-the-box' disclosure as to whether transfer pricing documentation has been prepared is a sign of the increasing focus and scrutiny on transfer pricing matters by the IRB, whether mandatory documentation requirements have been met. Previously, taxpayers were required to disclose whether transfer pricing documentation had been prepared only if they received a Form MNE 1/2011 ('Form MNE') from the IRB.

As the IRB is intensifying its efforts on transfer pricing through audits, this revision to the Form is a further indicator of transfer pricing being an area of priority now and in the imminent future. Not satisfying the IRB's mandatory requirements carries substantial tax risks that an appropriate analysis and documentation exercise can help avoid.

#### *Description of Risk*

To date, no legal cases concerning transfer pricing have been decided by the Malaysian courts. However, a few cases have recently gone to court and are awaiting hearing. Most of the cases involving disputes on transfer pricing issues have been settled out of court, and the details have not been published.

Since the transfer pricing guidelines were issued in Malaysia in July 2003, the MIRB has set up a team at its head office that specialises in transfer pricing audits. This has been further enhanced with the establishment of separate transfer pricing teams in the various tax audit assessment branches of the MIRB across the country. Most of the tax officers have experience handling tax investigations and tax audits. The officers are continually updating their knowledge through dialogues with other tax administrations in the region, in addition to participating in training conducted by foreign and international tax authorities/bodies, such as the OECD (Deloitte 2012, Deloitte 2012a).

In 2013, Global Witness exposed the occurrence of transfer pricing amongst forestry companies with ties to the former Sarawak Chief Minister Taib (Global Witness 2013). The exposé focused on the sale of forested land in Malaysia to foreigners and highlighted the existence of strategies to avoid real property gains tax by under-declaring the true value of and having the full value transferred offshore. The case is not directly linked to sale of

timber, but provides an indication of unlawful price manipulation can occur within the forest sector.

The case took place in Sarawak, but as the legal requirements are the same in all of Malaysia and the general level of corruption in Malaysia indicates a risk that transfer pricing also could take place in any Malaysian State.

Based on the limited available information, a precautionary approach has been used to find this indicator specified risk.

#### *Risk Conclusion*

'Specified risk'. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.18.6. Risk designation and specification**

Specified risk

#### **1.18.7. Control measures and verifiers**

- Determine if the company has any subsidiary operating in a known tax haven.
- Review internal invoicing to determine whether the prices used were comparable to market prices.
- Review transfer pricing documentation to prove market price-based transactions.

### **1.19. Custom regulations**

*Custom legislation covering areas such as export/import licenses, product classification (codes, quantities, qualities and species).*

#### **1.19.1. Applicable laws and regulations**

- Customs Acts 1967 [Act 235]. Available at: <https://www.mytradelink.gov.my/documents/10179/0/Customs-act>
- Customs Export Prohibition Order (1998). Available at: [http://www.vertic.org/media/National%20Legislation/Malaysia/MY\\_Customs\\_Prohibition\\_Export\\_Order\\_Schedule3.pdf](http://www.vertic.org/media/National%20Legislation/Malaysia/MY_Customs_Prohibition_Export_Order_Schedule3.pdf)
- Customs Import Prohibition Order. Available at: [http://www.env.go.jp/recycle/yugai/reg/pua\\_20121231\\_P.U.%28A%29490-LaranganImportFinal\[Warta311212\].pdf](http://www.env.go.jp/recycle/yugai/reg/pua_20121231_P.U.%28A%29490-LaranganImportFinal[Warta311212].pdf)
- Sabah Forest Enactment, 1968 - <http://faolex.fao.org/docs/pdf/mal10907.pdf>
- Forest Rules 1962 - [http://www.sarawakforestry.com/pdf/laws/the\\_forest\\_rules.pdf](http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf)

#### **1.19.2. Legal authority**

- Sabah Forest Department
- Customs Department

### 1.19.3. Legally required documents or records

#### *Imports*

- Company Import Certificate-FDS
- Import clearance (CD1 Form)-RMC
- Phytosanitary certificates (DoA)
- Physical Inspection report by FDS.
- Records of Import data (FDS)
- Import license/permit
- Company ROC certificate and trading license.

#### *Exports*

- Export License
- Inspection reports
- Endorsed/Export Approval Stamped on CD2 Form
- Export data (output of SJHP)
- Company ROC certificate and trading license

### 1.19.4. Sources of information

#### *Non-government sources*

- UNODC, (2017). Criminal justice response to wildlife crime in Malaysia - A rapid assessment: Available: [https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Malaysia\\_Assessment\\_-\\_09.pdf](https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Malaysia_Assessment_-_09.pdf), accessed 13 February 2018.
- Expert consultation conducted by NEPCon, 2015
- New Straits Times, (2017). Sabah timber industry set to boost with return of licensing power: LDP. Available: <https://www.nst.com.my/news/nation/2017/05/242178/sabah-timber-industry-set-boost-return-licensing-power-ldp>, accessed 13 February 2018.

### 1.19.5. Risk determination

#### *Overview of Legal Requirements*

According to the Sabah TLAS document, the follow procedures apply for imports and exports of timber from the state:

#### Imports

A company intending to import timber and timber products needs to register with the Registrar of Companies (ROC), FDS and poses a trading license. Note: ROC registration is not applicable to sole proprietors/enterprise/individual and only a trading license is required.

A company intending to import timber products (logs/veneer/sawn timber) is subject to phytosanitary requirements and obtains an import permit from the Department of Agriculture (DoA).

A company intending to import timber products is required to obtain Customs' clearance (using CD1 Form) by Royal Malaysian Customs (RMC). iv. Imported timber is subject to inspection by FDS and payment of inspection fees to FDS.

The following verification procedure applies:

1. FDS (DFO) checks compliance of company's application for Importer's Certificate and issues Importer's Import Certificate.
2. FDS (DFO) ensures that the applicant for the import license is registered with ROC and/or with trading license and have a valid sales contract.
3. FDS (DFO) checks the CD1Form for every consignment of imported timber. iv. FDS (DFO) conducts random 10 % physical inspection each consignment against import declaration and other supporting documents, collects Inspection fees and records volume of imported timber. v. DoA inspects consignment for compliance to phytosanitary requirements. Frequency: The above procedures apply to every consignment of imported timber.

#### Exports

A company intending to export timber and timber products needs to be registered with the Registrar of Companies (ROC) and poses a trading license. Note: ROC registration is not applicable to sole proprietors/enterprise/individual and only a trading license is required.

A company/sole proprietor (Enterprise) declares timber and timber products to be exported to the District Forestry Officer with a valid export permit or annual export license with supporting documents such as Log summary, Sales Contract, Invoice, Packing List, Borang EIS 1/2000 (declaration on the source of processed timber to be exported), CITES Permit, where applicable, receipt of royalty payment and other fees where applicable (for logs, sawn timber, veneer, plywood and moulding) (not applicable to planted timber from SL and AL and other products not mentioned herein).

Exporters of certain round logs, timber and timber products must pay export royalties, as provided in the Forest Rules 1969:

#### HS Codes 44 and 94.

Any company/person engaged in the export of timber under these HS Codes must be registered and licensed by SFD. Registered and licenced companies/persons are issued with a registration and export licence. A timber export permit is issued by SFD to these persons/companies upon satisfaction of all export requirements.

The Second Schedule of the Customs (Prohibition of Exports) Order 2012 lists the timber and timber products that require an export licence/permit from SFD prior to export.

#### HS Codes 47 and 48 (pulp and paper)

Exporters under these codes must make a declaration using Customs Export Declaration Form K2 and submit it to the Customs Department for final clearance of exports.

In June 2017, the licensing power for imports and exports to Sabah was transferred from the Malaysian Timber Industry Board to the Sabah Forestry Department (New Straits Times 2017).

*Description of Risk*

- Malaysia receives timber from 3rd countries as long as export documents are in place and without requiring proof of legal origin. When this timber enters the supply chain and is processed into secondary products there is a possibility that an export license can be issued for products that could have an illegal origin. However, international trade in timber from Malaysia is generally well regulated and there is only a low risk that the Malaysian custom regulations have been violated (Personal communication 1 and 2).
- An October 2017 report from the New Straits Times states that 'MTIB intercepts illegal shipment of round logs worth RM500,000'. The article claims that Malaysian Timber Industry Board (MTIB) has revealed that it foiled an attempt in August to smuggle 10 containers filled with 133 round logs of the banned keruing species, worth RM500,000. MITB director-general Datuk Jalaluddin Harun said the logs, en route from Pahang to India, were seized at Westports Malaysia in Port Klang on Aug 22."

The 2017 report from the UNODC contains a number of observations relevant to this indicator:

- Port Klang is Malaysia's largest port [...] figures prominently in the seizures of large quantities of wildlife products. Between 2011 and 2014 the port was the subject of two Malaysian Anti-Corruption Commission (MACC) investigations into corruption. (These investigations were not specifically related to wildlife or forest crime cases, but do indicate the presence of some officials complicit in illicit activities). [...] It stands to reason that some of the corrupt customs officials previously investigated by the MACC in relation to other offences (between 2011 and 2014), or others working at the port at that time, may have played a role in facilitating the importation and re-export of wildlife products into and from Malaysia during that period.
- Corruption has plagued the Royal Malaysian Customs Department (RMCD) over the last several years and is something that the Department has shown it is committed to addressing. All customs officers take an oath and sign a pledge committing to integrity, as all government agencies are required to do. All civil servants (including customs officers and their spouses) must also declare personal assets every five years as well as any trip abroad. At the start of every shift, customs officers must declare how much money is being carried on their person, and it is checked again at the end of the shift. Supervisors can also make spot checks during a shift to ensure compliance. There is an RMCD Internal Disciplinary Board that conducts an initial assessment of any allegations made against customs officers.
- Cases can also be started by MACC, and the RMCD supports these investigations. There are also integrity officers from the MACC that are seconded within the Customs Department. Internationally, RMCD requests for assistance and information sharing are conducted under the Regional Intelligence Liaison Office of the World Customs Organization (WCO) with other countries (for example the United States, Korea, or Turkey).

- Domestically, Customs has good cooperation with domestic wildlife agencies, notably Perhilitan, FDS, and SWD, and with other agencies such as the MACC, RMP and MTIB. Intelligence on environmental crime is disseminated to other agencies on a case-by-case or ad-hoc basis.
- Most of the identified illegal trade cases undertaken by the MTIB relate to transshipments and imports of timber. From 2012 to 2017, the MTIB investigated 34 cases related to prohibited imports, of which 22 cases related to the illegal imports/transshipments of CITES-listed timber species. Despite having the necessary provisions within the Act, none of these investigations resulted in a period of imprisonment, with all being resolved by way of administrative sanction.
- According to the MTIB, the majority of timber imported into or exported from Malaysia is in the form of furniture, and to a lesser extent, whole logs. Primary export destinations include the US, EU, Japan and to a lesser extent China. Most of the timber imported into Malaysia is from China and Indonesia.
- It is surprising that in Malaysia there are more wildlife cases before the courts than forestry cases. [...] This could be because the MTIB has not yet commenced any prosecutions that resulted in court action for timber cases. It will be interesting to see if these numbers change now that Sabah and Sarawak will be taking over the role of the MTIB within their jurisdictions.
- Shortcomings of MTIB:
  - Prison terms for forestry offences are not applied
  - Regulatory agency with little law enforcement experience
  - No intelligence unit
  - No formal law enforcement training
  - No central CHIS system
  - Does not use advanced investigative methodologies
  - Challenges with identification of nonnative CITES-listed species
- The Malaysian Legislators and Courts have shown themselves to be innovative and in touch with the needs of the environment. They are to be congratulated for the strength of judgement that sees those engaged on transnational and domestic wildlife crime feeling the full weight of the law
- The Customs Department has 709 officers working in the Enforcement Division posted throughout the country, handling all tasks relating to law enforcement. Customs officers are well trained and educated, with senior officers requiring a Bachelor's Degree as a minimum requirement for employment.
- At this moment, the overall effectiveness of Malaysia's effort to address the international aspect is questionable. Despite many seizures there is very little to show in the way of arrests, prosecutions and convictions. There has also never been a controlled delivery of any of the shipments seized by the RMCD. Seizures of a finite wildlife resource will not prevent or stop wildlife trafficking. In the absence of arrests, seizures alone may in fact do more harm than good.

Because the import/export regulation functions only reverted to Sabah Forestry Department from MTIB in July 2017 (New Straits Times 2017), it is too early to properly evaluate the effectiveness of the monitoring and enforcement functions. Based on the analysis provided in the UNODC report, and applying a precautionary approach, the risk for this indicator has been evaluated as specified.

#### *Risk Conclusion*

'Specified risk'. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

#### **1.19.6. Risk designation and specification**

Low risk

#### **1.19.7. Control measures and verifiers**

N/A

### **1.20. CITES**

*CITES permits (the Convention on International Trade in Endangered Species of Wild Fauna and Flora, also known as the Washington Convention). Note that the indicator relates to legislation existing for the area under assessment (and not e.g., the area from which CITES species are imported).*

#### **1.20.1. Applicable laws and regulations**

- International Trade in Endangered Species Act 2008 (Act 686). Available at: [http://www.unodc.org/res/cld/document/international-trade-in-endangered-species-act-2008\\_html/International\\_Trade\\_in\\_Endangered\\_Species\\_Act\\_2008.pdf](http://www.unodc.org/res/cld/document/international-trade-in-endangered-species-act-2008_html/International_Trade_in_Endangered_Species_Act_2008.pdf)
- Customs Act 1967 [Act 235]. Available at: <https://simplymalaysia.files.wordpress.com/2011/10/act-235-customs-act-1967.pdf>
- Customs (Prohibition of Exports) Order 2012. Available at: [http://www.env.go.jp/recycle/yugai/reg/pua\\_20121231\\_LaranganExport.pdf](http://www.env.go.jp/recycle/yugai/reg/pua_20121231_LaranganExport.pdf)

#### **1.20.2. Legal authority**

- State Forestry Department SFD

#### **1.20.3. Legally required documents or records**

- CITES Export or re-Export permit issued by SFD.

#### **1.20.4. Sources of information**

##### *Government sources*

- mtib.gov.my (N.Y.) *Malaysian Timber Industry Board*. [online]. Available at: <http://www.mtib.gov.my>

##### *Non-Government sources*

- Barden, A., Awang Anak, N., Mulliken, T., Song, M. (2000). *Heart of the Matter - Agarwood Use and Trade and CITES Implementation for Aquilaria malaccensis*. [online]

Available at: <http://www.traffic.org/publications/heart-of-the-matter-agarwood-use-and-trade-and-cites-impleme.html>

- checklist.cites.org (N.Y.). *CITES Species Checklist*. [online]. Available at: [http://checklist.cites.org/#/search/country\\_ids\[\]=127&cites\\_appendices\[\]=I&cites\\_appendices\[\]=II&cites\\_appendices\[\]=III&output\\_layout=alphabetical&level\\_of\\_listing=0&show\\_synonyms=1&show\\_author=0&show\\_english=1&show\\_spanish=1&show\\_french=1&scientific\\_name=Plantae&page=1&per\\_page=20&locale=en](http://checklist.cites.org/#/search/country_ids[]=127&cites_appendices[]=I&cites_appendices[]=II&cites_appendices[]=III&output_layout=alphabetical&level_of_listing=0&show_synonyms=1&show_author=0&show_english=1&show_spanish=1&show_french=1&scientific_name=Plantae&page=1&per_page=20&locale=en)
- cites.org (2004). Proposal for the inclusion of *Gonystylus* spp (Ramin). [online]. Available at: [http://www.cites.org/common/cop/13/raw\\_props/ID-Ramin.pdf](http://www.cites.org/common/cop/13/raw_props/ID-Ramin.pdf)
- cites.org (N.Y.). *CITES Country Profile: Malaysia*. [online]. Available at: <http://www.cites.org/eng/cms/index.php/component/cp/country/MY>
- Expert consultation conducted by NEPCon, 2015 - Personal communication 5
- Gratzfeld, J., Tan, B. (2008). *Agarwood - saving a precious and threatened resource*. [online] Botanic Gardens Conservations International. Available at: <http://www.bgci.org/resources/article/0576/>
- New Straits Times, (2017). Sabah timber industry set to boost with return of licensing power: LDP. Available: <https://www.nst.com.my/news/nation/2017/05/242178/sabah-timber-industry-set-boost-return-licensing-power-ldp>, accessed 13 February 2018.
- speciesplus.net (N.Y). *Species+ Database*. [online]. Available at: <http://www.speciesplus.net/>
- Teck Wyn, L., Awang Anak, N. (2010) *Wood for the Trees - A review of the Agarwood Trade in Malaysia*. [online] TRAFFIC Southeast Asia. Available at: [http://www.academia.edu/812244/Wood\\_for\\_the\\_Trees\\_A\\_Review\\_of\\_the\\_Agarwood\\_Trade\\_in\\_Malaysia](http://www.academia.edu/812244/Wood_for_the_Trees_A_Review_of_the_Agarwood_Trade_in_Malaysia)
- Teck Wyn, L., Soehartono, T., Hin Keong, C. (2004). *Framing the Picture: An assessment of Ramin trade in Indonesia, Malaysia and Singapore*. [online] TRAFFIC Southeast Asia Available at : [http://www.illegal-logging.info/item\\_single.php?it\\_id=126&it=document](http://www.illegal-logging.info/item_single.php?it_id=126&it=document)
- unep.wcmc.org (2013). *CITES Tree Species*. [online]. Available at: [http://www.unep-wcmc.org/medialibrary/2013/07/10/7a9ef9fe/Trees\\_CITES\\_listed\\_updated\\_July\\_2013.pdf](http://www.unep-wcmc.org/medialibrary/2013/07/10/7a9ef9fe/Trees_CITES_listed_updated_July_2013.pdf)
- UNODC, (2017). Criminal justice response to wildlife crime in Malaysia - A rapid assessment: Available: [https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Malaysia\\_Assessment\\_-\\_09.pdf](https://www.unodc.org/documents/southeastasiaandpacific/Publications/2017/Malaysia_Assessment_-_09.pdf) accessed 13 February 2018.
- World Resources Institute (WRI) (2013). Forest Legality Alliance Risk Tool, 2013: Malaysia: <http://www.forestlegality.org/risk-tool/country/malaysia#tab-management> [accessed 23 February 2015]

#### 1.20.5. Risk determination

##### *Overview of Legal Requirements*

Malaysia acceded to CITES in 1977. The export of goods made from *Dalbergia* spp, *Aquilaria* spp. *Gonystylus* spp., *Taxus chinensis* and *Taxus wallichianais* is included on the CITES list under the CITES Commercial Regulations under Appendix II (CITES Checklist).

As of July 2017, the Management Authority for timber species in Sabah, is the Sabah Forestry Department, who is responsible for the issuance of export, import and re-export permits for the CITES listed timber species: Ramin or Karas/Gaharu wood originating from Malaysia.

The Ministry of Natural Resources and Environment (NRE) is the Scientific Authority under CITES. To legally export either Ramin or Karas wood, operators will need to work with these bodies.

For the export of Ramin, a CITES export permit application must be made directly to SFD and NRE, while for Agarwood products/Karas (either woodchip or Agarwood oil), exports are subject to the approval of the company quota, made in advance. States apply for export quotas of Agarwood/Karas before applying for the CITES permit. Other operators wanting to import and re-export products made with these materials from these trees will need a similar permit to re-export before these goods reach their final destinations.

#### *Description of Risk*

- Importing countries have contacted the MTIB to verify the authenticity of the CITES documents, and thereby several of cases of false CITES permits have been detected, which shows that there is a risk of fraud with CITES permits for products originating from Malaysia (Personal communication 5).

According to the 2017 UNODC report:

- Malaysia is one of eight countries identified by CITES as being of “primary concern” and heavily implicated in the illegal trade in ivory.
- All seized wildlife and timber products are handled in accordance with the provisions of relevant legislation and the Enforcement Standing Instructions. Any timber seized in Malaysia is measured, marked, recorded and photographed, and put into secure storage that only the investigating officer can access. A similar system exists for wildlife seizures.
- Even though capacity-building programmes have been conducted to identify CITES-listed timber species, customs officers still need to contact the MTIB to conduct joint inspections of timber cases.
- Most of the identified illegal trade cases undertaken by the MTIB relate to trans-shipments and imports of timber. From 2012 to 2017, the MTIB investigated 34 cases related to prohibited imports, of which 22 cases related to the illegal imports/trans-shipments of CITES-listed timber species. Despite having the necessary provisions within the Act, none of these investigations resulted in a period of imprisonment, with all being resolved by way of administrative sanction. According to the MTIB, most of timber imported into or exported from Malaysia is in the form of furniture, and to a lesser extent, whole logs. Primary export destinations include the US, EU, Japan and to a lesser extent China. Most of the timber imported into Malaysia is from China and Indonesia.

The risk is considered specified due to the risk of using false CITES certificates.

Because the CITES functions only reverted to Sabah Forestry Department from MTIB in July 2017 (New Straits Times 2017), it is too early to properly evaluate the effectiveness of the monitoring and enforcement functions. Based on the analysis provided in the UNODC report, and applying a precautionary approach, the risk for this indicator has been evaluated as specified.

*Risk Conclusion*

'Specified risk'. Threshold (2) is met: Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

**1.20.6. Risk designation and specification**

Specified risk for all CITES species

**1.20.7. Control measures and verifiers**

The authenticity of CITES permits should be verified by MTIB. MTIB can be contacted by email.

**1.21. Legislation requiring due diligence/due care procedures**

*Legislation covering due diligence/due care procedures, including e.g. due diligence/due care systems, declaration obligations, and /or the keeping of trade related documents, legislation establishing procedures to prevent trade in illegally harvested timber and products derived from such timber, etc.*

**1.21.1. Applicable laws and regulations**

N/A

**1.21.2. Legal authority**

N/A

**1.21.3. Legally required documents or records**

N/A

**1.21.4. Sources of information**

N/A

**1.21.5. Risk determination**

N/A

**1.21.6. Risk designation and specification**

N/A

**1.21.7. Control measures and verifiers**

N/A



## Annex I. Timber source types

The table **Timber Source Types in Malaysia – Sabah** identifies the different types of sources of timber it is possible to find in the country of origin.

'Timber Source Type' is a term used to describe the different legal sources of timber in a country, in order to allow a more detailed specification of risk. The Timber Source Type is used to clarify:

- which forest types timber can be sourced from legally;
- what the legal requirements are for each source type, and
- if there are risks related to certain source types and not others.

Timber Source Type can be defined by several different characteristics. It may be based on the actual type of forest (e.g. plantation or natural), or other attributes of forests such as ownership, management regime or legal land classification. In this context Timber Source Types are defined and discerned using the following characteristics:

- Forest type** - refers to the type of forest such as plantation or natural tropical forest, or mixed temperate forest. Often the clearest differentiation is between natural forest and plantations.
- Spatial scale (Region/Area)** - relating to meaningful divisions of a nation. However, in some cases the assessment may be carried out at national level where that allows the risk assessment to establish risk at a meaningful level. E.g. a small country with uniform legislation and a uniform level of risk in all areas of the country, as national level assessment may be enough. In case there are significant differences in the legal framework or legality risks between different types of ownership (e.g. public forest, private forest, industrial forest), between different type of forest (e.g. natural forest and plantations) and/or between different geographical regions the conformance risk evaluation shall specify these differences when specifying the risk and apply the appropriate control measures.
- Legal land/forest classification** - refers to the legal classification of land. Focus is on land from where timber can be sourced, and this could entail a number of different legal categories such as e.g. permanent production forest, farm land, protected areas, etc.
- Ownership** - Ownership of land may differ in a country and could be state, private, communal etc. Ownership of land obviously have impacts on how land can be managed and controlled.
- Management regime** - Independently of the ownership of the land, the management of forest resources may differ between areas. Management may also be differentiated as private, state, communal or other relevant type.
- License type** - Licenses may be issued to different entities with a range of underlying requirements for the licensee. A license might be issued on a limited area, limited period of time and have other restrictions and obligations. Examples could be a concession license, harvest permit, community forestry permit etc.

TIMBER SOURCE TYPES IN MALAYSIA - SABAH						
Forest type	Region / Area	Legal Land Classification	Ownership	Management regime	License / Permit Type	Description of source type
Natural Forest	National	Permanent Forest Reserve - FM	State	State (via private concession)	Harvest permit or license	1a. Timber from this source includes timber from "natural forest" (i.e. selective logging) management areas
						1b. Timber from this source originates in areas of natural forest being cleared as part of a timber plantation concession (i.e. concession for the clearance of natural forest for conversion to monoculture timber plantations)
		Permanent Forest Reserve - Protected area	State	State	Harvest permit or license	2. Generally no timber sourcing is permitted from protected areas (including National Parks and Wildlife Sanctuaries)
		State land	State	State (harvesting permit)	Harvest permit or license	3. Permits for clearance of natural forest are given to private companies who have the rights to log the area but do not have ownership rights to the land (the land is zoned for possible future use for agriculture, housing, etc. but no private title to the land has yet been issued)
		Alienated land	Private	Private	Harvest permit or license	4. Permit for clearance of natural forest for private use (this almost always results in the forest being cleared for non-forest use such as agriculture)

Timber plantations	National	Alienated land	Private	Private	Harvest permit or license	5. Native or exotic timber species (e.g. Acacia, Eucalyptus, Latex Timber Clones Rubberwood) from timber plantations are seldom established on private land (this land is usually more profitably used for growing oil palm or rubber primarily for latex – not primarily for timber)
		State land	State	State (Harvesting permit)	Harvest permit or license	6. Timber plantations are very rarely established on state land. However, timber plantations established on forest reserves that have since been excised and have had their status changed to “state land” could have timber plantations on them
		Permanent Forest Reserve	State	State (Via private concession)	Harvest permit or license	7. Timber plantations (e.g. Acacia, Eucalyptus, Latex Timber Clones Rubberwood) are often established in forest reserves.
Agricultural areas (e.g. rubber plantations)	National	Alienated land	Private	Private	Harvest permit or license	8. Timber from private “agricultural” estates mainly consists of rubberwood from rubber plantations that are being cleared for oil palm or for another rotation of rubber (i.e. grown primarily for latex and not primarily for timber)
		State land	State	State (harvesting permit)	Harvest permit or license	9. Similarly to (8), timber from agriculture on stateland includes rubberwood harvested from rubber plantations
		Permanent Forest Reserve	State	State (Harvesting permit)	Harvest permit or license	10. Very occasionally, there are small agricultural rubber plantations (i.e. planted primarily for latex) in PFR that can be harvested for their timber the same was as in (7)



The mark of  
responsible forestry  
FSC™ A000535

This risk assessment has been developed with funding from FSC™. FSC is not otherwise associated with the project Supporting Legal Timber Trade. For risk assessment conducted according to the FSC-STD-40-005, ONLY entries (or information) that have been formally reviewed and approved by FSC and are marked as such (highlighted) can be considered conclusive and may be used by FSC candidate or certified companies in risk assessments and will meet the FSC standards without further verification. You can see the countries with approved risk assessment in the FSC document: FSC-PRO-60-002b V2-0 EN List of FSC-approved Controlled Wood documents 2015-11-04.

## About

### Supporting Legal Timber Trade

Supporting Legal Timber Trade is a joint project run by NEPCon with the aim of supporting timber-related companies in Europe with knowledge, tools and training in the requirements of the EU Timber Regulation. Knowing your timber's origin is not only good for the forests, but good for business. The joint project is funded by the LIFE programme of the European Union and UK aid from the UK government.



NEPCon (Nature Economy and People Connected) is an international, non-profit organisation that builds commitment and capacity for mainstreaming sustainability. Together with our partners, we foster solutions for safeguarding our natural resources and protecting our climate.

NEPCon | [www.nepcon.org](http://www.nepcon.org) | [info@nepcon.org](mailto:info@nepcon.org)  
FSC™ A000535 | PEFC/09-44-02 |