

Timber Legality Risk Assessment Malaysia - Sarawak

Version 1.3 | May 2018



COUNTRY RISK
ASSESSMENTS



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

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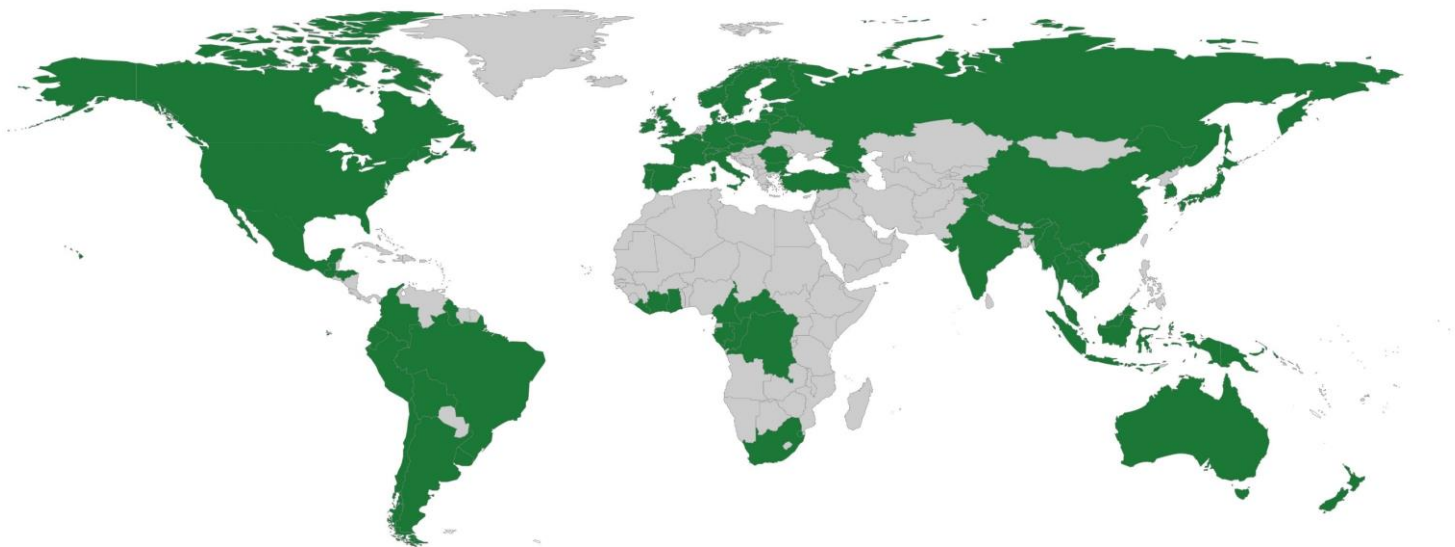
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A. Introduction

This Timber Legality Risk Assessment for Sarawak 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.

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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:

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

FSC CW effective date: 8 May 2018

NEPCon originally published the Timber Legality Risk Assessment for Sarawak Malaysia in August 2017. Since then, amendments to the Assessment have been made, including changing the risk conclusions of indicators 1.3, 1.5, 1.7, 1.16, 1.17 and 1.19 from low risk to specified risk. Additional risk information has also been included for other indicators. 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: 0 / 100 in 2017

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

- **Specified risk for 20 sub-categories.**
- **Low risk for 1 sub-category.**

The Timber Risk Score for Sarawak is 0 out of 100. The key legality risks identified in this report concern timber harvesting activities related to legal rights to harvest, taxes and fees, timber harvesting activities, third parties' rights, and transport and trade.

For **Legal rights to harvest**, there is a risk that:

- customary lands and aboriginal reserves have not been gazetted and thus are not recognized by law (1.1).
- corruption and nepotism influence how land rights are granted to private companies (1.1).
- corruption affects the awarding of concession licenses for Permanent Forest Reserves (PFR) (1.2) and the issuance of logging permits for all source types (1.4).
- management and harvest planning requirements are not followed (1.3).

For **Taxes and Fees**, there is a risk that:

- logs lack the legally required property hammer mark and removal pass (1.5).
- the volume of timber harvested and stamped is greater than the volume represented by the royalties paid (1.5).
- goods and service tax (GST) is not paid (1.6).
- tax is evaded or payable amounts are illegally manipulated (1.7).

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

- mapping and harvest planning requirements for PFR, including that for preparing harvest plans, are not followed (1.8).
- national parks are (illegally) harvested (1.9)
- Environmental Impact Statements (EIAs) are not conducted (1.10).
- health and safety requirements, such as the provision personal protective equipment and first aid kits, are not followed (1.11).
- the 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 and unfair dismissal) (1.12)

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

- Native Customary Rights related to land tenure are violated during the gazettal of land and tenure is disputed (1.13, 1.15)

- consultation is not conducted, and free prior and informed consent is not obtained from local indigenous communities, prior to gazettal/harvesting (1.14)

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

- timber species are incorrectly classified to avoid paying royalties and harvesting fees (1.16).
- timber species are substituted during transport due to the lack of information in the documents that are carried during transportation as well as a poor traceability system (1.17).
- transfer pricing occurs (1.18).
- fraudulent CITES permits are used (1.20).

Timber source types and risks

There are five timber source types found in Sarawak. 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. We have analysed the risks for all five of these source types and found that if legislation is in place for the specific source type, the risk is the same.

Natural forest in *Permanent Forest Reserve* not being cleared for plantation/other land use

Natural forest in Permanent Forest Reserve that is being managed as a natural forest (i.e. it is regenerated after harvest) and not for clearance/conversion.

Natural forest in *Permanent Forest Reserve* being cleared for plantation/other land use

Natural forest in Permanent Forest Reserve being cleared as part of a timber plantation concession (i.e. concession for the clearance of natural forest for conversion to monoculture timber plantations).

Plantation in *Permanent Forest Reserve*

Timber plantation (e.g. Acacia, Eucalyptus, Latex Timber Clones Rubberwood) in forest reserves.

State land and Alienated land

Clearance of natural forest on state land where private companies 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) and on alienated land (which almost always results in the forest being cleared for non-forest use such as agriculture).

Timber plantations on state and alienated land (rare). Sometimes timber plantations established on forest reserves

are later excised to state land, and on alienated land, this land is usually more profitably used for growing oil palm or rubber, not trees for timber.

**Agricultural land
(primarily rubberwood)**

Timber from private "agricultural" estates on alienated land. 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).

Timber from agriculture on stateland includes rubberwood harvested from rubber plantations

Very rarely, 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 for other agricultural land

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

Legal Category	Sub-category	Source Type			
		Permanent Forest Reserve	State Land	Alienated land	Agricultural land
Legal rights to harvest	1.1 Land tenure and management rights	Specified	Specified	Specified	Specified
	1.2 Concession licenses	Specified		N/A	N/A
	1.3 Management and harvesting planning	Specified	N/A	N/A	N/A
	1.4 Harvesting permits	Specified	N/A	N/A	N/A
Taxes and fees	1.5 Payment of royalties and harvesting fees	Specified	N/A	N/A	N/A
	1.6 Value added taxes and other sales taxes	Specified	Specified	Specified	Specified
	1.7 Income and profit taxes	Specified	Specified	Specified	Specified
Timber harvesting activities	1.8 Timber harvesting regulations	Specified	Specified	Specified	Specified
	1.9 Protected sites and species	Specified	Specified	Specified	Specified
	1.10 Environmental requirements	Specified	Specified	Specified	Specified
	1.11 Health and safety	Specified	Specified	Specified	Specified
	1.12 Legal employment	Specified	Specified	Specified	Specified
Third parties' rights	1.13 Customary rights	Specified	Specified	Specified	Specified
	1.14 Free prior and informed consent	N/A	Specified	N/A	N/A
	1.15 Indigenous/traditional peoples rights	Specified	Specified	Specified	Specified
Trade and transport	1.16 Classification of species, quantities, qualities	Specified	Specified	Specified	Specified
	1.17 Trade and transport	Specified	Specified	Specified	Specified
	1.18 Offshore trading and transfer pricing	Specified	Specified	Specified	Specified
	1.19 Custom regulations	Specified	Specified	Specified	Specified
	1.20 CITES	Specified	Specified	Specified	Specified
	1.21 Legislation requiring due diligence/due care procedures	N/A	N/A	N/A	N/A

C. Overview of the forest sector in Malaysia - Sarawak

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 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/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;
- 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;
- 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>
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- 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

- Forest Ordinance. Available at: http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- Forest Rules 1962. Available at: http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf
- Land Code 1958 (Chapter 8). Available at: <http://faolex.fao.org/docs/pdf/mal134804.pdf>
- Native Courts Ordinance, 1992
- Native Courts Rules, 1993

1.1.2. Legal authority

- Forest Department Sarawak
- Land and Survey Department, Sarawak

1.1.3. Legally required documents or records

- Forest timber license
- Civil court decision on legal or customary tenure or use right
- Contract agreement with local communities with use rights for use of land
- Native court decision records

1.1.4. Sources of information

Non-Government sources

- Colchester, M., Pang, W. A., Chuo, W. M., & Jalong, T. 2007. Land is Life: Land Rights and Oil Palm Development in Sarawak. Forest Peoples Programme and Perkumpulan Sawit Watch.

- Environment News Service. 2014. Sarawaks new chief minister takes on corrupt timber tycoons: <http://ens-newswire.com/2014/11/18/sarawaks-new-chief-minister-takes-on-corrupt-timber-tycoons/>
- Global Witness (2013). *Inside Malaysia's Shadow State*. Available at <https://www.globalwitness.org/campaigns/forests/inside-malysias-shadow-state/>.
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- Suara Sarawak. 2014: Sarawak gov't suffers 10 defeats in NCR land cases: <http://www.barubian.net/2014/04/sarawak-govt-suffers-10-defeats-in-ncr.html>.
- Transparency International, (2017). Corruption Perception Index 2016. Available at: <https://www.transparency.org/country/MYS>. [Accessed 5 February 2018].

1.1.5. Risk determination

Overview of Legal Requirements

The land tenure system in Sarawak encompasses both formal titles in the Torrens system as well as informal titles derived from customary laws. Consequently, one system is based on "adat" (customary), subsistence land use and traditional farming systems, while the other allows for commercial large-scale agriculture (Ngidang, 2005).

Land ownership is legally prescribed under the Land Code for Native Customary Land on State Land and Alienated Land; and subsequently as prescribed under Forest Ordinance 1958 for Forest Reserve, Protected Forest and Communal Forest. Following the Sarawak Land Code 1958, there exist six categories of land in Sarawak:

- Mixed Zone Lands – located along the coast line. Privately held land. Land markets can freely operate and land can be owned by Malaysians as well as foreigners.

- Native Land Areas – close to the coast, restrained land markets where individual titling is encouraged. Available to indigenous people of Sarawak (natives or Dayak) only.
- Native Communal Reserves (NCR) – declared by the government, regulated by customary law
- Native Customary Lands – Ruled by local customary practices (adat), but subject to the legal interpretation of Native Customary Rights.
- Interior Area Lands – Designated over areas where rights/uses are yet to be defined.
- Reserved Lands – Gazetted land for special purposes (Colchester et al, 2007, pp. 12-13)

All registry numbers for Alienated Land are recorded in a publicly available land registry under the survey department.

There are no official native rights to the Permanent Reserved Forest areas. Any former Native Customary Rights (NCR) should have been compensated.

Before gazettal of a forest area, any native communities' claims are to be included and considered. If no claims are being made the process of allocation will proceed. In Sarawak, state land areas subject to NCR are excluded from the licensed area. However, these areas may be allowed to be harvested with prior consent of the NCR land owners and subsequent approval of the Director of Forests. NCR rights are not registered and there is no title.

The Forest Ordinance provides for traditional uses in Part IV. It allows that following a request from a community, the State can constitute any State land as a Communal Forest (CF).

Description of Risk

There is a risk of corruption and nepotism in the allocation of ownership rights:

- Much of Sarawak's land has been in private hands for decades. Alienated Land is land that has been transferred from Government to private ownership, with reports of companies getting the land cheaply due to corruption/nepotism (Sarawak Report, 2015). These reports have been linked to the former Prime Minister. A new Sarawak Chief Minister was appointed in early 2015, and has started initiatives to clamp down on corruption in the forest sector (Environmental News Service, 2014). However, whether the initiatives are successful in halting corruption is still to be demonstrated.
- Lim (2013) states that "there is still a very high level of perceived corruption in Malaysia – especially related to the granting of land concessions by state governments. Numerous studies suggest that the main beneficiaries of concessions are politicians associated with state executives, their relatives, proxies, cronies and businessmen. There have been extensive allegations of corruption against the chief ministers of Sabah and Sarawak in the form of kickbacks and cronyism connected with the clearance of natural forest for plantations."

There is a risk of insecure land tenure related to the allocation of Native Customary Rights (NCR):

- Allegations of NCR breaches in the allocation of leases over forestland have been the most contentious issue in plantation development in Malaysia for the last 20 years. Though federal and state laws enshrine the rights of local people to the land on which

they have traditionally depended, affected communities and nongovernmental organizations claim that these rights have been almost universally abused in the issuance of logging and plantation licenses. NCR conflicts are a feature in almost every new plantation project in Malaysia, with the situation being particularly serious in Sarawak (Lim, 2013).

- Despite the requirement that communities be provided with the opportunity to raise their claim to an area to be gazetted, the process of gazettal might however be made public with a discreet notice that is not read by communities, with no claims therefore raised. Thus, tenure rights disputes between forest enterprises and local communities still occur after gazettal of a forest area.
- Many legal cases are currently in court: in Spring 2014 more than 300 NCR land cases were pending in High Court; and ten cases had in April 2014 been settled in favour of the native people (Suara Sarawak, 2014).
- Sarawak and its former Chief Minister and current governor, Abdul Taib Mahmud, are notorious for a high level of corruption in the logging- and palm oil industry (Global Witness, 2013).
- 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.
- Sarawak is perhaps the state with most media-attention in relation to corruption (Global Witness, 2013; Transparency International, 2016). Corruption in the country is especially related to the granting of land concessions by state governments (Lim, 2013).
- The complex nature of land tenure in Sarawak and the high level of corruption has made NCR breaches one of the most prominent issues in Malaysia for many years. The apparently wide gap between customary rights as conceived by the native peoples and the 'Native Customary Rights' as interpreted by the Government regarding the Land Code, has led to numerous land disputes many of which have been referred to the courts (Colchester et al., 2007).
- Lim (2013) has reported that over 200 cases of breaches of NCR rights were pending in Sarawak alone (p. 25). New cases are being filed faster than current cases are resolved. Of the 200 cases, 70 were related to plantation development and a vast majority of these were related to palm oil (Lim, 2013). While the current trend is to rule in favour of the plaintiffs, some cases are currently more than a decade old and as such time intensive. Hence, there is a wide array of risks related to land tenure, mainly caused by the complex nature of the tenure system, NCR claims, the amendments to the SCL and the notorious high-level corruption surrounding the Chief Minister and his family.
- According to the Sarawak Report (2016), 'What we have seen in Sarawak, time and again, is the muscling of native peoples out of their land rights by brute force, backed by corrupt political figures and agencies such as the police.'

- According to a report from Earthsight in October 2017, since 2010, Shin Yang and other timber companies operating in Sarawak have been linked to corruption and malpractice. In 2013, a local community took Shin Yang to court for not obtaining consent before it began logging on its turf (Mongabay 2017).

As the issue is lack of gazettal of land, this issue relates to all sources of timber.

Due to the historically high level of cases of corruption, as well as a high level of tenure dispute with native communities, 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.

1.1.6. Risk designation and specification

Specified

1.1.7. Control measures and verifiers

- Confirm land registry ownership and validity of property deed.
- Confirm that land tenure rights are clear through consultation with neighbours, local communities and others.
- Confirm that registration of FME has been granted following legally prescribed processes through stakeholder consultation.
- Confirm that legal status of the operation or rights for conducting the established activities are not subject to court orders or other legally established decisions to cease operations through stakeholders consultation.

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 Ordinance. Available at: http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- Sarawak Procedures for the Inspection of Harvesting Areas 1999
- Sarawak Instructions for the Inspection of Logging Areas 1982

1.2.2. Legal authority

- Forest Department Sarawak

1.2.3. Legally required documents or records

- Concession permits

1.2.4. Sources of information

Non-Government sources

- Daily Express (2015) Sarawak Assembly approves Forests Bill, Available at: <http://www.dailyexpress.com.my/news.cfm?NewsID=99207>
- Global Witness (2013). Inside Malaysia's Shadow State. Available at <https://www.globalwitness.org/campaigns/forests/inside-malaysias-shadow-state/>.
- Global Witness (2013). Inside Malaysia's Shadow State. Available at <https://www.globalwitness.org/campaigns/forests/inside-malaysias-shadow-state/>.
- NEPCon expert consultation 2015-2017, personal communication.
- Report-Sarawak Timber Concession System. http://studentsrepo.um.edu.my/2370/6/BAB_3.pdf
- 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/>
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- Sarawak Report, (2016). Familiar Story Plays Out Against the Native Landowners of West Malaysia. Available at: <http://www.sarawakreport.org/2016/09/familiar-story-plays-out-against-the-native-landowners-of-west-malaysia/>.
- Suara Sarawak, (2014): Sarawak gov't suffers 10 defeats in NCR land cases. Available at <http://www.barubian.net/2014/04/sarawak-govt-suffers-10-defeats-in-ncr.html>.
- The Borneo Post, (2015) Forests Bill 2015 to better regulate state's timber industry, Available at: <http://www.theborneopost.com/2015/04/23/forests-bill-2015-to-better-regulate-states-timber-industry/>
- The Star (2014). Adenan shows the way. Available online at <https://www.thestar.com.my/opinion/columnists/along-the-watchtower/2014/11/19/adenan-shows-the-way/> accessed 6 April 2018.
- The Star Online, (2017). All timber concessions in Sarawak will need forest management certification. Available at: <https://www.thestar.com.my/news/nation/2017/11/07/all-timber-concessions-in-sarawak-will-need-forest-management-certification/>.

1.2.5. Risk determination

Overview of Legal Requirements

Licenses can only be awarded on Permanent Reserved Forest (PRF) (section 49 of the Forest Ordinance) or State Land (s 50-51 of the same). According to Section 51 and 51A of Forest Ordinance (Chapter 126), the Ministry of Planning and Resource Management has absolute power to issue and retract timber licenses on State Land, but such licenses shall only be valid for one year, unless express permission by the Minister has been given for a longer license period.

The Director of the Sarawak Forestry Department has the power to issue licenses and permits under conditions as he deems appropriate.

A new Directive by the Chief Minister of Sarawak is to be implemented. Under the new directive, long-term timber concessions (up to 60 years) would be considered by the Sarawak State Government for those license operators/holders who obtain internationally recognized Sustainable Forest Management (SFM) certification within three years of the date of issuance of their license. Presently, timber concessions are issued for a period between 5–10 years in the PRF. One FME that has already been certified has been awarded the extended lease (NEPCon expert consultation 2015, Personal Communication 3).

Description of Risk

There is a risk that concession licenses are issued illegally and the allocation process is widely reported to be at risk of corruption:

- There are reports describing concession permits being issued associated with high level corruption (nepotism/cronyism) during the administration of the previous Chief Minister; although such cases were not proven in court (Sarawak Report 2012; Global Witness 2013).
- A new Sarawak Chief Minister was appointed in early 2015, and has started initiatives to clamp down on corruption in the forest sector. However, whether the initiatives are successful in halting corruption is still to be demonstrated. The new Forest Bill, still to be implemented, states that "The taking of forest produce from permanent forests and Alienated Land in Sarawak shall be controlled and regulated by the director of forests who may issue such licences in such form and under such terms and conditions as he may determine". Thus, it is still possible that nepotism and cronyism will occur, with no guarantee of transparency of the licensing process.
- Despite the requirement that communities be provided with the opportunity to raise their claim to an area to be gazetted, the process of gazettal might however be made public with a discreet notice that is not read by communities, with no claims therefore raised. Thus, tenure rights disputes between forest enterprises and local communities still occur after gazettal of a forest area. Many legal cases are currently in court; in Spring 2014 more than 300 NCR land cases were pending in the High Court; and ten cases had in April 2014 been settled in favour of the native people (Suara Sarawak, 2014).
- According to the Sarawak Report (2016), 'What we have seen in Sarawak, time and again, is the muscling of native peoples out of their land rights by brute force, backed by corrupt political figures and agencies such as the police.' This demonstrates a risk that the licensing process is not conducted according to the law.

- In 2014, Sarawak swore in a new chief minister, Tan Sri Adenan Satem. After entering office, Mr Adenan declared that his government would not issue any new timber concession licences, would not approve expansion of palm oil plantations, and would combat timber sector corruption "to the last log". Consistent with these commitments, he challenged Sarawak's biggest logging firms to sign "integrity pledges" against corruption (The Star 2014). According to the Straits Times (2016), despite these promises, the Chief Ministers office has failed to investigate and prosecute the palm oil company BLD for destroying peatlands on a 20,000ha concession in the Sibu region of Sarawak. The concession includes lands claimed by indigenous communities.
- Regarding Sarawak's "Big Six" logging companies - Samling, Shin Yang, Rimbunan Hijau, Ta Ann, WTK and KTS - which already hold licences to log most of Sarawak's remaining rainforest, Adenan has promised repeatedly that these firms would not be exempt from his promised crackdown on illegal logging.
- In 2015, Adenan announced that these firms must get their logging operations certified for sustainability by 2017. In November 2017, the Deputy Chief Minister reiterated this commitment, stating that the Sarawak government will make it mandatory for all timber concessions in the state to get forest management certification at conference in Kuching. He stated that this requirement would be implemented in phases to boost sustainable forest management in Sarawak. He did not give a timeframe for this (the Star Online, 2017). It is not clear from the publicly available information why the 2017 deadline for certification was not maintained. This clear government recognition of the issues associated with the allocation of concession in Sarawak, and the requirement that all concessions are certified is a strong indication of the risks associated with this indicator. As the government has not upheld their certification requirements (the initial deadline has now passed), it indicates that the historical issues with concession licensing in Sarawak have not been fully resolved.

Due to the historically high level of cases of corruption, as well as a high level of tenure dispute with native communities, the risk is considered Specified for the PRF and State Land.

As Concession Licenses are only available for the PRF and State Land, this indicator is not applicable to Alienated Land and Agricultural Land.

Risk conclusion

'Specified risk' for the Permanent Reserved Forest (PRF) and State Land (SL). Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

Not Applicable for Alienated Land and Agricultural Land.

1.2.6. Risk designation and specification

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

and

Not Applicable for Alienated Land and Agricultural Land.

1.2.7. Control measures and verifiers

- There shall be no major claims by Natives on customary rights within the concession area (can be verified at the High Court of Sarawak)

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

- Forest Ordinance. Available at: http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- Forest Rules 1962. Available at: http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf
- Sarawak Procedures for the Inspection of Harvesting Areas 1999
- Sarawak Instructions for the Inspection of Logging Areas 1982

1.3.2. Legal authority

- Forest Departments Sarawak
- Sarawak Forestry Corporation

1.3.3. Legally required documents or records

- Approved Forest Management Plan
- Approved General Harvesting Plan
- Approved Detailed Harvesting Plan

1.3.4. Sources of information

Government sources

- Sarawak Forestry Corporation (SFC) N.Y: Sustainable forest management: <http://www.sarawakforestry.com/htm/sustainable.html>

Non-government sources

- Borneo Post, (2016). Sarawak State Government is committed to combat illegal Logging. Available at: <http://www.theborneopost.com/2016/03/03/sarawak-state-government-is-committed-to-combat-illegal-logging/>.
- Borneo Post, (2017). Transparency in illegal Logging. Available at: <http://www.theborneopost.com/2017/10/27/transparency-in-illegal-logging/>.
- John C. Cannon, (2017). Leading US plywood firm linked to alleged destruction, rights violations in Malaysia, Mongabay Available at: <https://news.mongabay.com/2017/10/leading-us-plywood-firm-linked-to-alleged-destruction-rights-violations-in-malaysia/>.

- NEPCon.org (2015). Sarawak sets out towards forest certification. [online]. Available at: <http://www.nepcon.net/newsroom/sarawak-sets-out-towards-forest-certification>.
- Sarawak Report: <http://www.sarawakreport.org/>
- Star Online, 2014. Adenan Satem warns Sarawak's timber industry. Available at: <https://www.thestar.com.my/news/nation/2014/11/17/adenan-satem-tells-off-sarawak-logging-firms-on-corruption/>
- Transparency International, (2017). Corruption Perception Index 2016. Available at: https://www.transparency.org/news/feature/corruption_perceptions_index_2016 .

1.3.5. Risk determination

Overview of Legal Requirements

According to section 95 of the Sarawak Forest Ordinance, for logging inside the PRF, preparation of management plans, and harvesting plans, must be conducted by concessionaires and approved by the Forestry Department.

The Forest Department Sarawak (FDS) processes and approves the General Harvesting Plan (GP) which shows the layout and size of coupes, harvesting sequence, proposed road networks, camp sites, log dumping points and other general planning for the entire licensed area.

The Sarawak Forestry Corporation (SFC) processes and approves the Detailed Harvesting Plan (DP). The DP contains operational prescriptions at the coupe level, the layout of logging blocks, surveyed road networks, protected or conservation areas as well as the proposed harvesting method. Further pre-harvesting safeguards to ensure compliance with the approved GP and DP are provided by the need for the logging operators to apply for a permit to enter coupe (PEC). The PEC process requires verification of satisfactory ground compliance in terms of coupes and blocks boundary demarcation, preparation of topographical work map, road alignment and construction, tree enumeration before the endorsement of blocks for logging.

Logging activities on SL and AL do not require management or harvesting plans.

Description of Risk

The corruption issue in Sarawak is still reported to be serious, with the likelihood that management and harvest planning requirements are not properly followed (Expert consultation 2015 and see for example Star Online 2014, Borneo Post 2016, Borneo Post 2017 and Mongabay, 2017). Management plans are reportedly rarely prepared and the requirements allegedly not enforced by the Forest Department (Expert consultation 2015). Despite this, the major logging companies in Sarawak have signed the integrity pledge, which describes the requirement for due care to be observed.

In 2015, Adenan (the Chief Minister) announced that these firms must get their logging operations certified for sustainability by 2017. In November 2017, the Deputy Chief Minister reiterated this commitment, stating that the Sarawak government will make it mandatory for all timber concessions in the state to get forest management certification at conference in Kuching. He stated that this requirement would be implemented in phases to boost sustainable forest management in Sarawak. He did not give a timeframe for this

(the Star Online, 2017). It is not clear from the publicly available information why the 2017 deadline for certification was not maintained.

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.

Based on the lack of preparation of management plans in Sarawak to date, the risk is considered specified for Permanent Reserved Forest.

Risk Conclusion

'Specified risk' for the Permanent Reserved Forest (PRF). 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.

Not applicable for State and Alienated Land.

1.3.6. Risk designation and specification

'Specified risk' for the Permanent Reserved Forest (PRF).

Not applicable for State and 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

- Forest Ordinance (Cap 126) - http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
 - Sections 49 (1) Power of the Director to issue a licence or permit in forest reserves and protected forests
 - Section 51: Power of the Director to issue a licence or permit in State land
 - Section 55: Power of the Director to issue a licence under special conditions
 - Section 58: Power of the Director to issue a licence in government reserves
 - Section 59: Power of the Director to issue a licence or permit in Alienated land
 - Section 65B: Power of the Director with the approval of the Minister to issue a licence for the establishment of planted forests.
- Forest Rules 1962. Available at: http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf
- Sarawak Procedures for the Inspection of Harvesting Areas 1999
- Sarawak Instructions for the Inspection of Logging Areas 1982

1.4.2. Legal authority

- Forest Department Sarawak
- Sarawak Forestry Corporation

1.4.3. Legally required documents or records

- Permit to Enter Coupe (PEC)

1.4.4. Sources of information

Government sources

- Sarawak Forestry Corporation (SFC): Sustainable forest management:
<http://www.sarawakforestry.com/htm/sustainable.html>

Non-government sources

- Global Witness 2013: Inside Malaysia Shadow state:
<https://www.globalwitness.org/campaigns/forests/inside-malaysias-shadow-state/>
- The Star Online, (2015). Listed timber firms not affected by crackdown in Sarawak:
<http://www.thestar.com.my/business/business-news/2015/05/25/listed-timber-firms-not-affected-by-crackdown-in-sarawak/>
- Transparency International, (2017). Corruption Perception Index 2016. Available:
<https://www.transparency.org/country/MYS>. Accessed 5 February 2018.

1.4.5. Risk determination

Overview of Legal Requirements

Under the Forest Ordinance 1958, a person(s) wishing to harvest any timber for commercial purposes must first obtain a license or permit from the Director of Forests. Permits can be given for a period of minimum five years.

Before selective extraction can commence on PRF, the permit holder is to prepare and submit for approval a detailed harvesting plan. The felling permit (commonly known as a Permit to Enter Coupe) is issued and endorsed by the Sarawak Forest Department before harvesting can take place in the approved block, while Sarawak Forestry Corporation (SFC) does the enforcement.

A PEC is not required for logging on SL or AL.

Description of Risk

In Sarawak, there is a risk of corruption in the issuing of harvesting licenses and permits.

- 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 corruption issue in Sarawak is widespread: (Sarawak Report; Global Witness, 2013) the issuance of harvesting permits is not transparent with details allegedly not made public.
- The appointment of permits to several large logging companies with links to top governmental persons is reported to indicate corruption and nepotism/cronyism practices. Chances are the rights to harvest may have been obtained via corrupt practices (Sarawak Report; Global Witness 2013).
- There have been numerous cases and reports by the International NGO Global Witness concerning unlawful harvesting operation occurs outside on areas which have not been approved and encroachment in the national park (Global Witness, 2013).

- The Sarawak state government in 2015 teamed up with the Malaysian Anti-Corruption Commission (MACC) to launch a major crackdown on the state's illegal timber trade and tax evasion that had cost the government billions of ringgits in losses. Termed "Ops Gergaji", the MACC had carried out raids in 49 locations in Sarawak including Kapit, freezing a total of 519 accounts of companies and individuals including a state assemblyman with a total worth of almost RM700 million (The Star Online, 2015).
- Information provided by the Sarawak Forestry Department on infringements is at a very high level (see 2013 Annual Report from the Sarawak Forestry Department, not that this is the most recent Annual Report publicly available). According to that report, in 2013 there were 116 investigations carried, resulting in the seizure of 15.5 thousand logs. It is not clear what the infringements were.
- The general breakdown of law in the forest sector leads to a conclusion of specified risk for PRF based on a precautionary approach.

Risk Conclusion

'Specified risk' for the Permanent Reserved Forest (PRF). Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

Not applicable for State and Alienated Land.

1.4.6. Risk designation and specification

'Specified risk' for the Permanent Reserved Forest (PRF).

Not applicable for State and Alienated Land.

1.4.7. Control measures and verifiers

- The FMU shall have in place approved General Harvesting Plan and Detailed Harvesting
- Plans prior to harvest the FMU shall have a valid permit to enter coupe (PEC).

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 Ordinance, 1954 (Cap. 126)
http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- First Schedule Section 52 (2): Produce Taken Under Licence
- Rates of Royalty and Second Schedule, Section 52(3), Section 52(5), Section 52(5)
- Produce Taken Under Permit, Section 52(4A) (a).
- Forest Premium and CESS under Fourth Schedule of Forest Timber Licence

1.5.2. Legal authority

- Forest Department Sarawak
- Sarawak Forestry Corporation
- State Treasury Department

1.5.3. Legally required documents or records

- Removal Pass (Royalty)
- State Treasury Receipts

1.5.4. Sources of information

Government sources

- Australian Government Department of Agriculture and Water Resources Country specific guideline for Malaysia (Sarawak):
<http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/illegal-logging/malaysia-sarawak.pdf>
- Sarawak Forestry Corporation (SFC): Sustainable forest management:
<http://www.sarawakforestry.com/htm/sustainable.html>

Non-government sources

- Borneo Post, (2016). Sarawak State Government is committed to combat illegal logging[online] Available at: <http://www.theborneopost.com/2016/03/03/sarawak-state-government-is-committed-to-combat-illegal-logging/>, [accessed 8 February 2018].

- Borneo Post, 2014. 869 logs with unpaid royalty seized during sawmill raid[online]. Available at: <http://www.theborneopost.com/2014/05/01/869-logs-with-unpaid-royalty-seized-during-sawmill-raid/>, [Accessed 8 February 2018].
- Goh Pei Pei(2014) RM32m worth of logs seized since Jan-Nov: Adenan Satem.[online] New Straits Times, Available at: <https://www.nst.com.my/news/2015/09/rm32m-worth-logs-seized-jan-nov-adenan-satem>, [accessed 8 February 2017].
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1.5.5. Risk determination

Overview of Legal Requirements

In Sarawak, there are different regulations pertaining to fees and taxes, including those under Forests Ordinance 1954 (Chapter 126, Sections 2 & 5). One deals with forest produce taken under a valid license, while the other pertains to forest produces taken under a valid permit. It also includes a cess payment and a liquidated damages fee.

Statutory charges - Following the issue of a timber harvesting licence, a licensee is required to deposit a security, guarantee or bond with the Government within a specified time as indicated in the licence conditions.

Section 45 (1), 46(1), 47(1), 48(1) and 48(2) of Forests Ordinance, 2015 (Cap 71) requires a licensee to pay royalties, premiums and fees payable to the State Government for timber harvested from the licenced area (Australian Government Department of Agriculture and Water Resources, 2017).

A licensee must apply for royalty assessment of their logs at the Forest Checking Station by submitting their Log Specification Form, Log Specification Summary and DPR (Daily Production Return). SFC will conduct the royalty assessment of the logs by embossing the Government hammer mark 'JH' (which stands for Jabatan Hutan / Forest Department) at both ends of the logs.

At the Forest Checking Station, Sarawak Forestry Corporation (SFC) will issue the Removal Pass (royalty) for timber that has been assessed for royalty and dues paid to Government.

Bills issued by SFC. Royalty and premium paid to State Treasury Department. No logs can be transported until both procedures are completed.

All local sources of timber must pay royalties except rubberwood.

Description of Risk

There is general risk of logs being illegally felled, transported, traded and exported in Sarawak.

There is risk that the timber does not have the property hammer mark and removal pass, this indicates that royalties are not being paid. Even where hammer marks and removal passes are in place, the risk of corruption on Sarawak means that the authenticity of documents produced is questionable.

- The Sarawak state government in 2015 teamed up with the Malaysian Anti-Corruption Commission (MACC) to launch a major crackdown on the state's illegal timber trade and tax evasion that had cost the government billions of ringgits in losses. Termed

“Ops Gergaji”, the MACC had last week carried out raids in 49 locations in Sarawak including Kapit, freezing a total of 519 accounts of companies and individuals including a state assemblyman with a total worth of almost RM700 million (The Star Online, 2015).

- In response to the crackdown described in the previous point, AmResearch pointed out that a short-term pain was likely for the players due to stricter enforcement of regulations, including the new marking requirements at harvest points (Star Online 2015).
- In December 2014, the New Straits Times reported that over the course of 2014, a total of 65,000 cubic meter logs worth RM32 million were seized by the forestry department. State forestry director Sapuan Ahmad said that there had been 76 cases over the year classified as tax avoidance.
- In May 2014, the Borneo Post published a story of 869 logs with unpaid royalty seized during sawmill raid. The article goes on ‘Sapuan said among actions to be taken included slapping high compounds to those found guilty. The department would not hesitate to suspend the licence of any sawmills found to be processing timber logs without royalty being evaluated through the proper process and procedures’.
- In March 2016, the Borneo Post published a statement from the Chief Minister Datuk Patinggi Tan Sri Adenan Satem which said (amongst other things):
- “Since 2014, the State Government has stepped up its efforts to combat illegal logging in Sarawak. Illegal logging has many negative impacts on the economy, environment and society. It contributes to environmental degradation which leads to biodiversity loss, destruction of habitats for animals and deforestation. Besides causing the state losses in millions of ringgit in terms of timber royalties, illegal logging damages the environment and tarnishes the state’s reputation and image.
- [...] The establishment of ‘One Stop Compliance Centre’ (OSCC) to bring enforcement of compliance particularly assessment of royalty to the forest as close as possible to the felling site. A total of 48 OSCCs will be established throughout Sarawak in 2016.”
- The increase in the royalty rate applicable in Sarawak was met with significant opposition from the timber sector. The Borneo Post reported that ‘negative for earnings of timber players such as Ta Ann Holding Bhd (Ta Ann)’ (May 2017).
- The government of Sarawak has invested significant amounts into improving the legality and credibility of the timber sector in Sarawak. This includes investing heavily in improvements to the monitoring and enforcement of all legal requirements. While these activities have certainly reduced the risk of non-compliance and/or increased the likelihood of effective enforcement, the experts who developed this assessment do not consider the risks to be low now.

The risk is considered specified for all sources.

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.

1.5.6. Risk designation and specification

Specified risk

1.5.7. Control measures and verifiers

- Timber shall be marked with the correct hammer markings "JH"
- Removal pass shall be based on Royalty Payment and it shall be possible to cross check hammer markings

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

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

- Sarawak Forestry Corporation (SFC) ,[online], Available at: <https://www.sarawakforestry.com/about/>
- Sarawak Forestry Department (SFD) [online], Available at: <http://www.forestry.sarawak.gov.my/> GST industry guide on forestry,[online], Available at: http://www.forest.sabah.gov.my/media-centre/rapid-info/guidelines/450-gst-forestry?sfd_subsites=&Submit=Go!
- 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)

Non-Government sources

- New Straits Times, 2017: <https://www.nst.com.my/news/2016/07/159375/2621-companies-fail-comply-gst-act>

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 Sarawak, 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 effects 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.
- In Sarawak, the risks of bribery and corruption are particularly acute, and may impact the compliance and enforcement of the GST requirements further in that state. Representative from the Malaysian Anti-Corruption Commission (MACC) acknowledges the occurrence of bribery, illegal logging and tax evasion by timber companies in Sarawak, leading to billions of ringgits in losses to the federal government and Sarawak state government (Malay Mail Online, 2015).
- In May 2015, the MACC froze over RM560 million in over 370 bank accounts and seized 500 timber logs in a massive raid in Sarawak to counter illegal logging (Malay Mail Online, 2015).
- Given the general lack of GST readiness reported by the NST, and the specific corruption issues in Sarawak, a precautionary approach has been taken to the evaluation of this indicator, and it is considered 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.

1.6.6. 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/ministryprofile/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 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; 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

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<https://www.sciencedirect.com/science/article/pii/S1877042814058832>
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<https://www.globalwitness.org/campaigns/forests/inside-malaysias-shadow-state/>.
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<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>

- Sarawak Report 2015: Tufail Mahmud. How I evaded tax on my secret timber concession, [online], Available at: <http://www.sarawakreport.org/2015/01/tufail-mahmud-how-i-evaded-tax-on-my-secret-timber-concession/>
- 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 . [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).

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).
- 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).
- 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

In addition, there have been reports of forestry enterprises evading tax payments (Sarawak Report; Global Witness 2013). Court cases including one involving the Sarawak Governor Taib Mahmud's brother in Singapore High Court reveals that "transfer pricing," that has been commonplace for the major timber companies in Sarawak, who tend to habitually declare pathetic profits or even losses each year, even though Sarawak is still the largest tropical timber exporter in the world. This practice involves selling timber cheaply to a so-called broker agent that is secretly owned by the timber enterprise itself before invoicing end buyers in countries like China and Japan for large profits (Sarawak Report, 2015).

Based on the reports of tax evasion, the risk is considered specified for all timber sources.

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

Specified risk

1.7.7. Control measures and verifiers

- Consultation with financial authority to verify that all required income and profit taxes have been paid

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

- Procedures on Reduced and Low Impact Harvesting Systems 1999, Sarawak
- Basic Chainsaw Maintenance and Directional Tree Felling 2001, Sarawak
- Forest Rules 1962, Rule 10 and 19
- Protection of Soil and Water, 1999
- The Manual of Silviculture for the Permanent Forest Estate of Sarawak, 1999
- Guidelines for Forest Road Layout and Construction, 1999
- Forests (Planted Forests) Rules 1997
- Forest Ordinance. Available at:
http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- Forest Rules 1962. Available at:
http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf

1.8.2. Legal authority

- Sarawak Forest Department (SFD)
- Sarawak Forestry Corporation

1.8.3. Legally required documents or records

- Approved Detailed Harvesting Plan
- Pre-Felling inspection report
- Enumeration data
- Record of monitoring by SFD
- Record of demarcated boundaries

1.8.4. Sources of Information

Government sources

- sarawakforestry.com (N.Y.) Sarawak Forestry Corporation (SFC). [online]. Available at:
<http://www.sarawakforestry.com/htm/sustainable.html>

- forestry.sarawak.gov.my (N.Y.) Sarawak Forestry Department (SFD). [online]. Available at: <http://www.forestry.sarawak.gov.my/>

Non-government Sources

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- Transparency International, (2017). Corruption Perception Index 2016. Available at: https://www.transparency.org/whatwedo/publication/corruption_perceptions_index_2016 .

1.8.5. Risk determination

Overview of legal requirements

In PRF, the Forest Department of Sarawak (FDS) processes and approves the General Harvesting Plan (GP) which show the layout and size of coupes, harvesting sequence, proposed road networks, camp sites, log dumping point and other general planning.

In PRF, the Sarawak Forestry Corporation (SFC) processes and approves the Detailed Harvesting Plan (DP) which contains operations prescriptions at coupe level, the layout of logging blocks, surveyed road networks, protected or conservation areas as well as the proposed harvesting methods. Further pre-harvesting safeguards to ensure compliance with the approved GP and DP are provided by the need for logging operators to apply for a permit to enter coupe (PEC). The PEC process requires verification of satisfactory ground compliance in terms of coupes and block boundary demarcation, preparation of topographical work map, road alignment and construction, tree enumeration before endorsement of blocks for logging in PF.

There is a requirement for boundary demarcation by licensee and checking by SFC as follows: -

- Under-brushing of boundary
- Marking of selected trees along boundary

Numeration is done by licensee and checked by Sarawak Forestry Corporation. For certified areas, a 100% tree tagging for trees to be harvested are to be carried out (PF). For non-certified areas, the standard 10% enumeration is carried out.

Enumeration is not applicable to planted forest or for logging on SL or AL. No tree tagging is required SL and AL, only hammer mark is required on the harvested log (Expert consultation, personal communication 2).

SFC checks that harvesting operations have taken place within approved areas in compliance with the Forest Timber Licence terms and conditions and that the licensees use only approved LPI numbers. SFC checks and verifies the DPR information and uploads this to the Log Tracking System (Lots).

Description of risk

- Despite legal prescriptions for GP, DP and mapping of planned harvest areas, this information is not made publicly available. The limited availability of information about compliance levels makes the evaluation of the risk of non-conformance with these requirements difficult.
- In 2014, Sarawak swore in a new chief minister, Tan Sri Adenan Satem. After entering office, Mr Adenan declared that his government would not issue any new timber concession licences, would not approve expansion of palm oil plantations, and would combat timber sector corruption "to the last log". Consistent with these commitments, he challenged Sarawak's biggest logging firms to sign "integrity pledges" against corruption. According to the Straits Times (2016), despite these promises, the Chief Ministers office has failed to investigate and prosecute the palm oil company BLD for destroying peatlands on a 20,000ha concession in the Sibul region of Sarawak. The concession includes lands claimed by indigenous communities.
- Regarding Sarawak's "Big Six" logging companies - Samling, Shin Yang, Rimbunan Hijau, Ta Ann, WTK and KTS - which already hold licences to log most of Sarawak's remaining rainforest, Adenan has promised repeatedly that these firms would not be exempt from his promised crackdown on illegal logging.
- In 2015, Adenan announced that these firms must get their logging operations certified for sustainability by 2017. In November 2017, the Deputy Chief Minister reiterated this commitment, stating that the Sarawak government will make it mandatory for all timber concessions in the state to get forest management certification at conference in Kuching. He stated that this requirement would be implemented in phases to boost sustainable forest management in Sarawak. He did not give a timeframe for this (the Star Online, 2017). It is not clear from the publicly available information why the 2017 deadline for certification was not maintained.

There is a lack of information available at the time of preparing this report to indicate a low risk in this indicator for Sarawak. The introduction and requirement for certification might lower this risk in the future, by introducing best practices and regular harvesting controls, but to date no results has been provided. Thus, based on the precautionary approach, the risk is considered 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.

1.8.6. Risk designation and specification

Specified risk

1.8.7. Control measures and verifiers

- The FMU shall have in place approved General Harvesting Plan and Detailed Harvesting Plans
- Prior to harvest the FMU shall have a valid permit to enter coupe (PEC).
- There shall be evidence that the requirements of the General Harvesting Plan and the Detailed Harvesting Plan (DP) are being followed in the forest, including : layout of logging blocks, surveyed road networks, protected or conservation areas as well as the proposed harvesting methods.

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

- National Parks and Nature Reserves Ordinance 1998 (Cap. 27). Available at: http://lawnet.sarawak.gov.my/lawnet_file/Ordinance/ORD_CAP.%2027%20watermark.pdf
- Wildlife Protection Ordinance 1998 (Cap. 26 . Available at: http://www.sarawakforestry.com/pdf/laws/wildlife_protection_ordinance98_chap26.pdf
- National Parks & Nature Reserves Regulations 1998. Available at: http://lawnet.sarawak.gov.my/lawnet_file/Ordinance/ORD_CAP.%2027%20watermark.pdf

1.9.2. Legal authority

- Sarawak Department of Environment (DOE): enforces the Environmental Quality Act 1974.
- Sarawak 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).
- Department of Fisheries Malaysia (DOF): enforces Fisheries Act 1985 (Act 317).
- Forest Department Sarawak: is responsible for enforcing the Forest Bill 2015.
- Sarawak Forestry Corporation: is empowered under the Sarawak Forestry Corporation Ordinance 1995 (Sarawak Cap. 17/95) to enforce the Forest Bill 2015, Wildlife Protection Ordinance and National Parks & Nature Reserves Ordinance on the ground. It also includes regulation, inspection and issuance of permits and certificates in line

with CITES, with notable enforcement successes in terms of seizures of illegal timber and wildlife.

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

1.9.4. Sources of Information

Government sources

- sarawakforestry.com (N.Y.) Sarawak Forestry Corporation (Protected Areas and Biodiversity Conservation units). [online]. Available at: <http://www.sarawakforestry.com/htm/sustainable.html>
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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. According to Ministry of Natural Resources and Environment (NRE), Malaysia has 3,400,000 ha of terrestrial protected areas (PAs) which is approximately 10% of the land base (UNDP, 2013). Timber harvesting and hunting is prohibited in these areas.

In Sarawak, protected areas are referred to as “Totally Protected Areas” (TPAs). These are comprised by 30 national parks, six wildlife sanctuaries and eight nature reserves. According to the Sarawak Forestry Corporation, TPAs encompass 602,035.8 ha of land, not including 229,789 ha of protected bodies of water (JI, 2015). This is less than 5% of the total land area of the state.

The Wildlife Protection Ordinance, 1998 aims to provide better provisions for the protection of wild life, the establishment and management of Wildlife Sanctuaries and all matters related. This Ordinance states the banning all commercial sales of wildlife and any products derived from wildlife. It provides the protection for both plants and animals as well as the protection of the habitat of plants and animals within the Wildlife Sanctuaries which are part of the Totally Protected Areas network (TPAs) in the State. The areas which included in the Ordinance are only open for the purpose of conservation and research of

wild life. Under this Ordinance, the "Wildlife" term refers to wild plants and animals and they are categorised as "Totally Protected" or "Protected". Totally Protected species refers to endangered species due to hunting, habitat destruction and are extremely rare. No licence is to be issued for the possession of any wild life under "Totally Protected Wildlife", except for certain condition which custodian licence is to be issued to keep the wildlife under strict condition. Under "Protected List Wildlife", licenses to hunt or ownership can be retrieved upon payment with respective amount of fees. As for wildlife which is not listed under "Protected List", a licence is required for the import or export from the State.

Harvesting of timber is prohibited in Totally Protected Areas (TPA) such as National Parks, Nature Reserves and Wildlife Sanctuaries. Written permission from the Controller of Wildlife is required to harvest any 'totally protected plants' for scientific or educational purposes.

For 'protected plants', harvesting is allowed in accordance with the terms and conditions of a license issued by the Controller of Wildlife whether on PF, SL or AL.

Description of Risk

- Logging operations have been detected inside national parks in the past and reported as recent as 2016 (The Borneo Post, 2016). Poor traceability has been demonstrated in the state of Sarawak, and there is a risk that harvested trees are coming from the protected areas.
- There are no descriptions of the requirements for identification of protected sites and species – either physically or on the map, the written permission from the Controller of Wildlife is the only requirement.
- Some forest enterprises may not be familiar with the requirements for endangered, rare and threatened species and protected sites and habitats.
- Accessibility and field monitoring are challenging because most forests are in remote areas. (Personal communication 2 and 7).
- In October 2017, the Borneo Post quoted the Chief Minister in 2015 as saying "*I suspect some enforcement personnel are in cahoots with illegal logging operators as every time enforcement agencies raided illegal logging sites, only logs and machineries were seized while the culprits had fled the scene.*" He backed his suspicion by citing a case of encroachment into the Similajau National Park in Bintulu where illegal logging operators even managed to build a railway system to transport felled timber without the knowledge of Forestry officers.
(<http://www.theborneopost.com/2017/10/27/transparency-in-illegal-logging/>)
- 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)."

- The main legal safeguard for the protection of legally protected species outside of totally protected areas is the requirement for an environmental permit (for which an environmental impact assessment (EIA) and mitigation actions are required) in some situations. Under the Natural Resources and Environment (Prescribed Activities) Order, 1994, agricultural development activities that require an EIA include development of agricultural estates or plantations of an area exceeding 500 hectares from land under primary or secondary forest, which would involve the resettlement of more than 100 families, or which would involve modification in the use of the land, and when mangrove swamps are converted into an agricultural estate. The requirements for an EIA are not detailed, but a section for "Habitat and species" is required under "Biological system".
- There are also serious problems with the EIA system under the law as there is commonly a conflict of interest between the companies and the consultants they hire to do the EIA, and there are also loopholes whereby an 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).
- According to Lim (2013), most forest conversion projects do produce EIAs, and most that are submitted are approved, with mitigation measures prescribed. Given the complexity of the natural ecosystems, environmental consultants have difficulty identifying specific mitigation measures for the protection of certain rare and threatened species in oil palm plantations. 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).

Based on the above risk description, the risk is considered specified for all timber sources.

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.

1.9.6. Risk designation and specification

Specified risk

1.9.7. Control measures and verifiers

- FME shall clearly outline areas allowed for harvesting and avoid harvesting within protected areas.
- All legally protected areas (including species habitats) shall be included in the management plan.
- FME shall identify and record any protected species within the FMU; and where possible to conduct inventory on number of species involved.

- FME shall identify and record protected species fauna and flora in the forest area.
- The FME shall implement protection of the species of fauna and flora in the forest area.

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 1962 - http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf
- Protection of Soil and Water, 1999
- Land Conservation Act 1960, revised 1989 - <http://www.kptg.gov.my/sites/default/files/article/Act%20385-land%20conserve.pdf>
- National Land Code 1965 - <http://www.kptg.gov.my/sites/default/files/article/NLC1956DIGITAL-VER1.pdf>
- Water Act 1920 (Act 418) - <http://faolex.fao.org/docs/texts/mal33533.doc>
- Wildlife Protection Ordinance, 1998 - http://www.sarawakforestry.com/pdf/laws/wildlife_protection_ordinance98_chap26.pdf
- National Parks and Nature Parks Ordinance (Sarawak) 1998 - http://lawnet.sarawak.gov.my/lawnet_file/Ordinance/ORD_CAP.%2027%20watermark.pdf
- Natural Resources and Environment (Prescribed Activities) Order 1994 (Incorporating all amendments up to November 2004) - http://www.nreb.gov.my/modules/web/download_show.php?id=24
- Natural Resources & Environment Ordinance (Cap.84-Laws of Sarawak 1958 ed.) - http://www.nreb.gov.my/modules/web/download_show.php?id=7
- Sarawak Rivers Ordinance, 1993 - http://lawnet.sarawak.gov.my/lawnet_file/Subsidiary/SUB_Swk.%20L.N.%2050_95hwm.pdf
- Water Ordinance, 1994 - http://lawnet.sarawak.gov.my/lawnet_file/Subsidiary/SUB_Swk.%20L.N.%2050_95hwm.pdf
- SARAWAK FORESTRY CORPORATION ORDINANCE, 1995 - http://lawnet.sarawak.gov.my/lawnet_file/Ordinance/ORD_CAP.17hwm.pdf

- Wildlife Conservation Act 2010 - https://www.unodc.org/res/cld/document/wildlife-conservation-act-2010_html/Wildlife_Conservation_Act_2010.pdf

1.10.2. Legal authority

- The Natural Resources and Environment Board (NREB)
- Sarawak Forestry Department (SFD)
- Sarawak Forestry Corporation

1.10.3. Legally required documents or records

- Forest Management Report
- Letter of Approval
- EIA Report - Pursuant to Article 3 of the Natural Resources and Environment (Prescribed Activities) Order 1994, (Sarawak. L.N. 45/94) the EIA report must be prepared by such expert or authority as may be approved by the Natural Resources and Environment Board).
- Environmental Mitigation Measure (EMM) is required for replanting and new planting when ordered by the Environmental Controller of Sarawak.

1.10.4. Sources of information

Government sources

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1.10.5. Risk determination

Overview of Legal Requirements

For all commercial logging (apart from logging of virgin forest) above 500 ha (whether on PF, AL or SL), the licensee is to submit an Environmental Impact Assessment Report – with proposed mitigation measures – to Natural Resources and Environment Board (NREB). NREB approves conditions for environmental management, with environmental requirements outlined in Government guidelines.

In Sarawak, both the Federal and State environmental laws require EIA to be conducted (Emang, 2006). The Federal law is the Environmental Quality Act, 1974 and the State law is the Natural Resources and Environment Order, 1994 (Emang, 2006). The evaluation process for EIA reports at both the Federal Department of Environment (DOE) and the Natural Resources and Environment Board, Sarawak (NREB) is generally similar, but the EIA procedure in Sarawak does not require any public participation (Emang, 2006).

Description of Risk

- The requirement to have an approved EIA was not properly observed in the past. In addition, there is no emphasis on compliance with mitigation measures as approved in the EIA and mostly are considered purely reporting matters. The EIA is not legally required to be made public, and it is thus not known if EIAs are conducted (Personal communication 1, 2, 3).
- The DOE is responsible for enforcing environmental laws to prevent, eliminate, control pollution and improve the environment, but has limited powers to deal with the land planning system which designates where oil palm can be and is grown, 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). Furthermore, the DOE has had limited resources to

undertake its functions (Memon, 2012 and Yaacob & Yusof, 2013), and despite the significant numbers of breaches of environmental law, the proportion of prosecutions or other enforcement action is extremely low (Maidin, 2005). Until 2005 there had only been five reported cases under the heading of environmental law in the law reports in Malaysia (Maidin, 2005). In 2014, Malaysia Federal Court judge Datuk Azhar Mohamed told a UN forum that enforcement agencies in Malaysia “do not have sufficient trained officers and tools, and many cases are not brought before the courts” (AHMAD, 2014).

- Under the Natural Resources and Environment (Prescribed Activities) Order, 1994, agricultural development activities that require an EIA include development of agricultural estates or plantations of an area exceeding 500 hectares from land under primary or secondary forest, which would involve the resettlement of more than 100 families, or which would involve modification in the use of the land, and when mangrove swamps are converted into an agricultural estate that exceeds 50 hectares. There are serious problems with the EIA system under the law as there is commonly a conflict of interest between the companies and the consultants they hire to do the EIA, and because companies can easily break their plantation activities into smaller lots (less than 500ha) to avoid the EIA requirement in the first place (Sharom, 2008). There are also several procedural weaknesses in the EIA system now in place in Sarawak, where the state-level enactments and the NREB have been established 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). Most relevant officials often lack sufficient expertise to vet the Development Proposals and the EIA reports submitted by the applicants seeking for grant of planning permission, and monitoring environmental compliance is lacking due to lack of personnel and increasing numbers of newly approved development projects (Maidin, 2005).

Based on the above risk description, the risk is considered specified for all timber sources.

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.

1.10.6. Risk designation and specification

Specified risk

1.10.7. Control measures and verifiers

- Third part verification of the implementation of the mitigation measures as prescribed in the EIA should be observed on-site and cross-checked.
- Interview with the NREB Environmental controllers shall confirm conformance with EIA.

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. Available at: <http://www.dosh.gov.my/index.php/en/list-of-documents/acts/23-02-occupational-safety-and-health-act-1994-act-514/file>

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.
- Sarawak Forestry Department (SFD)
- Sarawak Forestry Corporation

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
- Work instructions, training, insurance and incident records
- Records of personal accident insurance policies and coverage or Social Security Organisation (SOCSSO)

1.11.4. Sources of information

Government sources

- dosh.gov.my (N.Y.). Department of Occupational Safety and Health Malaysia. [online] Ministry of Human Resources. Available at: <http://www.dosh.gov.my>

Non-Government sources

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- 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.

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.

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.

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

- FME shall observe occupational health and safety requirements by all personnel involved in harvesting and forest management activities: 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.
- Interviews with staff and contractors shall confirm that legally required protection equipment is provided by the FME and used by laborers.

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

- Industrial Relations Act 1967 - Sec.4 and 13
<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/48066/99440/F1841123767/MYS48066.pdf>
- 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&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 Act 1955- Sec.8. Available at:
<http://www.ilo.org/dyn/natlex/docs/WEBTEXT/48055/66265/E55mys01.htm>

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- Minimum Wage Order 2012. Available at: http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=96034&p_country=MY&p_count=199
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- Sarawak Weekly Holidays Ordinance 1951
- 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
- Workers Minimum Housing Standards and Amenities Act 1990 (Act 446)
- Workmen’s Compensation Act 1952. Available at: [http://myhos.mohr.gov.my/eAkta/akta_sosial/Akta%20Pampasan%20Pekerja%](http://myhos.mohr.gov.my/eAkta/akta_sosial/Akta%20Pampasan%20Pekerja%201952.pdf)

1.12.2. Legal authority

- KWSP (Employment Provident Fund - EPF)
- The Ministry of Human Resources (MOHR): Ministry charged with the regulation of wages as well as health and safety standards
- Department of Labour Sarawak:
 - 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>)
- Plantation Industries and Commodities Ministry: The main functions of MPIC are policy and strategy development in the plantation and commodity sector, as well as supervision of relevant government department and agencies regarding finance and implementation.

1.12.3. Legally required documents or records

- Employment records
- Employment providence fund (EPF)
- Payment records
- Employment Contract - Subject to the Sarawak Labour Ordinance 1952 and the Industrial Relations Act 1967, any employer or self-employed person must provide his/her employees with a written contract of employment (unless the duration of the work is less than one month, in which an oral contract will suffice).
- Migrant workers further must have a valid passport, valid visa as well as pass a medical exam prior to employment

1.12.4. Sources of information

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- 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](http://www.business-humanrights.org/en/malaysia-palm-oil-company-pjp-pelita-selangau-denies-exploitation-abuse-of-100-indonesian-workers-in-sarawak)
- 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/)

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. (Liaw 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, physically 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. The risk is considered specified for all timber sources.

- Sarawak is prone to illegal immigration from Indonesia, particularly in areas close to the Kalimantan border. A widely recognized problem is workers from neighbouring countries working illegally, with high staff turnover especially in the forestry sector. These issues are difficult to deal with due to the location of the various work places and low level of enforcement activity by the relevant agencies. FMEs are often located in remote areas where monitoring can be challenging (Personal communication 1, 2).

- State forestry employees are generally well safeguarded regarding labour law (Personal communication 2).
- In Sarawak, the issue of migrant workers is especially pertinent, as Sarawak currently faces a significant shortage of labour (especially in the oil palm industry) (Borneo Post, 2015). Apparently in recognition of a lack of willingness by Malaysian to undertake the dirty, dangerous and difficult (3D) work of oil palm harvesters, Sarawak 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 abuse of foreign workers in Malaysian oil palm plantations have surfaced in the media the last couple of years. An example is the report of abuses of 100 Indonesian workers in Sarawak in June 2015 (Business & Human Rights Resource Centre, 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 Labour to designate palm oil as a product produced by both forced- and child labour (US Department of Labour, 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.

Due to the risks identified above, 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.

1.12.6. Risk designation and specification

Specified risk

1.12.7. Control measures and verifiers

- Review on employment records and relevant documents, as well as interviews with workers, shall confirm evidence of legal employment.

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

- Forest Ordinance. Available at:
http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- Land Acquisition Act 1960 -
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
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[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 Ordinance 1992 -
http://lawnet.sarawak.gov.my/lawnet_file/Ordinance/ORD_CAP.%202022%20watermark.pdf
- Native Court Rules 1993 -
http://www.nativecourt.sarawak.gov.my/modules/web/page.php?id=63&menu_id=113&sub_id=120
- Sarawak Forest Ordinance (Cap. 126) - Part II (Forest reserves), Part III (Protected Forests) and Part IV (Communal Forests)
- Sarawak Land code (Cap. 81) (grants, leases, native customary right and communal reserves) - <https://tiyungdayak.files.wordpress.com/2010/11/land-code-1958.pdf>
- Sarawak Native Court Ordinance 1992
- Sarawak Native Court Rules 1993
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) -
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

1.13.2. Legal authority

- Sarawak Forestry Department (SFD)
- Sarawak Forestry Corporation

1.13.3. Legally required documents or records

- Forest timber license
- Civil court decision on legal or customary tenure or use right

- Contract agreement with local communities with use rights for use of land

1.13.4. Sources of information

Government sources

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- forestry.sarawak.gov.my (N.Y.) Sarawak Forestry Department (SFD). [online]. Available at: <http://www.forestry.sarawak.gov.my/>

Non-government sources

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- Lucas, J. (2013, November 26). Forest people 'disillusioned' in battle to protect land. Retrieved from Thomson Reuters Foundation News: <http://news.trust.org//item/20131126101312-463ag/>
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- Sarawak Gone, undated. Native Customary Rights. Available: <http://www.sarawakgone.cc/issues/ncr/>, accessed 12 February 2018.
- Suara Sarawak 2014: Sarawak gov't suffers 10 defeats in NCR land cases: <http://www.barubian.net/2014/04/sarawak-govt-suffers-10-defeats-in-ncr.html>
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1.13.5. Risk determination

Overview of Legal Requirements

As defined by article 161A of the Constitution, an indigenous person in Sarawak is a person who is born of parents who are both natives. The largest indigenous group is the

Iban (31% of Sarawak's population). Other groups are Bidayuh, Kenyah, Kayan, Kedayan, Murut, Punan, Bisayah, Kelabit, Berawan and Penan (Minority Rights Group International, 2016).

The Sarawak legal system constitutionally upholds and protects the native custom of its indigenous people (Colchester, Jalong, & Chuo, 2013). The village heads (tuai rumah or tua elocat), regional chiefs (penghulu) and paramount chiefs (pemancha and temongong) are not only recognized by the government of Sarawak, they receive compensation for their role in maintaining the rule of law. Despite the provision in the constitution allowing the Federal Government to make laws in an emergency or promote uniformity, the indigenous decision-making process remains protected because it is embedded in native customary practices (Colchester, Jalong, & Chuo, 2013; Bulan, 2010).

Under the Second Schedule of the FTL document, State land areas subject to Native Customary Rights (NCR) are excluded from the licenced area. These areas may be allowed to be harvested with the prior consent of the NCR land owners and subsequent approval of the Director of Forests. This is not applicable to PF or AL as NCR are deemed to have been extinguished on these areas. Under the Forest Ordinance, at the request of a community, the State can constitute any State land as a Communal Forest (CF). The community can take any forest produce from this area for their domestic use. Communities themselves need to apply for allocation of their land as Community Forest. Due to lack of knowledge of the community, this is often not done, which leads to the possibility that forest land will be allocated as forest concession, or converted to agriculture despite communities using the land. Some cultural areas, such as burial sites, are automatically protected by law.

Description of Risk

Although land ownership is legally prescribed and clear, there are issues with Native Customary Rights disputes between forest enterprise/State Government and local community/tribes. Local Indigenous people have constructed blockades against forest enterprises and, similarly, the former have been denied access to their customary lands.

"Allegations of NCR breaches in the allocation of leases over forestland have been the most contentious issue in plantation development in Malaysia for the last 20 years. Though federal and state laws enshrine the rights of local people to the land on which they have traditionally depended, affected communities and nongovernmental organizations claim that these rights have been almost universally abused in the issuance of logging and plantation licenses. NCR conflicts are a feature in almost every new plantation project in Malaysia, with the situation being particularly serious in ... Sarawak" (Forest Trends 2014, p. 52). Despite the requirement that communities be provided with the opportunity to raise their claim to an area to be gazetted, the process of gazettal might however be made public with a discreet notice that is not read by communities, with no claims therefore raised. Thus, tenure rights disputes between forest enterprises and local communities still occur after gazettal of a forest area. Many legal cases are currently in court; in Spring 2014 more than 300 NCR land cases were pending in the High Court; and ten cases had in April 2014 been settled in favour of the native people (Suara Sarawak 2014).

The main risks related to traditional- and indigenous rights are a legal framework that appears incapable of adequately protecting indigenous rights as well as State- and Federal governments, who have used this legal framework systematically to prioritize 'public purpose development' over customary land rights.

Malaysia has not ratified ILO convention 169 on indigenous and tribal peoples and the national legal framework does not adequately cover all rights of indigenes. While a positive development is traceable in the Malaysian court system, this road to justice oftentimes requires vast amounts time and resources not in the possession of all indigenous communities. 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 Sarawak in relation to land tenure is in contradiction with Malaysia's international moral obligations.

While the Sarawak legal system constitutionally upholds and protects the native custom of its indigenous, it is evident that the indigenous peoples of Sarawak suffer from a high level of tenure insecurity as the law also provides incontestable power over land matters to the State authority to promote private land development over NCR rights. This insecurity is mainly caused by the narrow interpretation of NCR by the Sarawak Government and the large land concessions handed over to private enterprises by the government. Land policy in Sarawak is governed by the Sarawak Land Code 1958. The law limits many aspects of NCR land and the amendments made by former Chief Minister and current governor Taib Mahmud have aggressively promoted private investments and large-scale plantations (Colchester, Jalong, & Chuo, 2013). The creation of the Sarawak Land Consolidation and Rehabilitation Authority SALCRA, section 46 of the Land Code as well as amendments made in 1996 and 1998 has provided the state with absolute power to extinguish NCR to promote private development (Colchester, Jalong, & Chuo, 2013; Bulan, 2010). ILO Convention 169 has not been ratified by Malaysia or Sarawak, but the UNDRIP has been adopted.

There is evidence of systematic violations of legal and customary rights of indigenous or traditional peoples. The complex nature of land tenure in Sarawak and the high level of corruption has made NCR breaches one of the most prominent issues in Malaysia for many years. In 2013, Lim (2013) reported that over 200 cases of breaches of NCR rights were pending in Sarawak alone, and cases are being filed faster than they can be resolved (p. 25). Of the 200 cases, 70 were related to plantation development and a clear majority of these were related to oil palm (Lim, 2013). Several of the cases are notable, perhaps the most famous is IOI-Pelita vs. Long Teran Kanan. In 1996, IOI-Pelita, and RSPO member, was granted land to a joint venture in the Tinjar area in northern Sarawak; an area that overlapped with NCR land of the Berawan-, Kayan- and Kenyah communities (Colchester, Jalong, & Chuo, 2013). The court first ruled in favour of the native community, however, this decision was later overturned after an appeal thus leaving the indigenous communities without land after a more than 15 year long legal battle (Lucas, 2013). In general, the disputes between the indigenous groups of Sarawak and the State- and Federal governments have been solved in the courts and the decisions of the courts seems to be respected by both parties, however court cases are generally both protracted and expensive and consequently out of reach for some indigenous groups of Malaysia.

Based on the high number of NCR issues, the risk is considered 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.

1.13.6. Risk designation and specification

Specified risk

1.13.7. Control measures and verifiers

- Records of consultation between the forest enterprise shall be available and interviews with the local indigenous people should be undertaken and verified against the consultation records.
- Maps showing the customary claims shall be available be considered and any claims areas shall be excluded from the harvesting areas.
- Verify whether the claims are genuine and evidence of customary use does exist.

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

- Sarawak Forest Ordinance (Cap. 126) - Part II (Forest reserves), Part III (Protected Forests) and Part IV (Communal Forests)
http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- Sarawak Land code (Cap. 81) (grants, leases, native customary right and communal reserves) <http://faolex.fao.org/docs/pdf/mal134804.p>
- Sarawak Native Court Ordinance 1992
- Sarawak Native Court Rules 1993
- Forest Rules 1962. Available at:
http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf

1.14.2. Legal authority

- Sarawak Forestry Department (SFD)
- Sarawak Forestry Corporation

1.14.3. Legally required documents or records

- Forest timber license
- Civil court decision on legal or customary tenure or use right
- Contract agreement with local communities with use rights for use of land

1.14.4. Sources of information

Government sources

- sarawakforestry.com (N.Y.) Sarawak Forestry Corporation (SFC). [online]. Available at: <http://www.sarawakforestry.com/htm/sustainable.html>
- forestry.sarawak.gov.my (N.Y.) Sarawak Forestry Department (SFD). [online]. Available at: <http://www.forestry.sarawak.gov.my/>

Non-governmental sources

- Expert consultation conducted by NEPCon, 2015
- Global Witness (2013). *Inside Malaysia's Shadow State*. Available at <https://www.globalwitness.org/campaigns/forests/inside-malysias-shadow-state/>.
- Sarawak Gone (N.Y). Native Customary Rights. [Online]. Available at: <http://www.sarawakgone.cc/issues/ncr/>.

1.14.5. Risk determination

Overview of Legal Requirements

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

Under the Second Schedule of the FTL document, State land areas subject to Native Customary Rights (NCR) are excluded from the licenced area. These areas may be allowed to be harvested with the prior consent of the NCR land owners and subsequent approval of the Director of Forests.

This is not applicable to PF or AL as NCR are deemed to have been extinguished on these areas (Sarawak Land Code, Chapter 8).

Description of Risk

Although land ownership is legally prescribed and clear, there are issues with Native Customary Rights disputes between forest enterprise/State Government and local community/tribes (Sarawak Gone (N.Y)). There are known cases whereby the land in dispute between the local indigenous people and the forest enterprise is being harvested without proper consultation taking place.

Free, Prior and Informed Consent (FPIC) is generally poorly understood by forest enterprises and legal requirements do not specifically mention the concept. Proper consultation, which requires the agreement of all the parties involved, is known to be poor considering the many blockades that occur in the State and displacement of local indigenous people from their customary lands (Global Witness 2013).

There is a risk of violation of FPIC by third parties and therefore the risk is considered specified for State Land.

Risk Conclusion

'Specified risk' for 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.

Not applicable for the Permanent Reserved Forest and Alienated Land.

1.14.6. Risk designation and specification

'Specified risk' for State Land.

Not applicable for the Permanent Reserved Forest and Alienated Land.

1.14.7. Control measures and verifiers

- Review FPIC record where prior and informed consent has been made with stakeholders on all NCR land.
- Interviews with all stakeholders to verify that this has been agreed between the management and all applicable stakeholders.

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

- Forest Ordinance. Available at:
http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- Land Acquisition Act 1960 -
<http://www.kptg.gov.my/sites/default/files/article/Act%20486-PENGAMBILAN.pdf>
- Land Code 1958 (Chapter 8). Available at:
<http://faolex.fao.org/docs/pdf/mal134804.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 Ordinance 1992 -
http://lawnet.sarawak.gov.my/lawnet_file/Ordinance/ORD_CAP.%2022%20watermark.pdf
- Native Court Rules 1993 -
http://www.nativecourt.sarawak.gov.my/modules/web/page.php?id=63&menu_id=113&sub_id=120
- Sarawak Forest Ordinance (Cap. 126) - Part II (Forest reserves), Part III (Protected Forests) and Part IV (Communal Forests)
- Sarawak Land code (Cap. 81) (grants, leases, native customary right and communal reserves) - <https://tiyungdayak.files.wordpress.com/2010/11/land-code-1958.pdf>
- Sarawak Native Court Ordinance 1992
- Sarawak Native Court Rules 1993
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) -
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

1.15.2. Legal authority

- Sarawak Forestry Department (SFD)
- Sarawak Forestry Corporation

1.15.3. Legally required documents or records

- Forest timber license
- Civil court decision on legal or customary tenure or use right
- Contract agreement with local communities with use rights for use of land

1.15.4. Sources of information

Government sources

- sarawakforestry.com (N.Y.) Sarawak Forestry Corporation (SFC). [online]. Available at: <http://www.sarawakforestry.com/htm/sustainable.html>
- forestry.sarawak.gov.my (N.Y.) Sarawak Forestry Department (SFD). [online]. Available at: <http://www.forestry.sarawak.gov.my/>

Non-Government sources

- Bulan, R. (2010). Indigenous Peoples and the Right to Participate in. International Expert Seminar on Indigenous Peoples and The Right to Participate in Decision Making. Chang Mai, Thailand.
- Colchester, M., Jalong, T., & Chuo, W. M. (2013). Sarawak: IOI-Pelita and the community of Long Teran Kanan. In M. Colchester, & S. Chao, Conflict or Consent? (pp. 232-258). FPP, Sawit Watch and TUK INDONESIA.
- Expert consultation conducted by NEPCon (2015)
- Lawson, S. (2014). Consumer Goods and Deforestation: An Analysis of the Extent and Nature of Illegality in Forest Conversion for Agriculture and Timber Plantations. Forest Trends. Accessed 6 March 2015 at http://www.forest-trends.org/documents/files/doc_4718.pdf.
- Lim, T. W. (2013). *Malaysia: Illegality 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.
- Lucas, J. (2013, November 26). Forest people 'disillusioned' in battle to protect land. Retrieved from Thomson Reuters Foundation News: <http://news.trust.org//item/20131126101312-463ag/>
- Minority Rights Group International. (2016). Malaysia - Indigenous peoples and ethnic minorities in Sarawak. Retrieved from www.minorityrights.org: <http://minorityrights.org/minorities/indigenous-peoples-and-ethnic-minorities-in-sarawak/>
- Sarawak Gone, undated. Native Customary Rights. Available: <http://www.sarawakgone.cc/issues/ncr/>, accessed 12 February 2018.

- Suara Sarawak (2014) Sarawak gov't suffers 10 defeats in NCR land cases: <http://www.barubian.net/2014/04/sarawak-govt-suffers-10-defeats-in-ncr.html>
- Subramaniam, Y. (2015). Ethnicity, Indigeneity and Indigenous Rights: The 'Orang Asli' Experience. *QUT Law Review*, 71-91.

1.15.5. Risk determination

Overview of Legal Requirements

As defined by article 161A of the Constitution, an indigenous person in Sarawak is a person who is born of parents who are both natives. The largest indigenous group is the Iban (31% of Sarawak's population). Other groups are Bidayuh, Kenyah, Kayan, Kedayan, Murut, Punan, Bisayah, Kelabit, Berawan and Penan (Minority Rights Group International, 2016).

The Sarawak legal system constitutionally upholds and protects the native custom of its indigenous people (Colchester, Jalong, & Chuo, 2013). The village heads (tuai rumah or tua elocat), regional chiefs (penghulu) and paramount chiefs (pemancha and temongong) are not only recognized by the government of Sarawak, they receive compensation for their role in maintaining the rule of law. Despite the provision in the constitution allowing the Federal Government to make laws in an emergency or promote uniformity, the indigenous decision-making process remains protected because it is embedded in native customary practices (Colchester, Jalong, & Chuo, 2013; Bulan, 2010).

Under the Second Schedule of the FTL document, state land areas subject to Native Customary Rights (NCR) are excluded from the licenced area. These areas may be allowed to be harvested with the prior consent of the NCR land owners and subsequent approval of the Director of Forests. This is not applicable to PF or AL as NCR are deemed to have been extinguished on these areas. Under the Forest Ordinance, at the request of a community, the State can constitute any state land as a Communal Forest (CF). The community can take any forest produce from this area for their domestic use. Communities themselves need to apply for allocation of their land as Community Forest. Due to lack of knowledge of the community, this is often not done, which leads to the possibility that forest land will be allocated as forest concession, or converted to agriculture despite communities using the land. Some cultural areas, such as burial sites, are automatically protected by law.

Description of Risk

Although land ownership is legally prescribed and clear, there are issues with Native Customary Rights disputes between forest enterprise/State Government and local community/tribes. Local Indigenous people have constructed blockades against forest enterprises and, similarly, the former have been denied access to their customary lands.

"Allegations of NCR breaches in the allocation of leases over forestland have been the most contentious issue in plantation development in Malaysia for the last 20 years. Though federal and state laws enshrine the rights of local people to the land on which they have traditionally depended, affected communities and nongovernmental organizations claim that these rights have been almost universally abused in the issuance of logging and plantation licenses. NCR conflicts are a feature in almost every new plantation project in Malaysia, with the situation being particularly serious in ... Sarawak" (Forest Trends 2014, p. 52). Despite the requirement that communities be provided with the opportunity to

raise their claim to an area to be gazetted, the process of gazettal might however be made public with a discreet notice that is not read by communities, with no claims therefore raised. Thus, tenure rights disputes between forest enterprises and local communities still occur after gazettal of a forest area. Many legal cases are currently in court; in Spring 2014 more than 300 NCR land cases were pending in the High Court; and ten cases had in April 2014 been settled in favour of the native people (Suara Sarawak, 2014).

Based on the high number of NCR issues, the risk is considered 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.

1.15.6. Risk designation and specification

Specified risk

1.15.7. Control measures and verifiers

- Records of consultation between the forest enterprise shall be available and interviews with the local indigenous people should be undertaken and verified against the consultation records.
- Maps showing the customary claims shall be available be considered and any claims areas shall be excluded from the harvesting areas.
- Verify whether the claims are genuine and evidence of customary use does exist.

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 Ordinance 1958 (Cha. 126), Part V - Section 52
http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- Forest Timber Licence: Fourth schedule - Forest premium and CESS Fifth Schedule- Liquidated damage
- Forest Rules 1962, Rule 25(I)
http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf

1.16.2. Legal authority

- Sarawak Forestry Department (SFD)
- Sarawak Forestry Corporation

1.16.3. Legally required documents or records

- Data on the quantity and species of timbers harvested within the forest management area
- Enumeration Data
- Compliance report
- Production report
- Production monitoring form
- Transit Pass
- Removal Pass

1.16.4. Sources of information

Government sources

- sarawakforestry.com (N.Y.) Sarawak Forestry Corporation (SFC). Sustainable Forest Management [online]. Available at:
<http://www.sarawakforestry.com/htm/sustainable.html>

- forestry.sarawak.gov.my (N.Y.) Sarawak Forestry Department (SFD). [online]. Available at: <http://www.forestry.sarawak.gov.my/>

1.16.5. Risk determination

Overview of Legal Requirements

According to the Forest Rules, 1969 (Rule 22), every licensee / permit holder must record the details of the timber harvested under that permit/license and have that timber checked at a forest checking station by a Forest Officer. The methods of measurement of timber and other forest produce for assessment of royalty or other payments due are prescribed by the Conservator. No forest produce can be removed to any place from any Forest Checking Station unless the person removing it is in possession of removal pass and the timber is marked with the government hammer mark.

At the forest landing, a licensee must:

- Mark both ends of each log with the registered property mark
- Scale and grade each log to determine the volume
- Affix a Log Production Identity (LPI) tag to each log
- Submit the log details in the Daily Production Return to SFC.
- The category of species is required in the removal licence.

Description of Risk

- SFC monitors and controls timber production through enumeration data, log production records, and logs are hammer marked with the licensee property mark.
- The classification of the exact species does not appear in the Transit Pass or Removal Pass, but the species category is required. Hence, substitution might potentially take place (Expert consultation, 2015). As the fee depend on the species and volume there is a risk of payment of incorrect fees. Issues such as failure to fully report the origin or volume – or reporting different species may arise and could be used for tax evasion purposes.
- The risks identified associated with non-payment of royalties in indicator 1.5 above are also considered relevant to this indicator, as all classification in Sarawak is done for the purposes of royalty calculation.

Based on the above risk of incorrect classification of timber species, the risk is considered specified for all timber sources

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.

1.16.6. Risk designation and specification

Specified risk

1.16.7. Control measures and verifiers

- The Transit Pass and Removal Pass shall entail information such as classification of species, volume and weight correspond with regard to the actual logs, and fees paid.

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 Ordinance 1958 (Cha. 126), Part V - Section 52
http://www.sarawakforestry.com/pdf/laws/forests_ordinance_chapter_126.pdf
- Forest Rules 1962, Rule 25(I)
http://www.sarawakforestry.com/pdf/laws/the_forest_rules.pdf

1.17.2. Legal authority

- Sarawak Forestry Corporation
- Harwood Timber Sdn Bhd
- Sarawak Forestry Department (SFD)

1.17.3. Legally required documents or records

- Removal Pass (Royalty)
- Endorsement Clearance Certificate (ECC)
- Transit Removal Pass (TRP)
- Export Clearance Certificate (ExCC)

1.17.4. Sources of information

Government sources

- Sarawak Forestry Corporation (SFC). Sustainable forest management:
<http://www.sarawakforestry.com/htm/sustainable.html>
- Sarawak Forestry Department (SFD): <http://www.forestry.sarawak.gov.my/>
- H32Harwood Timber Sdn.Bhd.
<http://www.sarawaktimber.org.my/content.php?do=subsidiaries>

Non-Government sources

- Brown et al, 2008. Legal Timber Verification and Governance in the Forest Sector:
<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/3472.pdf>

1.17.5. Risk determination

Overview of Legal Requirements

Licensed area to designated Forest Checking Station:

A licensee is required to register the company property mark with the Director of Forests (Rule 25 (I) of the Forest Rules 1962). At the forest landing, a licensee must:

- Mark both ends of each log with the registered property mark
- Scale and grade each log to determine the volume
- Affix a Log Production Identity (LPI) tag to each log
- Submit the log details in the Daily Production Return to SFC.

SFC checks that harvesting operations have taken place within approved areas in compliance with the Forest Timber Licence terms and conditions and that the licensee uses only approved LPI numbers. SFC checks and verifies the DPR information and uploads this to the Log Tracking System (LoTS). LoTS is an ICT tool used in Sarawak to monitor and control the movement of logs. The licensee then moves the logs from the licensed area to the Forest Checking Station for royalty assessment.

Logs are checked and royalty hammer-marked by SFC at the following points of the supply chain:

1. Forest Checking Station to processing mills:
 - a) Harwood Timber Sdn Bhd (HTSB) carries out an inspection of logs at the Forest Checking Station to ensure they have been royalty assessed.
 - b) HTSB issues Endorsement Clearance Certificate (ECC) and the shipping/transportation pass confirming logs for local processing to be delivered to local mills
 - c) Issuance of Transit Removal Pass (TRP) by SFC
 - d) Upon arrival at mills, logs are inspected by both SFC and Harwood Timber Sdn Bhd and reconciled with ECC and TRP
2. Checking Station to export point:
 - e) At Forest Checking Station, issuance of Transit Removal Pass (TRP) by SFC
 - f) At the export point, inspection of logs for issuance of Export Clearance Certificate (ExCC) by Harwood Timber Sdn Bhd (as authorized under Section 67A (7)(a) of Forests Ordinance (Cap 126))
 - g) Issuance of TRP by SFC at export point

These requirements are applicable for all timber sources.

Description of Risk

- Without tagging at the stump, the current system of timber administration functions more as a means for log tallying than a guarantee of legal origin. As a wholly-owned subsidiary of STIDC, Harwood's role in monitoring log reservation quotas is arguably a delegation of functions within the state administrative structure, as opposed to genuine outsourcing to a third party (Brown et al, 2008).

- As a result, risk of substitution may arise due to the lack of information in the documents that are carried during transportation – as well as the poor traceability system.
- Issues such as failure to fully report the origin or volume; or reporting different species may arise and could be used for tax evasion purposes.
- Extensive internet research has not revealed any additional sources which specifically analyse or highlight the risks associated with the transportation of timber in Sarawak. Referring to indicators 1.5 and 1.16, the risks associated with the royalty payments and classification of timber may also have an impact on the legality of the trade and transport process, and as such are considered relevant considerations for this indicator.
- As discussed in indicator 1.5 Payment of royalties and harvesting fees, the most common reported illegalities in Sarawak are of illegal harvesting, in the sense of harvesting without a license or permit, or harvesting outside the limits of a license or permit. Less attention (from authorities /media / NGOs) is given to the nuances compliance within the legal operations, and as such there is a lack of analysis of this issue in available sources.

Based on a precautionary approach the risk is considered specified for all timber sources.

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.

1.17.6. Risk designation and specification

Specified risk

1.17.7. Control measures and verifiers

- Inspect the validity of the documents (removal pass, transit removal pass) with the relevant agencies and ensure that the information is sufficient and consistent with the actual logs.

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
- 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'. 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.

1.18.6. Risk designation and specification

Specified risk

1.18.7. Control measures and verifiers

- Malaysian Inland Revenue Board (IRB) transfer pricing audit reports may be reviewed
- Verify if Corporate Income Tax Return Form ('Form') for 2014 contains disclosure as to whether transfer pricing documentation has been prepared.

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_Exports_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)

- The Sarawak Timber Industry Development Corporation Ordinance 1973. Available at: http://www.sarawaktimber.org.my/doc/STIDC_Ordinance_1973.pdf
- The Sarawak Timber Industry (Registration) Regulations 1999
- The Ramin Logs Prohibition of Export Order, 1980
- The Ramin Shorts and Ramin Squares Prohibition of Export Order, 1991
- The Sepetir Timber Export Restriction Order, 1980

1.19.2. Legal authority

- Sarawak Timber Industry Development Corporation (STIDC)
- Royal Malaysian Customs Department

1.19.3. Legally required documents or records

- Certificate of Registration with STIDC
- Timber export/import license/permit
- Custom export declaration form (K2)
- Grading summary
- Record of Customs clearance
- Goods/Consignments inspection report
- Approval letter from Ministry of Planning and Resource Management
- Bill of lading
- Invoice
- Customs form K1
- Customs form K3 (within Malaysia)

1.19.4. Sources of information

Government sources

- Mtib.gov.my (N.Y.). Malaysian Timber Industry Board. [online]. Official Portal. Available at: <http://www.mtib.gov.my>
- Customs.gov.my (N.Y.) Royal Malaysian Customs Department. [online] Available at: www.customs.gov.my
- sarawaktimber.org.my (N.Y.) Sarawak Timber Industry Development Corporation (STIDC). Available at: http://www.sarawaktimber.org.my/doc/STIDC_Ordinance_1973.pdf

Non-government sources

- Expert consultation conducted by NEPCo, 2015
- 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, accessed 13 February 2018.

1.19.5. Risk determination

Overview of Legal Requirements

There are mandatory requirements, for any persons/companies engaged in or associated with the manufacture, sale and marketing (export and imports) of timber, to be registered with Sarawak Timber Industry and Development Corporation (STIDC). Registered persons are issued with a certificate of registration.

STIDC is responsible for issuance of Export & Import Licenses. The issuance of export/import licenses is done through an ePermit System at STIDC's portal.

Export

Under Section 10 of the Customs Act 1967, STIDC officers are authorised to issue Export Licenses for every shipment of timber and timber products from Sarawak. The Export Licence is endorsed in the Customs Export Declaration Form (K2).

The Second Schedule of the Customs (Prohibition of Exports) Order 2012 lists the timber and timber products that require an Export Licence prior to export. There is no export duty imposed by the Sarawak Government on timber or timber products.

Import

Importers of logs are required to seek prior written approval from the Ministry of Resource Planning and the Environment. The Customs (Prohibition of Imports) Order 2012 has listed products for which an Import License from STIDC is required for importing into Sarawak. The following documents must also be attached to the application for an Import Licence:

- CITES Certificate, if applicable;
- Certificate Country of Origin COO; and
- Phytosanitary Certificate.

It is mandatory that every shipment is accompanied by an import licence. Imported logs are physically inspected, tagged, STIDC hammer-marked and issued with an STIDC Removal Pass prior to being transported internally.

Description of Risk

- There is a risk of illegal timber smuggles from Indoensia being mixed with the Malaysian supply chain. Experts consulted in the preparation of this report stated that they believed the custom regulation is well implemented (Personal communication 2).

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

- 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.
- 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.
- In Sarawak, all wildlife and forestry investigations are undertaken by the FDS since 2012, occasionally with the support of the RMP and RMCD, for example during operations targeting illegal loggers or poachers. Rangers engaged in enforcement activities receive basic law enforcement training, but like their counterparts in Perhilitan and Sabah, they come from a conservation background.
- The FDS has an intelligence unit but does not possess any analytical software, and its analysts receive only basic training.
- The FDS does not use advanced undercover officers or undertake electronic surveillance. It does have basic physical surveillance capability; however, its officers have not been trained in surveillance.
- When the FDS needs to utilize advanced investigation methods, it relies almost completely on the police.
- In Sarawak, the FDS utilizes Honorary Wildlife Rangers, who provide timely and reliable enforcement information from the field. These Honorary Rangers are generally recruited as volunteers from the local communities in certain areas, and through their employment the FDS has access to good local intelligence.
- In 2013, 2014 and 2015, the FDS investigated a total of 12, 13 and 15 cases respectively. In 2016 the number of cases dropped to five.

- Shortcomings of FDS:
 - Lack of training and experience in advanced investigative techniques
 - No centralized CHIS system
 - Lack of experience with advanced investigative methods
 - No advanced analytical software
 - No independent cell phone analytical capability
 - Poor informant reward provisions
 - High reliance on temporary staff and rangers
 - Poor crime scene capabilities

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.

1.19.6. 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

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- Customs Acts 1967 [Act 235]. Available at: <https://www.mytradelink.gov.my/documents/10179/0/Customs-act>
- Customs (Prohibition of Exports) Order 2012. Available at: http://www.env.go.jp/recycle/yugai/reg/pua_20121231_LaranganExport.pdf

1.20.2. Legal authority

- Sarawak Timber Industry Development Corporation (STIDC)
- Sarawak Forestry Corporation

- Sarawak Forestry Department (SFD)

1.20.3. Legally required documents or records

- CITES Export or re-Export permit

1.20.4. Sources of information

Government sources

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Non-Government sources

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- 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
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- 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 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 the Management Authority for timber species in Sarawak, Sarawak Timber Industry and Development Corporation (STIDC) is responsible for the issuance of export, import and re-export permits for the CITES listed timber species; Ramin or Karas/Gaharu (agar) wood originating from Malaysia. The Ministry of Natural Resources and Environment is the Scientific Authority under CITES. To export either Ramin or Karas wood legally, operators will need to work with these bodies. For the export of Ramin, a CITES export permit application must be made directly to MTIB and NRE, while for Agarwood products/Karas (either woodchip or Agarwood oil), exports are subject to the approval of the quota to the company 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

The risk description for Peninsular above is also relevant to Sarawak.

Based on the information contained in the UNODC report, and applying a precautionary approach, this risk for this indicator is considered 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

- All cross border-trade of CITES-listed species shall be documented and accompanied by required export, import and re-export certificates issued by competent authorities (CITES Management Authorities).
- 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 - Sarawak** 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 - SARAWAK

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)



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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.



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