



5.3 From forest certification to REDD+ in Malaysia

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Introduction

Malaysia has some of the world's most diverse and valuable forest resources, but has experienced significant deforestation and forest degradation. The country has undertaken efforts to address the problem, including a range of measures to combat illegal logging and improve the sustainable management of forests.

A major initiative was the Malaysian Timber Certification Scheme (MTCS), a national certification programme similar to the well-established international Forest Stewardship Council (FSC) standard. This paper evaluates forest certification as a means of improving forest governance and draws lessons from its implementation for forthcoming projects on reducing emissions from deforestation and forest degradation (REDD+).

The focus in this article is forest certification, since this has been implemented for some time in Malaysia, as opposed to other processes of managing illegal logging, such as a Voluntary Partnership Agreement (VPA), which is still under negotiation in the country. Clearly, the VPA has significant potential to promote sustainable forest management (SFM) and address major problems around illegal logging once it is in place.

Competing visions of what good forest governance entails in Malaysia has led to conflict in some forest areas. In this context of competing perspectives, the Malaysian government must broaden its concept of what good forest governance means in order for REDD+ to be effective in Malaysia — and to address two key issues: indigenous and local communities' participation; and customary land rights.



ALTHOUGH REDD+ ACTIVITIES ARE A FORM OF FOREST GOVERNANCE IN THEMSELVES, THEY ALSO

RELY ON PRE-EXISTING GOOD FOREST GOVERNANCE MECHANISMS.

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Forest governance in Malaysia

Malaysia is a federation of 13 states and three federal territories. Two states — Sabah and Sarawak — are located on the island of Borneo; the remaining states and territories form Peninsular Malaysia. Article 74(2) of the Constitution specifies that the Malaysian states have jurisdiction over land and natural resources. This provision empowers each state to independently regulate forests through enacting laws and formulating policy.

The National Forestry Council (NFC) was established in 1971 to enhance cooperation between the federal and state governments and to ensure a coordinated approach in the implementation of policies and programmes related to forestry. The NFC introduced the National Forestry Policy (NFP) in 1978. The NFP outlines principles for SFM, forest harvesting, regeneration, rehabilitation and management of non-wood forest products; the constitution of sufficient areas of Permanent Reserved Forest; and the establishment of downstream processing industries. Each state has applied the NFP.

In 1984 the federal Parliament passed the *National Forestry Act*, which builds on existing state law. While all states in the peninsula have enacted the Act, Sabah and Sarawak continue to regulate their forestry sectors using their own regulations. As a result, there are three separate jurisdictions governing forest resources: the peninsula, Sabah and Sarawak.

The NFP was revised in 1992 in an attempt to make it “greener” and now comprises federal policy on the development of community forestry, the establishment of Permanent Forest Estates, law enforcement, education, conservation, tree plantations and agro-forestry, as well as the commercial use of timber resources.

Malaysia attempts to control illegality in the forestry sector in a number of ways, including prevention, detection and suppression, penalties and forest certification.¹ The focus on regulation and policy highlights the Malaysian government’s emphasis on forest governance as a mode of law enforcement and control, although the introduction of timber certification may indicate a broader approach to governance in this sector. This article examines the use of timber certification only as a way of addressing illegality and improving forest governance.

Forest certification schemes

As forest certification schemes have developed globally over the past decades, Malaysia has not only embraced them, but has developed its own national programme, the MTCS. The development of this domestic initiative has been seen as driven by international market pressures, and by Malaysia’s desire not to have international measures imposed on it.

The MTCS was established in 2001. It is overseen by the Malaysia Timber Certification Council (MTCC), which is charged with operating and developing the scheme. The council is closely linked to the Malaysian government; two members of its Board of Trustees come from government agencies.

The initial certification standard was based on the International Tropical Timber Organization's Criteria and Indicators on Sustainable Forest Management, but has since evolved into the Malaysian Criteria and Indicators for forest management certification, known as MC&I 2002. It comprises nine principles, 47 criteria and 96 indicators. This standard is now subject to its first review; the revised standard will be known as the "MC&I (Natural Forest)."² The MTCS has been endorsed by the Programme for the Endorsement of Forest Certification (PEFC), the world's largest forest certification organization.

The MTCS now operates in 4.67 million hectares (ha) of permanent reserved forest in Peninsular Malaysia and 55,949 ha in Sarawak. A number of European countries, including Denmark, France and the United Kingdom, have accepted the MTCS as an authorized entity for inclusion in their public procurement policies. In contrast, the Timber Procurement Assessment Committee in the Netherlands has decided that the MTCS does not meet its standards for sustainable timber, largely due to concerns about the recognition of indigenous peoples' rights relating to the control of external activities in certified forest areas.

The FSC is also active in Malaysia, but on a much smaller scale than the MTCS. This may be due to the FSC's more stringent standard. Two forest management units (FMUs) have obtained FSC certification in Malaysia.³ A Malaysian-German Sustainable Forest Management project, covering 170,000 ha in Ulu Baram in Sarawak, is in the process of obtaining FSC certification.

The introduction of timber certification schemes has had a positive impact in improving forest management techniques in forest areas that have sought compliance with certification standards. It has also been influential in SFM standards being included in government audits of FMUs that are not part of certification schemes. For example, 100-year SFM Licence Agreements in Sabah are now based on FSC principles. Nevertheless, certification schemes — particularly the MTCS — have been criticized for failing to incorporate stakeholder views when formulating the initial standards and, more broadly, for not resolving conflicts relating to indigenous groups' customary land claims in certified forest areas.

Participation in forest certification schemes

The development of the MC&I involved a process of consultation with 85 organizations and private companies in October 1999. A National Steering Committee was formed in 2001 to revise the existing MC&I. Three indigenous peoples groups that were members of the committee later withdrew their membership; they felt their views were not being addressed, particularly in regards to indigenous customary land claims.⁴ These resignations were followed by that of WWF Malaysia, which was concerned that the MC&I 2001 did not provide a clear path to obtaining endorsement from FSC, and that the input received from the consultations was not being incorporated into the standards.

The MTCC then invited other social and environmental groups to be involved in the consultation process. These groups had little to do with the protection and recognition of indigenous peoples' rights. One indigenous representative group, JOANGO Hutan,⁵

questioned whether these groups were being included merely to meet the forest certification requirement of involving external stakeholders in the process of developing the standards, without actually taking their concerns into account.⁶

Treatment of indigenous peoples' rights and tenure

Despite the withdrawal of some groups, the MTCS, like the FSC, includes references to indigenous peoples' rights and tenure in its certification criteria. In reality, though, the MTCC does not consider that it is obligated to address these issues, stating that "land ownership and tenure rights for indigenous peoples lie outside the mandates of MTCC, forest and timber certification."⁷ An artificial division of responsibility between the government's land administration and forest certification body fails to take into account the connection between forest areas and indigenous peoples' land rights claims to those areas. Although the MTCC has claimed to address this matter by issuing additional instructions to ensure that the traditional uses of the forest by indigenous peoples are respected,⁸ this does not provide an adequate mechanism to deal with conflicting land claims that arise in areas where companies are involved in timber operations and indigenous peoples hold customary rights.

One example is the Samling Sela'an Linau FMU, which received MTCS certification in October 2004. This certification occurred despite the fact that the certified area overlaps the territories claimed by the Penan indigenous peoples group, with the land being the subject of litigation since 1998.

Penan communities have launched five cases in the Upper Baram region of Sarawak.⁹ The initial case argues that the government issued a logging licence to Samling Plywood, a subsidiary of the Samling group of companies, in an "unlawful"¹⁰ manner without considering native customary rights in the area. In response, the Government of Sarawak, as the First Defendant, denied that the plaintiffs held native customary rights over the land, and stated that even if they did, these rights were extinguished when no claims were made within 60 days of the notification being published.¹¹ To date, none of these cases have been resolved and they are only five of an estimated 100 claims filed by native plaintiffs in Sarawak.¹² The fact that none of these cases have been resolved suggests that legal recourse is not a quick or easy way to resolve overlapping land claims or obtain recognition of customary land rights.



Although timber certification schemes may not, strictly speaking, be responsible for resolving conflicting land claims, their standards should provide stronger guidance on how forestry companies should proceed if such conflicts exist. This could extend to requiring companies to investigate the existence of indigenous tenure rights themselves, rather than relying on government recognition of such rights.

It is in the interests of companies to prevent litigation around land claims, even if they also seek to continue to exploit the forest resources. Indeed, in response to NGO reports that criticized MTCS certification for failing to appropriately recognize indigenous peoples' land rights, Samling argued that it was the state government's responsibility to regulate and verify land claims.¹³ Meanwhile, the government has little incentive to process native customary claims since they often view this land as "idle" or "waste" land that can be put to "productive" use by commercial forestry exploitation.¹⁴ In that sense, although forest certification has had a positive impact in improving forest management techniques, it is difficult to conclude whether it has contributed to more inclusive forest governance. Although better forest governance is not the sole purpose of timber certification schemes, these programmes should contribute to, rather than detract from, better forest governance.

Nevertheless, the use of certification programmes has expanded the number of stakeholders who have the potential to influence the development of forest management policy, including, for example, national indigenous NGOs and international NGOs. These groups actively campaign for good forest governance in the form of greater transparency, participation and equity. In the context of forest certification schemes, this has led to conflict between these groups and government agencies, because of their differing views on what good forestry governance entails.

These civil society groups argue that good forest governance does not merely involve following the certification standards that have been set by the government and/or a third-party certification scheme. It also ensures that the outcomes of the scheme are equitable and fair in the broader national context of recognizing indigenous and local communities tenure rights. These actors have highlighted the forest governance challenges for Malaysia, which will need to be considered in the implementation of REDD+ schemes.

REDD+ policy and project development

Good forest governance is important for REDD+. It influences the extent to which REDD+ projects can be effectively implemented in the broader context of a country's forest governance and policy framework. REDD+ is still in the early stages of development in Malaysia, since it was only the recent expansion of REDD to REDD+ (i.e., the inclusion of conservation, sustainable management of forests and enhancement of forest carbon stocks) that provided greater opportunities for the country's participation.

REDD+ policy developments are coordinated on a national level, under the Ministry of Natural Resources and Environment. Malaysia is taking a phased approach to implementing REDD+. It begins with readiness activities, including the development of a national REDD+ strategy (expected to be complete by the end of 2012), and ends with quantified reductions in greenhouse gas emissions under full-scale REDD+ implementation. Working groups have been established to address matters such as baselines; monitoring, verification and reporting (MRV); institutional arrangements; governance; payment of benefits; and capacity building. A Task Force on REDD+ was established in January 2011.¹⁵

On the sub-national level, the state of Sabah has been taking an active lead in developing a REDD+ road map for the state. The Sabah Forestry Department is coordinating REDD+ development; it hosted a workshop in August 2011, with the assistance of WWF, to facilitate stakeholder consultation on the proposed REDD+ road map. This road map will form the basis for the state's sub-national strategy and will support participation in any international REDD+ mechanism.¹⁶ Sabah will also receive funding from the European Union to develop a number of pilot projects over a three-year period, commencing in 2012. The focus will be on carbon enhancement activities such as SFM, reduced-impact logging and forest restoration.¹⁷

Although the government of Sarawak does not appear to be developing a REDD+ policy, a private company, Tropical Offsets Pty Ltd., is developing a small REDD+ project in Long Bangan.¹⁸ The developers have gained the support of the Sarawak government and are waiting for approval from the company that holds the forest concession for the area.¹⁹

Lessons from forest certification for REDD+

At one level, the MTCS certification scheme in Malaysia could be regarded as having achieved important objectives, with almost five million hectares certified; and with significant gains in forest management practices that have contributed to Malaysia retaining its competitiveness in the international timber market. But underlying these more technical gains there remain concerns about the legitimacy of the certification procedures that do not address underlying forest governance matters such as the recognition of customary land rights. In this manner, Malaysia's experience in forest certification and its wider ramifications for more inclusive forest governance highlight some key issues that need to be considered in the development of REDD+ projects. Timber certification has demonstrated the need for robust and effective participation and transparency; by extension, it is important that REDD+ projects apply high standards of participation and transparency to their processes and procedures for implementation. Otherwise, these projects risk the same problems of legitimacy that have beset the MTCS, which some people have seen as involving indigenous groups only superficially, without seriously taking their concerns into account.

To ensure that REDD+ schemes retain legitimacy, and that projects provide more substantive co-benefits in Malaysia, it will be important for governments and REDD+ project proponents to follow procedures that allow the effective participation of indigenous peoples and local communities. REDD+ processes should adopt clear standards for negotiation that go beyond consultation after the REDD+ projects have been largely finalized by other parties. Involving local communities at all points in the process, including the early formative stages of the projects, is important to ensuring that potential social co-benefits are realized. Transparency around what such co-benefits may entail is also critical.

Indigenous groups report that they have not to date been invited to REDD+ discussions in Malaysia. Part of the explanation may be that in the preliminary stages, REDD+ is largely a technical activity and the focus is on issues such as carbon accounting, rather than how to deliver co-benefits to communities.

Unless there is active participation by indigenous and forest-dependent groups in the initial stages, however, the design of REDD+ processes may overlook their specific needs. This would be detrimental to the outcomes of the scheme, in terms of co-benefits and climate change mitigation, since in many areas local peoples' traditional knowledge and practices will be integral to reducing deforestation and forest degradation.

It is acknowledged that it will not be easy to satisfy indigenous and local community concerns, since one of the most intractable problems in Malaysia is the status of customary land rights. Many land claims remain unrecognized or are in the process of litigation. To date, the MTCS recognizes customary land rights only in accordance with existing

Malaysian law; this recognition does not extend to customary land claims, even where there is longstanding occupation of forest areas by indigenous peoples and local communities. The Samling case illustrates the limitations of market-based schemes such as timber certification. The scope for protection of customary land rights within these schemes is restricted by the confines of existing state law, and these schemes have had limited success in influencing national laws in this regard.



Increasingly, however, some timber-importing countries are unsatisfied with claims by forest-exporting countries that existing legal and institutional arrangements are an impediment to the recognition of customary land rights. The rejection of MTCS by the Netherlands may increase the pressure on Malaysian authorities and REDD+ project proponents to demonstrate a substantive recognition of customary rights. Otherwise, these schemes risk rejection by

potential international purchasers of REDD+ carbon credits; ultimately, the sequestration credits generated may not be commercially viable.

REDD+ activities provide an opportunity for international forest governance norms to provide leverage for these issues; REDD+ frameworks should mandate respect for, and the effective implementation of, customary land rights. The extent of this leverage will very much depend on whether binding international obligations to respect the rights of indigenous and local communities are embedded in international REDD+ frameworks. It will also depend on the extent of demand for REDD+ projects that meet this social criterion.

The implementation of REDD+ projects in forest areas where customary rights exist should not occur without the free, prior and informed consent of local communities, as mandated in international instruments such as the UNDRIP.²⁰ Although the Malaysian federal government is obliged to uphold the international treaties on indigenous peoples' rights that it has signed, past experience suggests that the national government may be reluctant to enforce these obligations on states, since forest governance is seen as a state responsibility in Malaysia. If the national government does not enforce these obligations in the development of REDD+ frameworks and standards, it could prove

detrimental to the incorporation of strong obligations for the states with respect to indigenous peoples' rights under a future UNFCCC regime for REDD+.

A related issue is that REDD+ tends to require a high degree of Malaysian federal control, especially if projects are to be accounted for on a national, rather than sub-national, scale.²¹ The information required for accounting and auditing may be difficult to obtain, given the independence of the states in forming forestry policy and legislation; The state of Sarawak in particular has maintained a position that forest matters are regarded as a sector under state control.

Any formulation of REDD+ frameworks in Malaysia should actively encourage cooperation between federal and state governments around contentious issues, such as the degree of state autonomy in forest management and the status of customary land rights. Only in this way will the Malaysian government be able to meet its international commitments regarding the commercial viability of carbon credits generated, and regarding co-benefits for indigenous and local communities.

Conclusion

Although timber certification schemes are capable of improving specific forest management practices, they are limited in their ability to influence the necessary major structural changes required to improve forest governance at national, state and local levels. The experience of Malaysia's timber certification schemes has highlighted some forest governance challenges in ensuring the participation of indigenous and local communities and in providing recognition of customary land rights in forest areas.

These challenges reflect differences in opinion between the government and civil society groups concerning what good forest governance entails. Government focuses on regulation and standards, while civil society groups focus on equity and participation. It is likely that these same debates will be played out in the REDD+ sphere.

The government may have to broaden its understanding of good forest governance, and go beyond merely complying with legal regulations and requirements, in order to meet international standards and expectations. This will be important for the successful implementation of REDD+ activities. Although these activities are a form of forest governance in themselves, they also rely on pre-existing good forest governance mechanisms — such as the clear recognition of tenure interests — in order to achieve their goal of climate change mitigation while simultaneously providing the benefits of poverty alleviation and biodiversity conservation.

There are two key lessons from forest certification for the development of REDD+ in Malaysia: 1) the government must seek to consult indigenous people from the outset; and 2) it must resolve customary land right conflicts in order to avoid the risk of reinforcing existing disparities in the access to and use of the forest resources. These disparities may jeopardize sustainable outcomes and disadvantage local forest-dependent communities.

Acknowledgement

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Endnotes

1. See A. Wells, T.H. Chiew and C.H. Keong. 2008. "Systems for Verification of Legality in the Forest Sector, Malaysia: Domestic Timber Production and Timber Imports." *VERIFOR Country Case Study 8*: 21–22.
2. A third draft of the revised standard was released at the time of writing and is expected to be implemented in October 2012.
3. The Perak Integrated Timber Complex in Perak, with an area of 9,000 ha, was certified in 2002; the Deramakot Forest Reserve in Sabah, covering 55,000 ha, was certified in 2007.
4. See Greenpeace. 2005. *Missing Links: Why the Malaysian Timber Certification Council Certificate Doesn't Prove that MTCC Timber is Legal nor Sustainable*, p.14.
5. JOANGO Hutan is a network of Malaysian indigenous peoples and environmental NGOs.
6. See A. Wells, T.H. Chiew and C.H. Keong. 2008. *Systems for Verification*.
7. See MTCC. 2005. MTC Information Note on the Malaysian Timber Certification Scheme, cited in Greenpeace (see also note 4).
8. See MTCC. 2011. Efforts towards sustainable forestry management undermined by SMK decision. www.mtcc.com.my/fullstory.asp?ID=143.
9. See World Wire. "Penan Go to Court to Defend Heart of Borneo Rainforests," December 21, 2010. www.world-wire.com/news/1012210001.html.
10. See Writ of Summons, *Kelasau Naan & 3 Ors vs Sarawak Government & 2 Ors*, High Court Suit Number 22-46-98 (MR).
11. See Defence of First Defendant, *Kelasau Naan & 3 Ors vs Sarawak Government & 2 Ors*, High Court Suit Number 22-46-98 (MR).
12. See M. Colchester et al. 2002. *Land is Life: Land Rights and Oil Palm Development in Sarawak*. Forest Peoples Programme and Perkumpulan Sawit Watch, UK and Indonesia, p.35.
13. See Malaysian Timber Certification Council. 2005. *Samling Response to NGOs – Finalised*. www.mtcc.com.my/fullstory.asp?ID=41.
14. See F.M. Cooke. 2006. Expanding state spaces using "idle" native customary land in Sarawak. In F.M. Cooke (ed.). *State, Communities and Forests in Contemporary Borneo*. Australian Nat'l Univ. Press, p. 5.
15. See Dato' Dr. A. Rahman, E. Philip and P.K. Aun. *REDD Plus Framework for Malaysia*. www.cbd.int/doc/meetings/for/wscbredd-apac-01/other/wscbredd-apac-01-malaysia-en.pdf.
16. See J. Leong. 2011. "Sabah moves forward with REDD+ road map." *Borneo Post* (online), August 24, 2011. www.theborneopost.com/2011/08/24/sabah-moves-forward-with-redd-road-map-latest.
17. See J. Leong. 2011. "Sabah moves forward."
18. The REDD+ project will consist of 3,000 ha of land as communal forest, 2,400 ha as agriculture land and a buffer zone for the carbon offsets created.
19. See e-mail from Brett Pritchard to Jessica Rae, September 15, 2011.
20. Malaysia voted in support of the UNDRIP, first in the Human Rights Council of June 29, 2006 and later in the UN General Assembly on September 13, 2007.
21. See Conference of the Parties UNFCCC. 2011. *Draft decision on guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emissions levels and forest reference levels as referred to in decision 1/CP.16, appendix I, Draft Decision-/CP.17 (advance unedited version, 2011) para 11*, which "acknowledges that subnational forest reference emissions levels and/or forest reference levels may be elaborated as an interim measure, while transitioning to a national forest reference emission level and/or forest reference level." This national platform of accounting and auditing will be necessary for monitoring, reporting and verification purposes, to prevent leakage and importantly, obtain financing.