

Melvin Ku

From: Cheah Chi Ern <cheah@mtcc.com.my>
Sent: Monday, 18 January, 2016 8:38 AM
To: Melvin Ku
Cc: Siti Syaliza Mustapha
Subject: FW: submission of comments on MC&I (Natural Forest)
Attachments: Forever Sabah (LEAP) comments on MC&I (Natural Forest).docx

From: Holly Jonas [<mailto:holly@foreversabah.org>]
Sent: Saturday, 16 January, 2016 11:57 PM
To: cheah@mtcc.com.my
Cc: Cynthia Gaik Suan Ong
Subject: submission of comments on MC&I (Natural Forest)

Dear Mr. Cheah,

Kindly find attached comments from Forever Sabah (via Land Empowerment Animals People, LEAP) on the MC&I (Natural Forest), in response to your letter dated 13 November 2015.

I apologies for submitting the comments one day past the deadline of 15 January, but I do hope you can still take them into consideration.

Please do not hesitate to be in touch with any questions or clarifications.

Many thanks in advance for your consideration and good luck with the rest of the review process. We look forward to contributing where possible.

All the best,
Holly

cc'd - Cynthia Ong, Executive Director of LEAP

[Legal Innovation Team](#)

Forever Sabah: Supporting Sabah's transition towards a diversified, equitable circular economy
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Feedback Form

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Dear Mr. Cheah,

Review of the Malaysian Criteria and Indicators for Forest Management Certification (Natural Forest): (i) First Public Comment (16 November 2015 – 15 January 2016)

With reference to your letter dated 13 November 2015, I would like to provide the following comments on the MC&I(Natural Forest):

1) General Comments:

Overall, Appendix I is well done and includes many useful provisions for indigenous peoples and local communities, as well as protection and conservation of natural forests. We have included a number of suggested amendments and additions to further strengthen the P&C and provide additional information, clarity and/or distinctions as needed.

2) Specific Comments:

Comment No.	Principle / Criterion / Indicator / Verifier	Proposal for amendment / deletion / addition	Reasons for proposed amendment / deletion / addition
1	Indicator 1.1.1. Verifier	Update the list of federal and state laws to reflect the latest subsidiary legislation, especially on forests	The list of laws is not fully up-to-date.
2	Criterion 1.1. and related Indicators	Add another Indicator after 1.1.2., e.g. "Forest managers incorporate and implement applicable federal, state and local	The three Indicators under C1.1. (records of laws, awareness and knowledge of laws, and records of violations) do not

		laws, and the regulatory framework for forest management, in their respective forest management plans, standard operating procedures and other related procedures and actions.” The Verifier could be: “Reference to applicable federal, state and local laws and the regulatory framework and provisions thereof in policies, SOPs and other related procedures and actions; and evidence of implementation of related laws and provisions in operations.”	necessarily provide for compliance with all applicable laws and administrative requirements.
3	Criterion 1.3., Indicator 1.3.1. and Verifier	Remove the word “binding” before “international agreements”.	It should not only be limited binding international agreements. Non-binding international agreements such as the Sustainable Development Goals – which were adopted by the UN General Assembly and apply to Malaysia – are essential elements of the global framework for forest governance.
4	Criterion 1.3. and Indicator 1.3.1.	Add another Indicator after 1.3.1., e.g. “Forest managers incorporate and implement binding international agreements relevant to forest management, in their respective forest management plans, standard operating procedures and other related procedures and actions.” The second part of the Verifier could be revised to: “Reference to binding international agreements and provisions thereof in policies, SOPs and other related procedures and actions; and evidence of implementation of binding international agreements and provisions thereof in operations.”	Indicator 1.3.1. (awareness of laws of binding international agreements) does not necessarily provide for actually respecting such agreements.
5	Verifier for Indicator 1.3.1.	For each international agreement listed, state that the agreements in their entirety shall be applied but particular attention shall be given to the specified provisions.	International agreements (as with all laws and policies) should be read in their entirety. It is fine to refer to specific provisions that are particularly relevant, but it would be better to not limit it only to those provisions.
6	Verifier for Indicator 1.3.1.	In the list of international agreements, add the following: <ul style="list-style-type: none"> a) Agenda 21, particularly Chapter 11 b) Strategic Plan for Biodiversity and Aichi Targets 2011-2020 (under UN CBD), particularly Targets 3-5, 7, 11, 14-15, and 18 c) Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, 2010 (under UN CBD) d) Akwe: Kon Guidelines for the conduct of cultural, 	<ul style="list-style-type: none"> a) Agenda 21 was adopted at the 1992 Rio Summit b) The Strategic Plan was adopted as a decision of the 10th Conference of the Parties to the CBD, including Malaysia c) Malaysia has not yet signed the Nagoya Protocol but has a draft Access to Biological Resources and Benefit Sharing Act d) The Akwe:Kon Guidelines were adopted in 2004 as a decision of the 7th Conference of the Parties to the

		<p>environmental and social impact assessments regarding developments proposed to take place on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities (under UN CBD)</p> <p>e) International Tropical Timber Agreement, 2006</p> <p>f) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989</p> <p>g) UN Sustainable Development Goals, particularly Goals 12, 13 and 15</p> <p>h) The Non-Legally Binding Instrument on All Types of Forests, 2007 (developed by the UN Forum on Forests)</p>	<p>CBD, including Malaysia</p> <p>e) Malaysia signed and ratified ITTA 2006 in 2007 (see link)</p> <p>f) Malaysia acceded to the Basel Convention in 1993</p> <p>g) The SDGs / 2030 Agenda for Sustainable Development was adopted by the UN General Assembly in September 2015</p> <p>h) The NLBI was adopted by the UN General Assembly in December 2007</p>
7	Indicator 1.5.1	Amend to (addition in underline): “Availability of <u>and compliance with</u> legal provisions...”	As above, availability of legal provisions alone does not necessarily lead to protection of forest management areas, as required by Criterion 1.5
8	Verifier for Indicator 1.5.1	For each law listed, state that they shall be applied in their entirety, but particular attention shall be given to the specified provisions.	Laws should be read in their entirety. It is fine to refer to specific provisions that are particularly relevant, but it would be better to not limit it only to those provisions.
9	Criterion 1.5	Add another Indicator after 1.5.2. to provide for community conserved and protected forests, e.g.: “Recognition of and respect for community owned, designated or otherwise controlled forests and customary laws and other community mechanisms for enforcement, protection and conservation.”	Indigenous peoples and local communities in Malaysia contribute significantly to conservation and protection of forests but often go unrecognised by government and the private sector. Respectful engagement between communities and forest managers / FMUs would strengthen control of encroachment and other activities by outsiders.
10	Criterion 1.6 and related Indicators and Verifier	<p>The commitment should also reflect: 1) the tenure of the land (e.g. time period of the license, if it is exclusive or if other companies’ operations overlap to some degree, etc.), and 2) risk associated with logging old growth and natural forest in new areas, which could then be converted to plantations (etc.).</p> <p>Could also add another Indicator, e.g. “Development of time-bound plans for implementing such policies or statements.”</p>	Long-term commitments are valuable and important. However, issues around such commitments have arisen in other jurisdictions such as Canada where the company pursuing certification is not the landowner. In addition, long-term commitments should be underpinned by action plans with tangible milestones and timelines.
11	Indicator 2.1.1.	Add “customary” as another type of law, i.e. “... within the relevant federal, state, local <u>and customary</u> laws in the FMU.”	Legal status and forest use rights may also be established under customary law. This would also align C2.1 with C2.2 and related Indicators.

		Add to the Verifiers: community protocols and by-laws, physical presence of fruit trees, vegetable gardens, burial grounds, oath stones, and other cultural artefacts; photographs and audio/visual recordings; and documentation of intangible cultural heritage and traditional knowledge such as place names and medicinal plants.	Customary law is not often in 'written' form, so both tangible and intangible cultural heritage should also be considered in addition to written laws and agreements.
12	Indicators 2.2.1. and 2.2.2.	Add "customary" as another type of law, i.e. "... within relevant federal, state, local <u>and customary</u> laws..."	Legal status and forest use rights may also be established under customary law, as already implied in C2.2 and related Indicators.
13	Criterion 2.2.	Add to the Verifiers: community protocols and by-laws, physical presence of fruit trees, vegetable gardens, burial grounds, oath stones, and other cultural artefacts; photographs and audio/visual recordings; and documentation of intangible cultural heritage and traditional knowledge such as place names and medicinal plants.	Customary law is not often in 'written' form, so both tangible and intangible cultural heritage should also be considered in addition to written laws and agreements.
14	Criterion 2.2.	Add an Indicator on free, prior and informed consent, e.g. "The process of communities granting free, prior and informed consent to delegate legal or customary tenure or use rights to forest operations is done in accordance with minimum international standards and guidelines and through their own representative institutions." Suggested Verifier(s) include: UNDRIP, particularly Articles 10, 11, 19, 28, 29, and 32; community protocols and by-laws; documentation of the process and outcome by third-party observers; interviews with a range of community members (not only local elites)	Free, prior and informed consent is a cornerstone of international law on indigenous peoples' rights and an essential tool for conflict prevention (when undertaken properly). However, it is often misunderstood by government and the private sector. There is a great deal of guidance available on FPIC and adapting the international term and concept to local contexts. Each community may have its own unique procedures and mechanisms for discussing proposals by outsiders and for withholding or granting consent for the same.
15	Indicator 2.3.1.	Amend to (additions in underline): "Availability of appropriate <u>legal, alternative and customary</u> mechanisms to <u>prevent and</u> resolve disputes over tenure and use rights." Add to the Verifiers: documentation of customary dispute resolution mechanisms and justice systems; records of alternative dispute resolution mechanisms such as mediation.	C2.3 is very useful. It would benefit from further distinction between types of dispute resolution mechanisms.
16	Indicator 3.1.2.	Add: "The process of indigenous peoples granting free, prior and informed consent to delegate legal or customary tenure or	Free, prior and informed consent is a cornerstone of international law on indigenous peoples' rights and an essential

		<p>use rights to forest operations is done in accordance with minimum international standards and guidelines and through their own representative institutions.”</p> <p>Suggested Verifier(s) include: UNDRIP, particularly Articles 10, 11, 19, 28, 29, and 32; community protocols and by-laws; documentation of the process and outcome by third-party observers; interviews with a range of community members (not only local elites)</p>	<p>tool for conflict prevention (when undertaken properly). However, it is often misunderstood by government and the private sector. There is a great deal of guidance available on FPIC and adapting the international term and concept to local contexts. Each community may have its own unique procedures and mechanisms for discussing proposals by outsiders and for withholding or granting consent for the same.</p>
17	Indicator 3.1.3.	Amend to: “Availability <u>and use</u> of appropriate mechanisms...”	Availability only is not sufficient.
18	Indicator 3.2.1. and Indicator 3.3.1.	Add: “international” and “customary” to the types of laws listed. Add to Verifiers: UN Declaration on the Rights of Indigenous Peoples, 2007; and Akwe: Kon Guidelines on cultural, environmental and social impact assessments (under the CBD).	Malaysia’s legal framework on indigenous peoples’ rights has some strengths (particularly in Sabah and Sarawak), but there are also gaps between it and UNDRIP. Reference to UNDRIP should be made as it is more comprehensive.
19	Indicator 3.2.2.	Add to the end: “... including just and fair compensation, restitution and the right to return in the case of unavoidable or unintentional displacement.”	It is important to explicitly provide for redress where adverse impacts occur.
20	Indicator 3.4.2.	Add “or non-commercial” after “compensation for the commercial...” After “by mutual agreement”, add: “, including community-determined priorities and arrangements for benefit sharing.”	There is a significant body of international law around traditional knowledge and access and benefit sharing, particularly under the CBD but also under WIPO. Even though Malaysia has not yet ratified the Nagoya Protocol, there are several COP Decisions related to access and benefit sharing that Malaysia must apply.
21	Indicator 4.2.1.	At the end of this Indicator, add (addition in underline): “... disseminated to them <u>in Bahasa Malaysia and the local or indigenous language, and in both written and oral forms.</u> ”	Most indigenous and local communities do not speak English or sometimes even Bahasa Malaysia. It is important to communicate relevant standards and rights to them in a language and format that they can understand.
22	Verifiers for Indicator 4.2.5.	Add: “Implementation of UN Declaration on the Rights of Indigenous Peoples, particularly Article 29(2) on storage and disposal of hazardous materials in the lands and territories of indigenous peoples”	Storage and handling of hazardous materials should also be done in accordance with international agreements
23	Criterion 4.4.	Amend the final sentence to (addition in underline): Consultations shall be maintained with people and groups	The phrase “directly affected by” is often interpreted too narrowly. Other individuals and groups such as civil society

		directly affected by management operations <u>and other stakeholders with relevant expertise and capacity to advise on mitigating impacts of such operations.</u> "	organisations, lawyers and international experts may not be directly affected in a physical sense, but may be able to contribute their expertise and guidance.
24	Indicator 4.4.1.	<p>Amend to (additions in underline): "<u>Third-parties shall undertake strategic environmental and social assessments to evaluate the social impact of forest operations</u> directly affecting communities, and the people and groups directly affected <u>and others with relevant expertise</u> shall have access to information on the results of the <u>assessments</u> and evaluations."</p> <p>Add new Indicator: "Forest managers shall respect and uphold social, environmental, wellbeing and human rights impact assessments and evaluations conducted by communities and other people and groups affected by the forest operations."</p> <p>Additional Verifiers could include: documentation of community assessments and evaluations; documentation of third-party assessments and evaluations; reference to UNDRIP and to Akwe: Kon Guidelines on cultural, environmental and social impact assessments (under the CBD)</p>	It is generally considered a conflict of interest for a company itself to undertake impact assessments and evaluations. In addition, communities' own assessments and evaluations should supported and respected, and more comprehensive assessments and evaluations should be undertaken, beyond just consultations. "Strategic environmental and social assessment" is a useful tool in this context.
25	Criterion 5.1.	Add "..., integrity and connectivity" after "ecological productivity".	To ensure alignment with Indicator 5.1.2.
26	Verifiers for Indicator 5.2.2.	Metric should also include: number of local person hours of employment per cubic meter of wood harvested	
27	Criterion 5.3.	Add Indicator tracking the amount of waste wood generated – bot in incidental felling as well as road building and other aspects of management.	The current Indicators do not sufficiently provide for tracking achievement of Criterion 5.3's emphasis on waste.
28	Indicator 5.4.1.	Add "and non-commercial" after "a mix of commercial".	It is essential that communities still have access to non-commercial uses of non-timber forest products, e.g. for subsistence consumption and use.
29	Indicator 5.6.1.	Amend to reflect that cut levels should be <u>significantly below</u> 'sustained yield' or Mean Commercial Annual Increment calculations.	This is very important in order to reflect the various values that need to be managed for (e.g. habitat, riparian, steep slopes and other non-harvesting land base).
30	Criterion 6.1.	Include "risk" in addition to scale, intensity and uniqueness.	For example, the risk associated with logging a never-logged forest is far greater than one that is in its third cycle of

			harvesting.
31	Indicators 6.1.1. and 6.1.2.	Consider merging these two Indicators since they both focus on environmental impact assessments. Also amend them to refer to “strategic environmental and social assessments”.	Strategic environmental (and social) assessments are more comprehensive than EIAs and are in accordance with global good practice on participatory approaches, etc.
32	Verifier for Indicator 6.2.1.	Add species-specific plans such as Sabah Orangutan Action Plan 2012-2016, Sabah Elephant Action Plan 2012-2016, etc.	The list of relevant actions plans is not fully up-to-date.
33	Verifier for Indicator 6.2.2.	Add the Strategic Plan for Biodiversity and Aichi Targets (of the UN CBD), specifically Target 11 on “effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservaton measures... integrated into the wider landscape and seascapes.” Also add: spatial mapping and planning.	Aichi Target 11 and the indicators currently being developed under the CBD provide important benchmarks and guidance. In addition to providing the opportunity for recognition of indigenous peoples’ and community conserved areas, it is also possible that areas protected or conserved in FMUs could be considered “effective area-based conservation measures”, under certain circumstances. For more about Target 11, please see link . Spatial mapping and planning are important tools for identifying high conservation value forests and opportunities for connectivity and integrity.
34	Indicator 6.2.3.	Add “indigenous peoples and local communities” to the list of actors / stakeholders for cooperation.	Indigenous peoples and communities can and do play a significant role in protection, conservation and management of forests, even when not recognised by government.
35	Indicator 6.2.4.	Either as an amendment or a new Indicator: “Forest management does not increase vulnerability to illegal hunting, fishing or harvesting, while respecting native customary rights.”	Explicit mention should be made to NCRs. Emphasis should instead be placed on illegal activities by outsiders.
36	Verifier for Indicator 6.2.4.	Add: Sabah Inland Fisheries and Aquaculture Enactment 2003.	Provides for inland fisheries, i.e. to align with Indicator’s reference to fishing.
37	Indicator 6.2.5.	At the end of this Indicator, add (addition in underline): “... promoted among local communities <u>in Bahasa Malaysia and the local or indigenous language, and in both written and oral forms.</u> ”	Most indigenous and local communities do not speak English or sometimes even Bahasa Malaysia. It is important to communicate relevant standards and rights to them in a language and format that they can understand.
38	Criterion 6.3.	Include provision to not log or at least not construct roads where ecological intactness is the most important ecological value.	Ecological intactness (and integrity) may be the most important ecological value. This can only be managed for by not logging or at least not establishing roads.
39	Indicator 6.3.3.	Amend to (addition in underline): “... conservation of biological corridors, <u>stepping stones</u> and buffer zones...”	Research has shown that stepping stones are important refuges for wildlife that move through plantations and other intensive land uses.

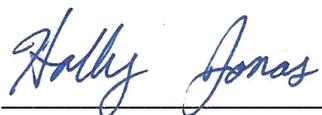
40	Verifiers for Indicator 6.3.3.	Add: species-specific action plans, e.g. for orangutan, elephants, rhinos, tigers. Also add: spatial mapping and planning.	Spatial mapping and planning are important tools for identifying high conservation value forests and opportunities for connectivity and integrity, including corridors and buffer zones.
41	Indicator 6.5.4.	Amend to: "Availability and implementation of guidelines for protection and conservation of <u>minimum buffer zones for streams, rivers and lakes, with due regard for the precautionary principle.</u> "	Riparian area protection is extremely important and minimum buffer zones should be determined with wider margins rather than less.
42	Criterion 6.6.	Remove the qualifiers "where possible" and "strive to".	It is important to use clear and precise terminology, otherwise it opens the door to lack of implementation.
43	Indicator 6.7.1.	Too similar to Criterion 6.7. Amend to include an actual indicator, e.g. to ensure there are no complaints regarding improper disposal.	Indicator should be distinct from Criterion.
44	Criterion 6.9 and related Indicator 6.9.1.	Amend to "... document, control and <u>remove</u> the use of exotic species to avoid adverse ecological impacts. <u>Only native species shall be used</u> in enrichment planting."	Exotic species should not be used at all. There are well-documented harmful impacts on ecosystems.
45	Criterion 6.10.	Add after (b): "does not occur on or affect lands, forests or resources subject to customary law and/or customary uses by indigenous peoples or local communities; will not negatively impact surrounding areas of forest, watersheds and rivers, and resources used by communities; and..."	There should be stricter limitations on situations in which forests can be converted into plantations or non-forest land uses, particularly those concerning communities and areas outside of the FMU boundaries or proposed conversion areas.
46	Indicator 6.10.1.	For HCV Forest areas, include a specific baseline date dating far enough in the past to ensure there is no clearance. Add Indicators for the proposed new components of Criterion 6.10. Amend the percentages listed in the "limited portion" definition for Years 4-7 as not more than X% of the remaining forested area.	If there is no baseline date, it could create an incentive to log HCV Forests. Perhaps refer to the Roundtable on Sustainable Palm Oil's procedures for identifying HCV areas. It needs to specify percentages of what.
47	Indicator 6.10.2.	Add at the end of the Indicator: "... and indigenous peoples' and local communities' right to give or withhold free, prior and informed consent." Add Verifiers from the sections above on FPIC.	Consent is also required from communities who may or will be affected.
48	Criterion 7.1.	Amend (f) to: "Environmental safeguards based on <u>strategic</u>	Management plans should provide for the most up-to-date

		<p>environmental assessments.”</p> <p>Include after (f): “Social and cultural safeguards based on strategic social assessments and communities self-determined plans and priorities.”</p> <p>Amend (h) to: “Maps describing the forest resource base, including protected areas, <u>effectively conserved areas (including by indigenous peoples and local communities),</u> planned management activities, land ownership, <u>and customary tenure.</u>”</p>	management tools such as strategic environmental and social assessments, and should include mapping of conserved areas and customary tenure.
49	Criterion 7.2. and Indicators 7.2.1. and 7.2.2.	Include references to “traditional, indigenous and local knowledge” in addition to scientific and technical information.	Indigenous peoples and local communities have extensive knowledge about forests, weather patterns, rivers, wildlife, medicinal plants, etc. Use of multiple knowledge systems increases the likelihood of effective management.
50	Criterion 8.1.	Add “risk” in addition to complexity and fragility.	Need to consider potential unintended consequences or perverse incentives.
51	Indicator 8.4.1.	<p>Amend to: “Forest managers shall <u>undertake a participatory consultation process, including with the free, prior and informed consent of indigenous peoples and local communities, to incorporate the results and findings...</u>”</p> <p>Add Verifiers: Documentation of FPIC process and outcome</p>	Revision and implementation of the forest management plan should be done through a participatory process in order to benefit from the collective wisdom and expertise of various stakeholders and rights-holders.
52	Indicator 9.1.1.	Add at the end: “This should be audited and verified by independent third-parties accredited with an internationally recognised body.”	It is essential to have credible and independent third-party involvement.
53	Criterion 9.2. / Indicator 9.2.2.	It should be recognised that the maintenance of some values (especially intactness and non-fragmentation) may necessitate refraining from logging.	Need to provide for protection against all logging.
54	Criterion 9.4. and Indicator 9.4.1.	Add “risk” in addition to effectiveness.	Need to consider potential unintended consequences or perverse incentives.
55	Definition of Key Terms (Appendix III)	Check definition of “chain of custody” and revise if needed to ensure accuracy.	The definition of “chain of custody” appears to be incorrect and appears to refer instead to “supply chain”.
56	Definition of Key Terms (Appendix III)	Consider adding a definition for “forest” that distinguishes natural forests from plantations. Perhaps refer to FAO Forest Resources Assessment 2015 ’s definition of “Forest” (page 3).	It usefully defines “forest plantation”, “High Conservation Forests” and “natural forest”, but does not include a definition for “forest” itself. Please also refer to “General Comments”

		The definition should exclude tree stands in intensive or permanent agricultural production systems such as oil palm plantations and industrial tree plantations.	above regarding concerns with the FAO definition of forests.
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Thank you very much in advance for your consideration.

Yours sincerely,



Date: 15 January 2016

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