

# FSC Malaysia National Consultative Group

## Discussion Paper on Forest Conversion | Summary Report

---

### Purpose

This discussion paper highlights matters related to FSC's policy on forest conversion in Malaysia. This paper incorporates feedback from panel members of a national consultative group, FSC International members based in Malaysia and members of the FSC Malaysia Board of Directors.

### Background

#### FSC Policy to Address Forest Conversion

FSC has several policies against the conversion of natural forest to plantations and other land use. The [FSC Principles and Criteria for Forest Stewardship](#) (P&C) prevent the certification of forest plantations on areas converted from natural forest after November 1994, except under specified conditions (Criteria 6.9 & 6.10). In addition, the FSC Policy for Association (PfA) does not allow FSC to associate with any individual or organization that has been engaged in significant conversion of forest cover.<sup>1</sup>

FSC is presently reconsidering the 1994 cut-off date, and compensation for past conversion, in terms of environmental restoration and social restitution (whether such compensation could remedy the harms caused by past conversion) thereby providing a pathway for forest areas converted after 1994 to enter the FSC system. These issues (including moving the conversion cut-off date to 31 December 2020) are contained in a draft FSC Policy to Address Conversion (PAC)<sup>2</sup>, which can only become effective with revisions to P&C Criteria 6.9 and 6.10 (that will be put to a vote in the [FSC General Assembly 2021-2022 Part 2](#) to be held in October this year). In addition, FSC has developed a framework for addressing forest conversion through social and environmental remedy (FSC Remedy Framework).<sup>3</sup> (This framework presents a set of rules against which the remediation and restorative activities of companies will be assessed to be eligible to the FSC system).

#### Forest Certification in Malaysia

Forest certification in Malaysia began in 1994, with the FSC certification of a 91-ha rubber plantation in Johor.<sup>4</sup> The present FSC-certified area is 364,595 ha<sup>5</sup>, including both natural forest and plantations, with one FSC certified management unit in Peninsular Malaysia and five in Sabah. FSC Malaysia has adapted the global P&C and come up with the *FSC National Forest Stewardship Standard of Malaysia* (NFSS).<sup>6</sup>

---

<sup>1</sup> Policy for the Association of Organizations with FSC (PfA) [FSC-POL-01-004 V2](#)

<sup>2</sup> FSC Policy to Address Conversion [FSC-POL-01-007 V1-0 D5-4-EN](#) (<https://fsc.org/en/current-processes/fsc-policy-on-conversion>)

<sup>3</sup> <https://fsc.org/en/current-processes/fsc-remedy-framework> (this consultation will last until 14 October 2022).

<sup>4</sup> This was the Sungai Labis Estate managed by Guthries Plantations Sdn Bhd and certified by SGS. This rubber estate was subsequently converted into oil palm and its certificate was revoked.

<sup>5</sup> As at 10 May 2022. FSC certified area (pre-Covid) was 691,389 ha (two management units in Peninsular Malaysia and ten in Sabah).

<sup>6</sup> <https://my.fsc.org/my-en/fsc-documents>

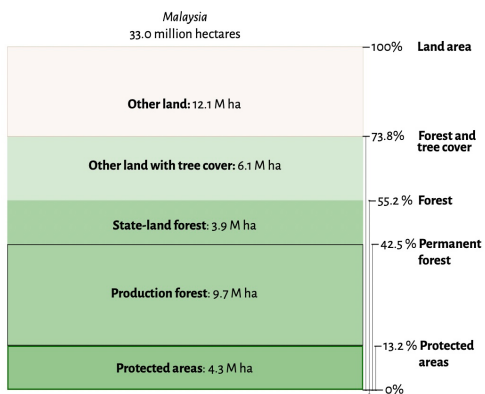


Figure 1: Land-use zoning in Malaysia (2016).<sup>7</sup>

### Forest Conversion in Malaysia

Over the last century, almost half of the natural forest in Malaysia was converted to plantations and other land use. Several million hectares of natural forest were converted since 1994. The Malaysian government has pledged 50% of the land to remain as forest. However, there remains about 10% of Malaysia's land area which can be converted in future. This land is known as "state-land forest" (Figure 1). In addition, the law allows for natural forest inside "permanent reserved forests" to be converted to plantations.<sup>8</sup>

### Certification and Forest Conversion in Malaysia

Ongoing conversion poses a challenge for the certification of Malaysia's forests. Most forest management companies in Malaysia are still involved in conversion activities. The 1994 cut-off date thus forms a "closed door" that limits FSC's influence in Malaysia. In addition, the PfA forms another barrier to FSC certification in Malaysia.

In Malaysia, most forests are owned and managed by the state governments. The state governments are also responsible for land-use planning. In Malaysia, decisions on whether to convert natural forest to plantations or other land use are made by the state government.

### A National Consultative Group (NCG)

In 2017, recognising these issues, FSC Malaysia decided to form a working group to engage with FSC International on its forest conversion policy. On 14 June 2022, FSC Malaysia convened a consultative group with representatives from a broad selection of stakeholders. The group included representatives from environmental and social non-governmental organisations, the timber industry, as well as certification professionals. The group was consulted on a wide range of issues related to forest conversion. The discussion was guided by a technical facilitator who summarised the position of the stakeholders present below. The technical facilitator also held discussions with several FSC International members based in Malaysia. The views of the FSC members were aligned with those of the NCG panel members, i.e. in principle, they consider positively (a) moving the 1994 cut-off date to a more recent date; and (b) for converted areas to enter FSC system, subject to appropriate restitution, remedy, and replacement.

<sup>7</sup> Ibid.

<sup>8</sup> RESCU (2022). *Impact of Malaysian land laws on its green economy ambitions* <http://www.rescu.com.my/2022-02-25%20Malaysia%20Land%20Laws%20RESCU%20FCDO.pdf>

## SUMMARY

---

### Position of Stakeholders in Malaysia on Forest Conversion and Certification

#### Overview

1. Stakeholders gave their support for FSC in Malaysia, and were unanimous in seeing FSC as a valuable initiative for both the conservation of forests and the sustainability of the timber industry.
2. Stakeholders agreed that, given its valuable contributions, FSC's influence in Malaysia should be strengthened. Stakeholders noted that FSC's current policies put constraints on FSC's influence in Malaysia.
3. Stakeholders, in principle, believe in the benefit of the PAC and the proposed remedy framework – i.e. that allowing converted forests into the FSC system (managed according to FSC's standards) will result in improved forest management. The stakeholders acknowledge that the challenge will be in balancing between strict limits and feasibility.
4. Several issues related to these policies were highlighted for consideration.

#### Position on conversion of natural forest to plantations

- (a) Broad agreement that tree plantations established after 1994 be eligible for FSC certification (subject to appropriate restitution, remedy, and replacement).
- (b) General consensus with regard to the need for a new cut-off date for conversion in Malaysia. Stakeholders viewed positively moving the old cut-off of 1994 to a new (more recent) date.
- (c) Asked to consider the eventual effective date of the policy as the cut-off date.
- (d) Support the pledges made by the Malaysian government to achieve net-zero emissions by 2050 and acknowledged that emissions from deforestation would need to be minimised.
- (e) Acknowledged that certain states in Malaysia were still in the process of developing their land-base.

#### Position on remedy of past harms

- (f) Found it appropriate for plantations to restore a portion of their area to natural forest.
- (g) Agreed in principle that if social and environmental harms had been remedied, then plantations should be eligible for certification.
- (h) Agreed that the draft remedy framework represented a pragmatic approach<sup>9</sup>. There were some questions as to loopholes allowing an organization to claim “no involvement in conversion” and thus only be obliged to undertake partial remedy (see Scenario 1, below).
- (i) Noted that it may be impossible to restore certain areas back to their original condition. In such cases, some form of off-site biodiversity restoration may be needed.
- (j) Noted that social and environmental remedies must be inclusive, taking into account the customary rights of indigenous people, gender concerns, as well as inter-generational equity.

#### Position on the policy for association

- (k) Felt that there was no fundamental barrier for FSC to associate with organisations that have been involved in past conversion.
- (l) Stakeholders accepted that the basis for using Dec 2020 as a cut-off date for allowing associates to be involved in conversion was in line with global commitments to end deforestation. Using the date of the adoption of the policy by FSC was accepted as reasonable.
- (m) Agreed that in line with the proposed remedy framework, FSC should be able to associate with an organisation that was involved in conversion if it agreed to remedy the past harms following the framework mentioned. The stakeholders identified several conversion-related issues arising from the PfA.

---

<sup>9</sup> It was noted that few stakeholders were familiar with the FSC policies or with the specific proposals for applying a Remedy Framework relating to conversion between 1994 and 2020.

## SUMMARY

---

### Conversion-Related Issues in the Malaysian Context

- (i) The act of clearing of a patch of forest seldom results in the conversion of that patch to non-forest. Such an act in-itself would seldom meet the proposed definition of conversion ([FSC-POL-01-007 V1-O\\_D5-4-EN](#))<sup>10</sup>. For example: how the timing (for which the conversion from natural forest to plantation) could be fixed to a specific date when conversion of a management unit usually involves an extended period of time (particularly for larger management units).
- (ii) Uncertainty on whether the date should be considered to be the date that an area was first clear-felled (i.e. the date when the large natural forest trees were felled) or the date on which the plantation was established (i.e. the date when the plantation trees were planted). In the Malaysian context:
- forest clearance is typically followed by rapid natural regeneration. Unless and until a plantation is established, there is seldom *lasting* loss of natural forest. The loss of natural forest only becomes permanent once the plantation is established and regular herbicide spraying commences.
  - land typically regenerates well-developed secondary forest within a few years of abandonment.
- There are several cases in Malaysia where this situation poses difficulties in interpreting FSC's policies. For example, land may have been (i) clear-felled with the intention of establishing a plantation prior to 1994; but (ii) the plantation was only established after 1994. The proposed definition of conversion does not make it clear whether:
- the conversion of an area is to be considered completed once an area has been logged; or
  - only after the establishment of the plantation over the entire management unit.
- (iii) Given the particularly active role of governments in the Malaysian context, stakeholders questioned the extent to which FSC's policies applied to governments. FSC policy refers to "The Organization" as "The person or entity holding or applying for certification and therefore responsible for demonstrating compliance with the requirements upon which FSC certification is based" (P&C).
- (iv) There were questions regarding the application of the remedy framework where stakeholders were divided:
- on the extent to which an entire state could be considered to be a Forest Management Unit (FMU)
  - as to whether states could take a jurisdictional-level approach to remedy.

Some stakeholders felt that FSC should take into account the existing conservation commitments of states (including the protection of up to 30 percent of the total land area in some cases). Other stakeholders felt that the conservation actions of governments should not detract from the obligations of FMU managers.

---

<sup>10</sup> Stakeholders noted that Malaysia's humid tropical climate, and extensive remaining natural forest needs to be taken into account.

## SUMMARY

---

### FSC Policy Loopholes

#### Overview

The stakeholders expressed concerns regarding three loopholes that allowed forest conversion to continue. In the Malaysian context there are three scenarios where loopholes in FSC policy allows association with entity (“X”) that carries out conversion using an agent (“Y”):<sup>11</sup>

- Scenario 1: “Traditional Ownership Loophole”  
X instigates conversion in a management unit owned by Y; X then purchases the management unit from Y.
- Scenario 2: “Shell Company Loophole”  
X controls Y via informal proxy, Y carries out the conversion. This could lead to Scenario 1.
- Scenario 3: “Contract manager loophole”  
X contracts Y to manage its land. Y applies for certification.

#### **Scenario 1: Traditional ownership loophole**

The latest draft of the PfA<sup>12</sup> includes the concept of “corporate group”. This concept goes a long way to closing the traditional ownership loophole. However, stakeholders raised concerns regarding the fact that the draft PAC and the draft Remedy Framework continue to refer to “indirect involvement” in conversion.

#### **Scenario 2: Shell company loophole**

Stakeholders also felt that an entity (X) could easily conceal involvement in conversion by a proxy or agent (Y). Malaysia does not have a public register of beneficial ownerships. It is easy to establish shell companies, anonymous trusts and to maintain control via an informal proxy (e.g. a family member).

A related loophole is found in the FSC Policy on the Excision of Areas from the Scope of Certification (PfE).<sup>13</sup> This policy allows for scenarios where an organization does not have control over the management of part of an FMU. The FSC excision policy allows the entity to excise up to 5% of the FMU from the scope of its certification.

The PfE does not mention the sale of part of the FMU. However, such a sale would entail the loss of control along the lines mentioned in the policy. The key issue is that such an area would lack safeguards to stop the area being converted to non-forest use. The PfE does not require any replacement or remedy for the loss of excised areas that are beyond the control of the organization.

The PfE states that the affected area shall not exceed 0.5% of the area of the FMU in any one year, nor affect a total of more than 5% of the area of the FMU. However, it is not clear whether any timeframe is attached to the 5% limit (from what date is the size of the FMU to be calculated). Similarly, if the FMU were to increase in size (such as following land acquisition), would the 5% be reset? Clarity on this issue is particularly important for FMUs in Malaysia, where there are regular excisions and additions.<sup>14</sup>

#### **Scenario 3: Contract manager loophole**

Scenario 3 relates to an agent-principal relationship. To a certain extent, this relationship might be covered by the concept of “corporate group” in the draft PfA (V3 D5). This is because the agent (Y) might be considered to be part of the “corporate group” of the principal (X). However the current definition is not explicit on this point.

The draft revision of the PfA (V3 D5) defines “corporate group” as “the totality of legal entities to which [Y] is affiliated in a corporate relationship in which either party controls the performance of the other”.

---

<sup>11</sup> Scenarios 1 and 2 are outlined by R.Z. Donovan (2020). Green Paper: Conversion and the Forest Stewardship Council (FSC) 1994 Cut-Off Date & Beyond. Forest Stewardship Council (FSC), September 2.

<sup>12</sup> Policy for the Association of Organizations with FSC (PfA) FSC-POL-01-004 V3-0 D5-0 EN (<https://fsc.org/en/current-processes/policy-for-the-association-of-organizations-with-fsc-pfa>)

<sup>13</sup> FSC-POL-20-003.

<sup>14</sup> Lim, T.W. and S. Sukswan. (2007). An Assessment of the Status of Permanent Reserved Forests in Peninsular Malaysia, 2001-2005. WWF-Malaysia, Petaling Jaya.

## SUMMARY

---

As Y is an agent of X, Y could be considered to be part of X's corporate group. However, this depends on the term "corporate relationship" being interpreted as "business relationship". If "corporate relationship" means "ownership relationship" then Y would not be considered to be part of X's corporate group.

The draft PfA (V3 D5) notes that factors that are used to determine whether a company is part of a broader corporate group include, "Financial control: Are there contractual or other financial arrangements that indicate one party controls the performance of another?". This is good guidance but the definition could be more explicit and state that contract managers are considered to be part of a forest owner's "corporate group" in this regard.

At any rate, FSC does not have procedures to examine the activities of X in this scenario. The FSC system considers the "organization" to be the party applying for certification. In this scenario, the "organization" would be Y. This would allow X to avoid having any formal association with FSC. The current PfA requires the applicant for certification (Y) to disclose of all forest areas over which it has responsibility. The PfA does not require that the owner (X) to disclose its forests areas.

In the Malaysian context, this scenario might apply in several instances: (i) the state grants a logging concession in a state-owned forest to a private company and the company applies for certification; (ii) a government agency applies for certification for state-owned forest; and (iii) a government company applies for certification for a concession that it has been granted by the state.

The contract-manager loophole may also apply in terms of the PfE mentioned under Scenario 2, above. For example, a forest owner may contract a company to manage part of its holdings. It may then choose to sell part of those holdings. The PfE is not explicit as to what happens if an excised area is removed from the control of the "owners or managers of the remaining FMU". Presumably the area will be at risk of conversion, without consequence to either the previous owners or the previous managers.

Similarly, the PfE does not guard against a scenario where an owner (X) may retain ownership over an area but remove the excised area from the control of the forest manager (Y). The owner might then place the area under the control of a third party, with instructions that the area be converted. This loophole could be closed if the Policy for Excision is revised to include the PfA's "corporate group" provisions.

July 2022.

---

