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# Malaysia Baseline Study: Indigenous Land Rights and Biodiversity Stewardship

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# Glossary of Terms

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## 1. Acronyms

- CT:** Communal Title. A form of land title issued to a community rather than an individual, intended to protect customary land from being easily sold or subdivided outside the community.
- FPIC:** Free, Prior and Informed Consent. An international human rights standard (prominent in UNDRIP) ensuring indigenous peoples have the right to give or withhold consent to projects affecting their lands, territories, and resources.
- JTU:** Jabatan Tanah dan Ukur (Lands and Surveys Department). The primary state government agency in Sabah responsible for land administration, surveying, and the issuance of land titles.
- NCR:** Native Customary Rights. Pre-existing, proprietary rights to land and resources held by indigenous peoples based on their continuous occupation and customary practices (*adat*), recognized under both Common Law and, to varying extents, Statutory Law.
- NT:** Native Title. A specific category of land title under the Sabah Land Ordinance that can only be held by an *Anak Negeri* (indigenous person of Sabah), typically granted in perpetuity.
- SFD:** Sabah Forestry Department (Jabatan Perhutanan Sabah). The state agency responsible for the management, protection, and regulation of Sabah's forest reserves.
- UNDRIP:** United Nations Declaration on the Rights of Indigenous Peoples. A comprehensive international instrument outlining the rights of indigenous peoples, frequently used as a benchmark for assessing state laws and policies.

## 2. Local Customary Terms

<b>Adat</b>	Customary law or traditional practices. In the context of Sabah, <i>adat</i> dictates the social, cultural, and spiritual rules of a community, including the traditional rules governing land stewardship, inheritance, and natural resource management. Many <i>adat</i> are legally enforceable among natives through the Native Courts.
<b>Anak Negeri</b>	Literally translated as "Child of the State." This is the legal term used in Sabah to define an indigenous person or native of the state, who is consequently eligible to hold Native Title and claim Native Customary Rights.
<b>Ketua Kampung / Ketua Anak Negeri</b>	Village Head and Native Chief, respectively. These are officially recognized traditional leaders who play a vital role in local governance, dispute resolution, and the verification of customary land claims.
<b>Mahkamah Anak Negeri</b>	Native Court. A legally recognized parallel judicial system in Sabah with jurisdiction over matters strictly pertaining to native customs ( <i>adat</i> ), personal law, and specific local disputes among the <i>Anak Negeri</i> . Governed by the Native Courts Enactment.

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<b>Tagal / Bombon</b>	A traditional indigenous system of watershed and fisheries management practiced in Sabah. It involves the communal zoning of rivers into strict conservation, restricted, and open fishing zones to ensure sustainable resource use, legally supported by the Sabah Inland Fisheries and Aquaculture Enactment.
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### 3. Key Legal Terminology

<b>Alienation of Land</b>	The formal legal process by which the State Government transfers the ownership, rights, or leases of state land to an individual, corporation, or entity, thereby transforming its legal status from unoccupied state land into titled private or alienated land.
<b>Common Law</b>	Common Law refers to laws derived from judicial decisions and precedents (such as landmark rulings affirming NCR as a pre-existing right).
<b>Statutory Law</b>	Statutory Law refers to written laws passed by the legislature (e.g., the Sabah Land Ordinance).
<b>Compulsory Acquisition</b>	The inherent power of the state to legally seize private property or legally recognized customary land for public use, provided that fair and adequate compensation is paid to the rights holders.
<b>Gazetting of Land</b>	The official process of publishing a formal notice in the Government Gazette to legally establish, declare, or alter the status of a specific area of land (e.g., gazetting an area as a Forest Reserve, a National Park, or a Native Reserve). Once gazetted, the land is subject to the specific regulations of that classification.
<b>Legal Pluralism</b>	The existence of multiple, often overlapping legal systems operating within a single geographic or political boundary. In Sabah, this manifests as the simultaneous operation of Civil Law, Statutory Law, Islamic (Syariah) Law, and Native Customary Law ( <i>adat</i> ).
<b>Usufructuary Rights</b>	The legal right to use, access, and derive benefits or profit from property or land that belongs to another entity (such as the State), without holding formal ownership or title to the land itself. Historically, statutory frameworks have often attempted to reduce NCR to mere usufructuary rights rather than full proprietary ownership.

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# Key Laws and Statutes Referred

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The following statutes form the primary legislative framework governing land, forestry, biodiversity, and indigenous rights in the State of Sabah:

<b>Federal Constitution of Malaysia</b>	The supreme law of the federation which safeguards fundamental liberties, including the protection of property rights, serving as the ultimate legal foundation for the judicial recognition of Native Customary Rights.
<b>Land Ordinance (Sabah Cap. 68):</b>	The central statutory framework that governs land tenure, the alienation of state land, the issuance of titles, and the administrative procedures for claiming (and restricting) Native Customary Rights.
<b>Forests Enactment 1968</b>	The primary law that determines forest boundaries, regulates the constitution of various classes of Forest Reserves, and dictates the strict administrative rules regarding access and use of forest resources by local communities.
<b>Forests (Constitution of Forest Reserves and Amendment) Enactment 1984</b>	The law that allows the State Legislative Assembly to create Forest Reserves through the passing of a bill, without going through the processes under the Forests Enactment 1968
<b>Native Courts Enactment 1992</b>	The statute that formally establishes the jurisdiction, powers, and procedural mechanisms of the Native Courts to adjudicate breaches of <i>adat</i> (customary law) among the indigenous populations of Sabah.
<b>Parks Enactment 1984</b>	The legal framework governing the creation, control, and absolute protection of National Parks and protected areas, which often strictly limits human habitation and traditional resource extraction within gazetted park boundaries.
<b>Wildlife Conservation Enactment 1997</b>	The state law dedicated to the protection and management of wildlife species and their habitats, outlining the rules for hunting, permits, and the creation of wildlife sanctuaries.
<b>Sabah Water Resources Enactment 1998</b>	The law providing for the sustainable management, use, and protection of the state's water resources, which includes the regulatory power to gazette crucial water catchment areas.
<b>Sabah Biodiversity Enactment 2000</b>	The statute regulating access to Sabah's biological resources, which is, among others, meant to ensure the protection of indigenous traditional knowledge, and establish frameworks for the equitable sharing of benefits arising from biodiversity utilization.
<b>Sabah Inland Fisheries and Aquaculture Enactment 2003</b>	The law regulating inland waters and fisheries, notable for providing statutory recognition and legal backing to traditional indigenous river management practices, such as the <i>Tagal</i> system.

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<b>Sabah Climate Change and Carbon Governance Enactment 2025</b>	Newly enacted legislation establishing the regulatory, legal, and transactional framework for carbon trading, climate change mitigation projects, and carbon governance within the state's forests and lands.
<b>State Heritage Enactment 2017</b>	Legislation designed to preserve and protect cultural, historical, and natural heritage sites, providing mechanisms to legally recognize areas of immense traditional or cultural importance to indigenous communities.

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# Executive Summary

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## Overview

This baseline study assesses the "enabling conditions" for Indigenous Peoples' rights in Malaysia, with a specific focus on the State of Sabah. Conducted as part of the *Transformative Pathways* project, the report analyzes the extent to which current legal and policy frameworks recognize, protect, or hinder indigenous stewardship of biodiversity.

The study finds that Sabah is characterized by a state of **legal pluralism**, where robust rights recognized by the Judiciary (Common Law) often clash with restrictive procedures enforced by the Legislature and Executive (Statutory Law). While the Federal Constitution and landmark court rulings affirm Native Customary Rights (NCR) as pre-existing proprietary rights, the statutory machinery for recognizing these rights—specifically the *Sabah Land Ordinance* and *Forest Enactment*—often imposes administrative barriers that render these rights difficult to realize in practice.

## Key Findings: The Spectrum of Recognition

### 1. Enablers (Pathways for Rights)

The study identifies several critical legal pathways that serve as powerful enablers for indigenous conservation:

#### Judicial

#### Pathway

The Federal Court has definitively ruled that NCR survives sovereignty and exists regardless of whether a formal title has been issued. This provides a legal shield against the argument that "no title means no rights."

#### Statutory

#### Pathway

The newly passed *Land (Amendment) Enactment 2025* introduces Section 88A(4)(c), which explicitly states that a corporate land title does not prevent the determination of NCR. This offers a new, powerful mechanism to challenge plantation titles that encroach on community lands.

#### Administrative

#### Pathway

The successful institutionalization of the *Tagal* system under the *Inland Fisheries and Aquaculture Enactment 2003* demonstrates that the State is capable of formally recognizing indigenous management authority when it aligns with economic and conservation goals.

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## 2. Hindrances (Structural Barriers)

Despite these enablers, systemic barriers persist:

### Constructive

### Notice

The State's reliance on constructive notifications (i.e. placing notices at the land office or district office in town instead of at the actual site) to extinguish rights (under Section 13 of the Land Ordinance) systematically disenfranchises remote communities who are unaware of legal deadlines to object to land alienation.

### Agrarian

### Bias

The statutory definition of NCR (Section 15) emphasizes "cultivation" and "fruit trees," effectively delegitimizing the stewardship of high-conservation value forests, which are often misclassified by the State as "idle" land.

### Lack

### of

### FPIC

Domestic legislation prioritizes "consultation" over "consent." With the exception of the *Protection of New Plant Varieties Act 2004* and the emerging carbon framework, there is no statutory mandate for Free, Prior and Informed Consent (FPIC) in land or forestry matters.

## Strategic Recommendations

To shift the baseline from "conflict" to "recognition," this report proposes a shift in advocacy strategy:

1. Communities should leverage the new Section 88A(4)(c) of the Land Ordinance to demand statutory inquiries into NCR on titled lands, bypassing the difficult "indefeasibility" defense used by companies.
2. Advocacy should highlight the legal inconsistency where the State requires community consultation for *carbon trading* (under the 2025 Climate Enactment) but not for logging or dams. This "carbon precedent" should be used to argue for equal participation rights of communities in the decision making and planning processes across all extractive industries and mega project implementation.
3. The legal recognition afforded to river management (*Tagal*) should be replicated for forest management (*Taval*) by utilizing the Native Courts to codify these practices as enforceable Native Law.

## Conclusion

While the current statutory framework in Sabah remains restrictive, recent legislative amendments and established case law provide underutilized avenues for reform. The "enabling conditions" for indigenous stewardship exist, but they require a strategic transition from passive reliance on administrative benevolence to the active legal enforcement of constitutional and statutory rights.

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# 1. Introduction

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## 1.1. Project Background

This report constitutes the baseline study for the Malaysia component of the global project titled "*Transformative Pathways: Indigenous Peoples and Local Communities Leading and Scaling Up Conservation and Sustainable Use of Biodiversity*." Funded by the German Government through the International Climate Initiative (IKI), this six-year initiative is implemented by a consortium of partners, including the Forest Peoples Programme (FPP) and PACOS Trust in Malaysia.

The overarching objective of the project is to improve the recognition of the contribution of Indigenous Peoples and Local Communities (IPLCs) to biodiversity conservation. In the Malaysian context, the project focuses specifically on the State of Sabah, aiming to strengthen the enabling conditions—legal, political, and administrative—that allow indigenous communities to govern their lands and resources effectively.

## 1.2. Scope and Objectives

This document attempts to provide a detailed assessment of the current legal and policy frameworks governing indigenous land rights and traditional knowledge. It serves as a baseline against which future changes in the legal landscape will be measured at the project's conclusion in 2028.

The specific objectives of this study are to:

- 1. Analyze Legal Frameworks**  
Review national and state-level laws (statutes) and binding judicial decisions (case law) related to indigenous rights.
  - 2. Evaluate Stewardship Recognition**  
Assess the extent to which traditional resource management systems (such as *Tagal*, *Tavol*, and *Momokan*) are formally or informally recognized by government agencies.
  - 3. Assess International Alignment**  
Analyze the gap between Malaysia's domestic legislation and its international commitments under the Convention on Biological Diversity (CBD) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
  - 4. Review Reporting Mechanisms**  
Determine if current frameworks facilitate community-based reporting to international bodies.
  - 5. Provide Strategic Recommendations**  
Identify actionable legal levers for advocacy to improve rights recognition.
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### 1.3. Geographical and Community Focus

While the legal analysis covers the relevant Federal and State laws applicable to Sabah, the situational analysis focuses on the specific territories of the project's partner communities. These communities represent the distinct ethnic groups targeted by the project—Murut Tahol, Kadazandusun, and Dusun as well as additionally the Tombonuo and Sungai Rumanau communities.

Specifically, the study draws on secondary data and stewardship practices from:

- **Kg. Alutok:** Representing the Murut Tahol system of forest stewardship (*Tavol*).
- **Kg. Kiau and Kg. Terian:** Representing Dusun and Kadazandusun watershed and forest management systems.
- **Kg. Mangkawagu:** Representing the distinct resource governance of the Sungai Rumanau peoples.
- **Kg. Sungai Elo:** Representing the Dusun Tombonuo's coastal mangrove stewardship (*Momokan*).

This targeted approach ensures that the legal analysis is not merely theoretical but grounded in the practical realities and diverse ecosystems—from highlands to coast—managed by Sabah's indigenous peoples.

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# 2. Methodology

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## 2.1. Research Design

This report employs a qualitative doctrinal legal research methodology, designed to assess the "enabling conditions" for Indigenous Peoples' rights in Malaysia with a specific focus on Sabah. Given the scope of the assignment as a baseline study, the research was conducted primarily through a desk-based review of legal instruments, judicial decisions, and policy documents.

The study adopts a "law in context" approach, analyzing not only the "black letter law" (statutes and regulations) but also the "living law" (judicial precedents and administrative practices) to identify structural gaps between legal theory and the on-the-ground reality for indigenous communities.

## 2.2. Data Collection

Data for this report was triangulated from three primary categories of documentary sources:

### 2.2.1. Primary Legal Sources

A systematic review of the Malaysian and Sabah legislative frameworks was conducted to establish the de jure status of indigenous rights. This included:

#### Statutes

Analysis of key enactments including the

- Sabah Land Ordinance (Cap. 68)
- Forest Enactment 1968
- Wildlife Conservation Enactment 1997
- Sabah Climate Change and Carbon Governance Enactment 2025.

#### Case Law

The review focused on landmark decisions from the High Court, Court of Appeal, and Federal Court regarding Native Customary Rights (NCR), specifically tracking the judicial evolution of concepts such as "fiduciary duty," "proprietary rights," and "constructive notice."

### 2.2.2. Secondary Sources and Community Case Studies

Information regarding the specific stewardship systems of the focal communities (Kiau, Alutok, Mangkawagu, Sg. Eloi, and Terian) was derived from a review of existing secondary literature. This included:

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### Internal Documentation

Review of previous case study reports, baseline data, and community maps as well as reports documenting the Tagal (fisheries), Taval (forest), and Momokan (mangrove) systems provided by PACOS Trust.

### Policy Documents

Review of government publications, including the National Policy on Biological Diversity 2022-2030 and relevant state strategic plans.

### 2.2.3. International Instruments

To fulfill the objective of assessing Malaysia's international alignment, domestic laws were benchmarked against key international standards, specifically:

- *The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).*
- *The Convention on Biological Diversity (CBD), particularly Articles 8(j) and 10(c).*
- *The Kunming-Montreal Global Biodiversity Framework (GBF).*

## 2.3. Analytical Framework

The collected data was analyzed using a comparative compliance framework. This involved a three-step analytical process:

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|---------------------|---|-----------------|
| 1. <b>Statutory</b> | Identifying the explicit rights granted under current written law.  | <b>Mapping</b>  |
| 2. <b>Judicial</b>  | Comparing these statutory provisions with binding judicial interpretations to highlight where the courts have expanded rights beyond the legislative text.  | <b>Contrast</b> |
| 3. <b>Gap</b>       | Evaluating the practical application of these laws against the documented stewardship practices of the case study communities to determine whether the current legal framework acts as an "Enabler" or a "Hindrance" to traditional conservation. | <b>Analysis</b> |

## 2.4. Scope and Limitations

This study is a desk-based legal analysis. No primary fieldwork or new interviews were conducted for this specific report. The situational analysis of the specific communities relies on the accuracy of existing secondary data and prior documentation available to the consultant. Furthermore, analyses of recent legislation, such as the Sabah Climate Change and Carbon Governance Enactment 2025 and the Land (Amendment) Enactment 2025, are based on the statutory text, as their practical implementation and judicial interpretation remain to be seen.

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## 3. Analysis of Legal and Policy Frameworks

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This section provides an analysis of the current legal and policy frameworks governing Indigenous Peoples' rights to land, resources, and territories in Malaysia, with a specific focus on the State of Sabah. The analysis is structured hierarchically, beginning with the supreme law of the Federation, followed by specific State enactments, and concluding with binding judicial precedents.

The legal landscape regarding Indigenous land rights in Malaysia is characterized by legal pluralism, where Statutory Law (written legislation), Common Law (judicial decisions), and Customary Law (*Adat*) interact. While land management is constitutionally a State matter—granting the Sabah State Government authority over land alienation via the *Sabah Land Ordinance*—this authority is not absolute. It is circumscribed by the Federal Constitution and interpreted through binding judicial precedents set by the superior courts of Malaysia, which have increasingly recognized Native Customary Rights (NCR) as pre-existing proprietary rights.

### 3.1. National-Level Frameworks (Malaysia)

To assess the "enabling conditions" in Malaysia, it is necessary to establish the benchmark set by the supreme law of the land and international standards.

#### 3.1.1. International Standards vs. Domestic Reality

International instruments such as ILO Convention No. 169 (Articles 14 & 15) and UNDRIP (Articles 25 & 26) explicitly recognize that Indigenous rights are based on "traditional occupation" rather than state grants. Crucially, Article 13 of ILO 169 defines "territory" as the total environment of the areas occupied—covering not just the soil, but the rivers, forests, and spiritual sites. As the analysis below demonstrates, Malaysian domestic law often fragments this holistic "territory" into separate administrative silos (Land, Forests, Water), creating a structural disconnect with these international standards.

#### 3.1.2. Constitutional Protections

The Federal Constitution of Malaysia acts as the supreme law of the Federation. Several Articles provide the bedrock for the recognition of indigenous land rights, serving as primary enablers for the protection of customary lands against arbitrary state action.

##### Article 13 (Rights to Property)

This is the primary constitutional safeguard. Clause (1) states that "no person shall be deprived of property save in accordance with law," and Clause (2) mandates adequate compensation for compulsory acquisition. Judicial interpretation has confirmed that NCR constitutes a "proprietary right" falling within this definition, meaning any extinguishment requires compensation.

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**Article 5 (Right to Life)**

The courts have expanded the protection of native lands to include the "Right to Life" under Article 5. The extinguishment of customary rights is viewed not merely as a deprivation of property but as a deprivation of livelihood. Consequently, compensation must account for the total dependency of the community on the land for their survival.

**Article 160 (Definition of Law)**

The Constitution defines "law" to include "any custom or usage having the force of law." This definition is critical as it constitutionally elevates native customs regarding land usage (such as *Taval* or *Tagal*) to the status of law, provided they have not been explicitly extinguished by clear and unambiguous statute.

**Article 161A(5) (Special Position of Natives in Sabah and Sarawak)**

This article provides the constitutional basis for Native Reserves in Sabah and Sarawak. It stipulates that Article 89 (on Malay reservations) does not apply to Sabah or Sarawak, and Article 8 (general equality) does not invalidate State laws that reserve or alienate land to natives, or give them preferential treatment in land alienation by the State..

**References for Section 3.1:**

- *Federal Constitution of Malaysia, Articles 5, 8, 13, 160, 161A.*
  - *International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989), Articles 13, 14, 15.*
  - *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), Articles 2*
  - *Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors [1998] 2 CLJ 665*
  - *Kerajaan Negeri Selangor & Ors v Sagon Tasi & Ors [2005] 4 CLJ 169*
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## 3.2. State-Level Frameworks (Sabah)

While the Federal Constitution provides the bedrock of indigenous rights, the practical administration of land and resources in Sabah is governed by State enactments. The legal landscape is defined by the Sabah Land Ordinance (Cap. 68), which operates on a modified Torrens System of registration. This creates a fundamental tension: the state system emphasizes formal registration as the evidence of title, whereas Indigenous peoples rely on historical occupation and custom.

This section analyzes the primary state laws governing land, forests, and resources, identifying where they enable indigenous stewardship and where they create systemic barriers.

### 3.2.1. The Sabah Land Ordinance (Cap. 68)

The *Sabah Land Ordinance* (SLO) is the principal statute regulating land tenure. Unlike the National Land Code, which applies to all states in Peninsular Malaysia but not Sabah or Sarawak, the SLO explicitly defines Native Customary Rights (NCR). However, the statutory mechanisms for recognizing these rights often impose agrarian definitions that clash with traditional conservation practices.

#### A. The "Agrarian Bias" in Defining NCR (Section 15)

Section 15 of the SLO provides the strict legal criteria for establishing NCR. Administrative interpretations require claimants to prove "continuous reliance" through seven specific criteria:

1. **Customary Tenure:** Continuous occupation or cultivation for three or more years.
2. **Fruit Trees:** A density of 50 or more trees per hectare.
3. **Isolated Plants:** Proof of upkeep of plants of economic value (e.g., sago, rotan).
4. **Grazing Land:** Stocked with sufficient cattle to suppress undergrowth.
5. **Cultivation:** Land built on or cultivated within three years.
6. **Burial Grounds/Shrines:** Recognized as proof of presence.
7. **Rights of Way:** Established paths for men or animals.

This framework creates a structural barrier for conservation. The requirement for "cultivation," "stocking with cattle," or high densities of fruit trees effectively penalizes communities that leave forests intact for catchment protection or spiritual use. Legally, a fallow forest recovering from swidden agriculture is often misinterpreted by the State as "idle" or "abandoned" land rather than part of an active customary cycle.

#### B. The Risks of Communal Title (Section 76)

Section 76 allows land to be held for the common use and benefit of a native community. While this appears to be a strong enabler for securing large territories, the legal reality is complex.

##### Trusteeship vs. Ownership

Land under Communal Title is held in trust by the Collector of Land Revenue. While the community are "beneficiaries," the Collector retains significant control as the trustee. Do note that, the proceeding section 77 does allow for a communal title to be subdivided into individual native titles which provide ownership & proprietary rights. However, this subdivision is dependent on the agreement of the Collector.

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### "State" vs. "NCR" Communal Titles

A critical distinction exists between Communal Titles based on proven NCR (which recognize pre-existing rights) and "State Communal Titles" (which are administrative grants and introduced to the section via amendment in 2009). In the latter, the State selects the beneficiaries. This undermines security of tenure, as the State retains the discretion to determine who qualifies as a "beneficiary," rather than the community determining membership based on *adat*.

### Administrative Restrictions on Stewardship

The limitations of Section 76 are not merely theoretical; they are administratively enforced through "Special Terms" frequently attached to Communal Titles. Analysis reveals that these titles often function less as instruments of ownership and more as instruments of state control. Common special terms include specific prohibitions that directly undermine indigenous self-determination and traditional stewardship, such as:

1. **Crop Control**

Terms often stipulate that "*Only plants or trees approved by the Director of Agriculture shall be cultivated,*" effectively limiting traditional diverse agroforestry or swidden practices in favor of state-sanctioned monocrops.

2. **Prohibition on Dealings**

Sub-leases or dealings are strictly prohibited *except* to State agencies or joint-venture companies approved by the Minister.

3. **Loss of Autonomy**

The Collector, acting as Trustee, retains the power to determine the boundaries of individual lots and even the eligibility of beneficiaries. These conditions effectively reduce the indigenous community from landowners to "tenant farmers" on their own territory, managing the land according to the State's agricultural priorities rather than their own *adat* (customary) conservation protocols.

### C. Native Reserves: Legislative Grant vs. Proprietary Right (Section 78)

Section 78 empowers the Yang di-Pertua Negeri to gazette State Land as a Native Reserve for the "protection and well-being" of natives. It does not require strict proof of agrarian cultivation to be granted, the State merely needs to find an area of unalienated land. It is well-suited for recognizing village settlements or mixed-use areas.

Unlike Native Titles, which recognizes a proprietary right, a Native Reserve is a legislative grant. It does not confer ownership. The reserve is managed by appointed Trustees, and the State retains the ultimate authority to revoke the reserve if it deems the community is not complying with the conditions. Functionally, it is similar to the "State Communal Title" under section 76. Thus, while it offers protection, it does not offer autonomy.

### D. Procedural Extinguishment (Section 13)

A major procedural hurdle is the "Notice" mechanism under Section 13. When land is to be alienated, the Collector publishes a notice calling for claims. If no claim is made within the specified period, the rights are deemed extinguished. In practice, reliance on "constructive notice" (e.g., posting a notice at the District Office) rather than actual notice to remote communities often leads to the extinguishment of rights by default, creating "indefeasible" titles for third parties over customary lands.

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## E. The Codification of Indefeasibility (2025 Amendment)

The legal framework governing land titles in Sabah underwent a paradigm shift with the passing of the Land (Amendment) Enactment 2025 in April 2025. This amendment introduced Section 88A, which codifies the Torrens system principle of "indefeasibility of title." While this provision generally strengthens the security of tenure for registered titleholders (including plantation companies), a critical analysis reveals that it simultaneously creates a statutory avenue for Indigenous communities to challenge such titles.

### 1. The "NCR Exception" to Indefeasibility (Section 88A(4)(c))

Section 88A(1) provides that a registered title is indefeasible, meaning it cannot be challenged by adverse claims, effectively protecting "bona fide purchasers" who buy land without notice of prior defects.

Historically, companies have used this defense to argue that once they hold a title, any prior Native Customary Rights (NCR) are extinguished or irrelevant. However, Section 88A(4)(c) explicitly creates a "saving clause." It states that the provisions of indefeasibility "do not prejudice or prevent the determination of native customary rights."

This is a legally profound exception as it establishes NCR as an overriding statutory interest. Unlike other unregistered interests that are wiped out by a transfer of title, the Enactment explicitly preserves the right of the community to have their NCR determined, regardless of who currently holds the title. Consequently, a company cannot rely on "indefeasibility" to block an NCR claim, because the very statute granting them that protection expressly carves out NCR from its scope.

### 2. The Procedural Precedent: *Alfeus Yahsu* (2016)

The practical mechanism for enforcing this exception on titled land was definitively established by the Court of Appeal in *Assistant Collector of Land Revenues & Ors v Alfeus bin Yahsu & Anor* [2016].

In this landmark case, the land in dispute had already been alienated and titled to a third party company (Sudi Kembang Sdn Bhd). The High Court originally granted a declaration of NCR to the native claimants. On appeal, while the Court of Appeal set aside the High Court's order on jurisdictional grounds (ruling that the High Court has appellate, not original, jurisdiction in these matters), it issued a decisive order: it directed the Assistant Collector of Land Revenue (ACLR) to conduct a public inquiry under Sections 13-16 of the Land Ordinance to determine the NCR claims, notwithstanding the valid existence of the company's title.

This established a binding legal precedent that the alienation of land and the issuance of a title do not extinguish the Collector's statutory duty to inquire into NCR claims. When read together with the new Section 88A(4)(c), the legal pathway is clear: the existence of a corporate title is not a bar to an investigation; rather, the title remains subject to the findings of such an inquiry.

### 3.2.2. Forestry Frameworks (Forest Enactment 1968)

In Sabah, land rights are often overlaid by the **Forest Enactment 1968**, which governs the State's permanent forest estate. This legislation creates a regulatory environment that frequently criminalizes traditional stewardship practices while simultaneously offering narrow, underutilized avenues for rights recognition.

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## A. The Criminalization of Customary Use (Section 20)

The primary source of conflict for indigenous communities living within or adjacent to Forest Reserves is Section 20 of the Enactment. This provision imposes strict liability, making it an offense to cultivate, clear, or dig up land in a Forest Reserve without express authority. This statutory prohibition directly conflicts with traditional swidden (rotational) agriculture. The Forestry Department's operational definition of "cultivation" often targets the clearing of fallow land, treating it as "new encroachment" rather than the continuation of an existing customary right. This effectively criminalizes the agricultural cycle essential to community food security.

## B. The "Saving" of Native Rights (Section 41)

Despite the general prohibitions, the Enactment contains a specific "saving clause" for native rights. Section 41 allows natives to cut and remove timber, atap (thatch), and other forest produce from State Land (not Forest Reserves) for domestic needs, such as constructing dwellings, fences, or boats, and for firewood.

This provision is restrictively interpreted. It covers only "domestic" use and does not explicitly recognize the right to collect non-timber forest products (like honey, resins, or medicinal plants) for trade or economic stewardship. This creates a legal gap where activities central to a community's economy remain legally precarious unless specifically licensed.

## C. Inquiry Mechanisms: The Procedural Gap

The Enactment provides procedural safeguards for recognizing rights. Before a reserve is constituted, an inquiry must be held to settle local claims under section 9 of the Enactment. However, this process relies on "constructive notice" (e.g., Gazette notification) rather than actual notice. Consequently, remote communities often remain unaware of the gazettement until enforcement actions begin, leading to the extinguishment of their rights by default.

Crucially, Section 14 empowers the Yang di-Pertua Negeri to admit rights or privileges after a reserve has been constituted. This is a vital, yet underutilized, strategic lever. It allows communities to petition for the formal recognition of residence or foraging rights within an existing reserve without requiring the politically difficult step of de-gazetting the land.

Despite this, implementation often falls short as there has been no publicly recorded case of a pre or post gazettement inquiry related to native privileges in a forest reserve.

## D. Bypassing Safeguards: The Forests (Constitution of Forest Reserves and Amendment) Enactment 1984

The most significant legal mechanism that allows the State to bypass the procedural safeguards (such as the inquiry process under Section 9 of the 1968 Enactment) is the **Forests (Constitution of Forest Reserves and Amendment) Enactment 1984** (the 1984 Enactment).

While the *Forest Enactment 1968* requires the Chief Conservator of Forests to conduct a public inquiry and settle claims *before* constituting a Forest Reserve, the 1984 Enactment allows the State Assembly to **create or amend Forest Reserves simply by passing a bill**.

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### **Impact on Native Customary Rights (NCR)**

#### **1. Legislative Override of Procedure**

The 1984 Enactment operates on the principle of legislative supremacy. When the State Assembly passes a law, that law is deemed to have followed all necessary procedures. This means that when a new Forest Reserve is constituted under this 1984 method, the government can argue that the requirement for a public inquiry (Section 9 of the 1968 Enactment) has been legislatively satisfied or overridden.

#### **2. Extinguishment without Notice**

The effect is the immediate creation of large Forest Reserves, often with the subsequent extinguishment of any pre-existing NCR, without the State having to issue any public notices, conduct on-site meetings, or formally settle or compensate claims.

#### **3. The "Saving Clause" Conflict**

This method creates an irreconcilable conflict with the "saving clauses" of the 1968 Enactment (Section 41). When a reserve is created by legislative fiat under the 1984 Enactment, it creates an environment where customary rights are extinguished by the sovereign power of the Assembly, leaving communities with little recourse other than challenging the process in the superior courts.

This 1984 mechanism is thus a powerful structural tool that prioritizes state land use planning (forest conservation or commercial exploitation) over the procedural rights of indigenous communities, rendering the safeguards in the 1968 Enactment largely cosmetic.

### **3.2.3. Water, Wildlife, and Parks Frameworks**

Beyond land and forests, specific resource laws create a complex patchwork of rights and restrictions. While often restrictive, these enactments contain specific provisions that can be leveraged to recognize indigenous stewardship.

#### **A. Water Resources Enactment 1998**

This legislation links land use with water protection, offering a progressive framework for recognizing community roles in watershed management.

The law explicitly recognizes "Private Water Rights," under Section 16, allowing owners or occupiers of land to take water free of charge for domestic purposes and subsistence agriculture. This provides statutory validation for indigenous presence and water usage.

Section 38 also allows for the declaration of "Water Conservation Areas" to protect water sources. Unlike strict "Protection Areas," conservation areas allow for flexible management plans. Section 38(6) explicitly requires the Director to consider the "economic and social impact" on occupiers. This provision effectively mandates the State to consider the livelihood needs of indigenous stewards when designing conservation rules.

## **B. Wildlife Conservation Enactment 1997**

This enactment stands out for explicitly integrating community roles into conservation enforcement.

Under Section 64 of the law the Minister has the authority to declare specific zones as "Wildlife Hunting Areas" where natives are legally permitted to hunt for subsistence. This is a rare instance where modern legislation validates traditional foraging rights under a regulated system.

The law also institutionalizes local involvement by allowing the Director to appoint community members as Honorary Wildlife Wardens under section 7. This confers legal authority upon community members to enforce wildlife laws, possibly bridging adat (customary) policing with state enforcement.

## **C. Parks Enactment 1984**

State Parks generally impose the strictest protections, which include prohibiting residence, cultivation, and hunting, as mandated by Section 48.

However, recognizing that strictly enforcing Section 48 would result in the displacement of thousands of indigenous people, such as those residing in the Crocker Range, Sabah Parks has implemented the "Community Use Zone" (CUZ) policy. This administrative arrangement, although not conferring a statutory title, permits long-established communities to continue their traditional residence and agriculture within the park boundaries. Consequently, the CUZ policy functions as a *de facto* recognition of historical rights, though it remains legally vulnerable to potential policy changes.

### **3.2.4 Climate and Carbon Frameworks (Enactment 2025)**

As of July 2025, the governance of Sabah's natural resources has been expanded by the Sabah Climate Change and Carbon Governance Enactment 2025. This legislation regulates the monetization of forest carbon and introduces a new layer of state control over indigenous territories, while simultaneously offering a unique statutory lever for rights recognition.

#### **A. State Sovereignty vs. Native Consultation**

The Enactment establishes the Sabah Climate Action Council (SCAC) as the centralized authority for all carbon trading projects. Legally, the State asserts sovereignty over all carbon assets. Section 23(1) explicitly vests all carbon rights in Sabah solely in the Government.

However, the Enactment does include a procedural requirement for native communities. Section 22(1) mandates that where a carbon activity is proposed in an area where Native Customary Rights (NCR) have been established, the project proponent must, as part of the feasibility study process, do the following:

1. Conduct consultations with the native community or their appointed representatives.
2. Propose community benefit measures.
3. Incorporate community development measures where applicable.

Importantly, Section 22(3) explicitly states that this section shall not be construed as conferring any ownership or possessory rights to the native community unless such rights are otherwise recognized under any written law.

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## **B. "Consultation" not "Consent"**

The Enactment does not use the term "Free, Prior and Informed Consent" (FPIC). Instead, the statutory requirement is for consultation as part of the pre-project feasibility study.

This procedural requirement, while being a lesser standard than FPIC, is legally significant because it establishes a higher, formal standard for engaging with native communities in the context of carbon projects than what is currently required in much of the legislation governing logging or large-scale agriculture.

This inconsistency—where the State requires a formal process of consultation for the intangible use of the forest (carbon storage) but a lower or absent standard for the tangible use of the forest (logging or dams)—provides a critical opening for legal advocacy to harmonize community engagement standards across all resource laws.

### **References for Section 3.1:**

- *Sabah Land Ordinance (Cap. 68), Sections 13, 15, 38A, 76, 78, 88A.*
  - *Land (Amendment) Enactment 2025.*
  - *Forest Enactment 1968, Sections 9, 14, 20, 41.*
  - *Forest Rules 1969, Rule 20A.*
  - *Forests (Constitution of Forest Reserves and Amendment) Enactment 1984*
  - *Sabah Water Resources Enactment 1998, Sections 16, 38.*
  - *Wildlife Conservation Enactment 1997, Sections 7, 64.*
  - *Parks Enactment 1984, Section 48.*
  - *Sabah Climate Change and Carbon Governance Enactment 2025, Sections 22, 23*
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### 3.3. Analysis of Key Court Rulings

Where statutory law is silent, ambiguous, or restrictive, Malaysian Common Law—derived from judicial decisions in the High Court, Court of Appeal, and Federal Court—plays a pivotal role in defining the nature and extent of Native Customary Rights (NCR). A review of relevant case law reveals that the judiciary has generally taken a more progressive stance than the legislature, establishing critical legal doctrines that serve as powerful enabling conditions for rights recognition.

#### 3.3.1. The Doctrine of Pre-Existing Rights

The most fundamental principle in Malaysian indigenous law is that NCR is not a creation of statute but an inherent right that pre-dates modern legislation.

##### **The Madeli Principle (Survival Against Reservations)**

In *Superintendent of Lands & Surveys Miri Division & Anor v. Madeli Salleh (2007)*, the Federal Court established that NCR is a proprietary right that survives sovereignty. The facts of this case are particularly instructive for modern land conflicts. The dispute involved land in Miri that the colonial Rajah had reserved for the Sarawak Shell Oilfields Limited under the "1921 Order." The State argued that this 1921 reservation automatically extinguished any native rights, meaning the claimant (Madeli) was merely a squatter.

The Federal Court rejected this, ruling that the mere reservation of land for a corporate or public purpose does not extinguish pre-existing customary rights unless the legislation contains clear and unambiguous words to that effect. Since the 1921 Order did not explicitly extinguish NCR, the Court held that the community's rights survived and co-existed with the Shell concession. This establishes a powerful precedent: a state reservation (whether for oil, forestry, or carbon) does not automatically wipe out native rights unless the extinguishment is explicit and compensated.

##### **Right to Enter State Land (Rambilin)**

The High Court decision in *Rambilin bte Ambit v. Assistant Collector of Land Revenues Pitas (2007)* (affirmed by the Court of Appeal in 2014) is the leading authority on "continuous occupation." The facts addressed a common reality for many indigenous families: migration for work. Rambilin did not live on the land full-time; she moved to follow her husband, a civil servant posted to different districts, while her brother (Magudar) looked after the land on her behalf.

The State argued that because she was not physically present 24/7, she had abandoned her claim. The Court firmly rejected this "physical presence" test. It held that "continuous occupation" does not require the claimant to be glued to the land. Constructive possession—exercised through agents, family members, or regular visits to harvest fruit—is sufficient to maintain NCR. Furthermore, the Court affirmed that natives have the right to enter State Land to establish NCR without requiring prior permission from the government, provided they do so according to native custom.

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### 3.3.2. Proprietary Rights and Fiduciary Duty

The courts have also elevated the status of NCR from a mere "license" to a protected proprietary right under the Federal Constitution.

#### NCR as "Property" (*Adong Kuwau*)

In *Kerajaan Negeri Johor v. Adong Kuwau* (1998), the Court of Appeal affirmed that NCR constitutes a "proprietary right" protected under Article 13 of the Federal Constitution. Therefore, any deprivation of these rights requires adequate compensation. Crucially, the Court expanded "compensation" to include not just the value of the land, but the loss of livelihood derived from it (e.g., loss of hunting and foraging grounds).

#### The State as Fiduciary (*Sagong Tasi*)

The decision in *Kerajaan Negeri Selangor v. Sagong Tasi* (2005) fundamentally altered the compensation landscape. The case arose from the eviction of the Temuan community from Bukit Tampoi to make way for the highway to Kuala Lumpur International Airport (KLIA). The State offered compensation only for the "improvements" (fruit trees and houses) but paid zero compensation for the land itself, arguing that the Temuan were merely "tenants at will" on State land.

The Court of Appeal rejected this colonial interpretation. It held that the State owes a fiduciary duty to indigenous peoples. By failing to gazette the land as an Aboriginal Reserve and then alienating it to a highway concessionaire (United Engineers Malaysia Bhd), the State breached this duty. The Court ruled that NCR is a form of proprietary title protected under Article 13 of the Federal Constitution. Consequently, compensation must be paid not just for the trees, but for the full market value of the land and for the loss of livelihood, effectively equating the destruction of the forest with the deprivation of life under Article 5.

### 3.3.3. Challenges to Indefeasibility and Procedure

While the State often argues that land titles issued to companies are "indefeasible" (cannot be challenged), case law provides avenues to challenge this when NCR is ignored.

#### Defeating Indefeasibility (The "Constructive Fraud" Doctrine)

The Federal Court case of *TR Nyutan Ak Jami v. TH Pelita Sadong Sdn Bhd* (2017) illustrates the conflict between corporate titles and native rights. The dispute involved the alienation of provisional leases to plantation companies for oil palm cultivation over land claimed by the Iban community of Kg. Lebor. The companies argued that their titles were "indefeasible" (absolute) under the Land Code and could not be questioned.

While the Federal Court ultimately awarded compensation rather than returning the land, the judicial findings highlighted a critical procedural breach: the land was alienated without first extinguishing the Native Customary Rights. The lower courts had characterized the State's action—ignoring the existence of a settled community to issue titles to a corporation—as a form of "constructive fraud" or at minimum a fatal procedural flaw. The key takeaway is that a title, no matter how formal, is vulnerable if the State failed to follow the mandatory legal process of extinguishing NCR and paying compensation *before* alienation.

### **Actual vs. Constructive Notice (*Tunku Yaacob*)**

A major administrative barrier is the reliance on "Constructive Notice" (publishing a notice in the Gazette) to extinguish rights. The Federal Court in *Tunku Yaacob Holdings Sdn Bhd v. Pentadbir Tanah Kedah (2015)* ruled that for matters depriving a person of property, actual notice is required; mere gazettelement is insufficient if it does not effectively communicate the decision to the affected person. This precedent provides a strong basis to challenge land acquisitions or forest gazettelements where communities were not directly informed.

### **3.3.4. The Procedural Constraint (*Alfeus Yahsu*)**

Despite these favorable rulings, the practical mechanism for enforcing this exception on titled land was established by the Court of Appeal in *Assistant Collector of Land Revenues & Ors v Alfeus bin Yahsu & Anor [2016]*. In this case, land had been alienated to a third party (Sudi Kembang Sdn Bhd) for oil palm cultivation. The natives sought a declaration of NCR directly from the High Court.

Crucially, the Court of Appeal clarified that the High Court acts as an *appellate* body in these matters, not a court of first instance. Therefore, it set aside the High Court's direct declaration of NCR but issued an order compelling the Assistant Collector of Land Revenue (ACLR) to hold a public inquiry. This distinction is vital: the judgment is a "procedural victory" rather than a final "merit victory." It establishes that the existence of a company title is not a valid reason for the Collector to refuse an inquiry. The Collector *must* hear the claim; they cannot hide behind the corporate title to deny the community their statutory right to a hearing.

#### **References for Section 3.3:**

- *Superintendent of Lands & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong) [2008] 2 MLJ 677 (Federal Court).*
  - *Rambilin bte Ambit v Assistant Collector of Land Revenues Pitas [2007] 1 MLJ 715 (High Court).*
  - *Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors [1998] 2 MLJ 458 (Court of Appeal).*
  - *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors [2005] 6 MLJ 289 (Court of Appeal).*
  - *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan Jami & Ors [2017] 6 MLRA 189 (Federal Court).*
  - *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors [2015] 4 CLJ 18 (Federal Court).*
  - *Assistant Collector of Land Revenues & Ors v Alfeus bin Yahsu & Anor [2016] 1 LNS 397 (Court of Appeal).*
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## 4. Evaluation of Recognition for Indigenous Stewardship Systems (Objective 2)

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### Introduction

This section evaluates the extent to which the traditional resource management and governance systems of these case study communities—Kiau, Alutok, Mangkawagu, Sg. Eloi, and Terian—are recognized by the State. While the previous section analyzed the statutory framework, this evaluation focuses on the practical application of these laws, assessing whether community stewardship is formally validated, administratively tolerated, or effectively criminalized.

Based on the current procedures for land and resource rights in Sabah, recognition is not a binary concept but operates along a spectrum of "Pathways." These pathways vary significantly depending on the resource in question—whether land, forest, water, or fisheries—and generally fall into three tiers of recognition:

1. **Formal Statutory Recognition**

This represents the highest level of security, where a community's stewardship system is explicitly codified in law and legally enforceable. An example is the gazettement of a specific zone where the community holds statutory authority to manage resources.

2. **Informal or Administrative Recognition**

In this tier, traditional practices are not formally gazetted but are recognized through administrative mechanisms. This includes technical support from government departments, the issuance of temporary permits, or policy adaptations like "Community Use Zones" that allow for continued access and use without granting full ownership or statutory control.

3. **Non-Recognition**

This occurs where traditional stewardship systems (such as rotational agriculture or specific spiritual protocols) have no legal visibility. In these instances, the state legal framework often overrides customary law, rendering traditional custodians as "encroachers" on state land or forest reserves.

The following analysis evaluates the specific stewardship systems of the beneficiary communities—ranging from the *Taval* prohibition system in Alutok to the *Tagal* fisheries management in Terian—against these tiers of recognition.

### 4.1. The Benchmark of Recognition: Inland Fisheries (*Tagal*)

The *Tagal* system represents the most successful model of indigenous stewardship recognition in Sabah. It is a traditional community-based fisheries management system where specific zones of a river are closed to fishing for designated periods to allow fish stocks to regenerate. Unlike terrestrial stewardship systems, which often operate in a legal gray area, the *Tagal* system is explicitly recognized and institutionalized under the Sabah Inland Fisheries and Aquaculture Enactment 2003.

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This legal framework provides three distinct pathways for recognition, offering a clear template for how indigenous authority can be formally integrated into state management systems.

#### **4.1.1. Formal Recognition via Gazettement**

The primary mechanism for recognition is the declaration of a Community Fisheries Management Zone (CFMZ). Under Section 35 of the Enactment, a community can propose a specific riverine area to be declared a management zone where it is deemed "expedient or necessary to involve members of a village or local community" in conservation.

Once approved by the Minister and published in the Gazette, the traditional Tagal system (or any other indigenous fisheries stewardship system) transforms from a customary practice into a legally binding regulation. This formal gazettement grants the community the legal authority to administer the resource and enforce rules against outsiders, providing the highest level of security for indigenous stewardship.

#### **4.1.2. Informal Recognition and Technical Support**

Crucially, the legal framework allows for recognition even before the lengthy process of formal gazettement is complete. The Department of Fisheries facilitates "informal recognition" by acting as a technical advisor and partner to communities.

Through this pathway, the Department assists communities in establishing rules and management protocols. This administrative support grants the traditional system "practical legitimacy" and allows it to function effectively on the ground with government backing, even while formal legal title is pending. This collaborative approach contrasts sharply with the "enforcement-first" approach often seen in the forestry sector.

#### **4.1.3. Formal Governance via Management Committees**

The legislation goes beyond merely recognizing the area; it explicitly recognizes the governance structure of the community. Once a zone is established, the Director of Fisheries can appoint community members (often village leaders) to a Community Fisheries Management Zone Committee.

This committee is legally responsible for administering, managing, and conserving the fisheries resources within the zone. By delegating these powers, the State effectively deputizes the community as the primary guardians of the resource, validating their traditional role as stewards.

The Kg. Terian community serves as a key example of this system in practice. Located in the upper reaches of the Papar river, Terian integrates the Tagal system into their broader community protocols for watershed protection. While their land tenure remains contested, their management of the riverine ecosystem through Tagal is recognized, demonstrating how this specific legal framework can secure at least one element of a community's broader territory.

#### **4.1.4. The Risk of Institutional Co-optation**

While the Tagal system is celebrated as a success story, its formalization under the Inland Fisheries and Aquaculture Enactment 2003 presents a subtle threat to indigenous autonomy. By bringing a traditional practice under statutory control, the locus of power shifts from the community's adat (customary law) to the State Department of Fisheries. Administrative observations indicate that once a Tagal committee is appointed by the Director, it becomes a statutory body accountable to the Department rather than the village elders. This can lead to the erosion of traditional authority, where "Tagal rules" are enforced as state regulations rather than cultural norms. There is a risk that this institutionalization can weaken the community's internal governance structures, transforming active indigenous stewards into mere implementers of departmental policy.

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## 4.2. Forest Stewardship Systems

In contrast to the clear pathways available for fisheries, forest stewardship systems face significant legal hurdles. The Forest Enactment 1968 generally centralizes control of forest resources in the State, often rendering traditional management systems invisible or illegal unless specific "administrative" pathways are utilized. The following analysis evaluates the status of stewardship systems in Alutok, Mangkawagu, and Kiau.

### 4.2.1. Rotational Stewardship: The *Tavol* System (Kg. Alutok)

#### *The Stewardship System*

The community of Kg. Alutok practices *Tavol*, a customary system of temporary prohibition. Unlike permanent conservation zones, a *Tavol* is declared over specific resource areas (such as hunting grounds or water catchments) to accumulate resources for a specific future community event, such as a wedding. The duration is determined by the community, often based on the timeline of the event (e.g., six months between engagement and wedding). This rotational closing of the forest allows for natural regeneration and prevents over-harvesting.

#### *Current Status and Conflict*

The Alutok community and its ICCA are located within the Sipitang Forest Reserve, a Class 2 Commercial Forest Reserve. Under the Forest Enactment, human activity within a forest reserve is strictly prohibited without permission. Currently, the *Tavol* system has no formal statutory recognition. Because the land is designated for commercial timber production, the community's traditional management is often viewed as an encroachment. The community has previously received warning notices from concessionaires, highlighting the precarious nature of their tenure.

#### *Evaluation of Recognition Pathways*

The existing legal framework, specifically the "Saving of Native Rights (Section 41)" within the relevant legislation, acknowledges and "saves" customary rights for native communities to extract timber and materials solely for domestic purposes. This includes resources for constructing houses and gathering firewood. However, a significant limitation of this provision is that it does not explicitly extend to cover the inherent native right to manage or close specific areas of the forest, which is a core requirement of the traditional *Tavol* system.

Given that the reserve is currently operating under a commercial concession, the most viable administrative pathway for the formal recognition of the *Tavol* system is "Pathway 2: Informal or Administrative Recognition" such as proposing a Co-Management or Social Forestry Project. This strategic approach necessitates a negotiated agreement involving the Forestry Department and the concessionaire. The primary goal of this negotiation would be to formally respect the *Tavol* zones and integrate them into the broader, official forest management plan. It is crucial to note, however, that while this co-management model represents a significant potential for formal recognition, it has not yet been realized and remains a prospective form of acknowledgment.

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### 4.2.2. Specialized Resource Stewardship: Honey Harvesting (Kg. Mangkawagu)

#### *The Stewardship System*

The Kg. Mangkawagu community maintains a highly specialized stewardship system centered on the harvesting of honey from *Apis dorsata* bees nesting in *Mengaris (Koompassia excelsa)* trees. The system is governed by strict *adat* (customary) protocols, including specific harvest seasons, prohibitions on taking larvae to ensure colony survival, and the use of traditional tools (wooden spikes) that do not damage the trees.

#### *Current Status and Conflict*

Like Alutok, Mangkawagu is located within a Class 2 Commercial Forest Reserve (Mengkawagu Forest Reserve). Section 2 of the Forest Enactment defines honey, wax, and cocoons as "forest produce". Consequently, Section 20(2) of the Enactment makes the unlicensed extraction of these resources an offense.

#### *Evaluation of Recognition Pathways*

Section 41 of the Forest Enactment purports to allow natives to take forest produce from areas classified as State Land (excluding Forest Reserves) or as conceded privileges. However, this statutory provision is interpreted operationally in an extremely narrow manner, typically including only basic materials such as timber, atap (thatching material), and firewood. Crucially, this restrictive interpretation generally excludes non-timber forest products (NTFPs)—such as honey or resin—when they are intended for sale or trade. This effectively criminalizes the fundamental economic activities of the Mangkawagu community unless they manage to obtain an official license.

Currently, the primary administrative mechanism available for the purported "recognition" of community resource use involves the issuance of specific licenses or permits by the Chief Conservator of Forests. Nonetheless, these permits are entirely discretionary, non-transferable, and possess a maximum validity period of only five years. This structure amounts to a form of mere administrative tolerance rather than a meaningful, enduring recognition of the community's traditional stewardship role. Consequently, the community is structurally treated as temporary "licensees" of the state, rather than legitimate "custodians" of their ancestral territories.

### 4.2.3. Spiritual Stewardship: Boros Puru and Mamatang (Kg. Kiau)

#### *The Stewardship System*

The Kg. Kiau community conserves a forest area excised from Kinabalu Park in 1997. Their stewardship is spiritual and educational, relying on the *Mamatang* ritual (seeking permission from the "guardian of nature" before entry) and the use of *Boros Puru* (a specialized forest language) to ensure safe passage and respect for the spirit world. The community has collectively agreed that the forest is for conservation and education, not farming.

#### *Current Status and Conflict*

The Kiau community succeeded in getting their community forest gazetted as a "Native Reserve" under Section 78 of the Land Ordinance in 2023. The Kiau Community Forest used to be on Un-titled State Land. That left it highly vulnerable. Under Section 12 of the Sabah Land Ordinance, the land was open for application by outsiders, and the community already had to intervene to stop private companies from applying for the land.

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### *Evaluation of Recognition Pathways*

While being declared a Native Reserve secures the land from outsiders, the official reserve gazette specifies the purpose as "occupation" and the "building of additional structures," which is in conflict with the community's primary goal of conservation and education. It is yet to be seen how the Kiau community will navigate this double-edged sword.

Hypothetically, the alternative pathway would have been gazetting the area as an "Amenity Forest Reserve" under the Forest Enactment. While Forest Reserves usually restrict rights, Class 4 reserves are specifically designated for recreation, education, and research. This pathway would offer a compromise by using State power to secure the land while aligning the designation with the community's conservation-focused management objectives.

However, the efficacy of this pathway would have been challenged by deep distrust. Indigenous communities view their hard-won land titles as a victory against historical dispossession. Consequently, the reluctance to surrender any portion back to the State—even for conservation—is very likely high, amplified by the perception of the State's past unreliability and inconsistency in upholding indigenous land claims. This underlying trust deficit is a significant barrier to the successful implementation of such a pathway as an enabler for indigenous conservation efforts.

## **4.3. Watershed Stewardship and Protected Areas (Kg. Terian)**

The Kg. Terian community, located along the Crocker Range, manages a sophisticated watershed stewardship system. This system is essential not only for their cultural identity but for their basic survival, supporting gravity-feed water systems, micro-hydro generators for electricity, and the irrigation of wet padi fields. However, their stewardship faces a dual challenge: their traditional territory overlaps with the strictly protected Crocker Range Park and includes parcels of alienated private land, while also facing the existential threat of the proposed Papar (Kaiduan) Dam.

The evaluation of recognition for Terian's stewardship centers on two key legislative frameworks: the Sabah Water Resources Enactment 1998 and the Parks Enactment 1984.

### **4.3.1. Recognition via Water Conservation Areas (Pathway 1)**

The Sabah Water Resources Enactment 1998 offers a promising, yet underutilized, pathway for recognizing indigenous stewardship based on its function—water security—rather than land ownership.

Section 38 allows the State to declare a Water Conservation Area to protect water resources. Unlike "Water Protection Areas" which strictly prohibit access, a Conservation Area allows for flexible management plans. This mechanism is particularly strategic for Terian because section 38(6) explicitly requires the Director of Water Resources to consider the "economic and social impact" on the owners or occupiers of the land. This provides a legal lever to argue that the community's continued presence and stewardship are essential for the "economic" stability (water and electricity) of the area.

Crucially, section 38(4) indicates that a Water Conservation Area can be declared over any land, including alienated private land. This offers a unique legal route to impose conservation protocols on private titles that overlap with the Terian watershed, potentially mitigating conflicting land uses without requiring the community to hold the title themselves.

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### 4.3.2. Recognition via Community Use Zones (Pathway 2)

For the portion of Terian's territory that falls within the Crocker Range Park, the Parks Enactment 1984 generally imposes strict prohibitions on residence and cultivation. However, the State has developed an administrative mechanism to reconcile these statutory prohibitions with the reality of historical occupation.

The Community Use Zone (CUZ) is a policy adaptation implemented by Sabah Parks. It allows long-established communities to continue traditional activities, including farming and residence, within the Park boundaries under specific agreements. The CUZ represents a significant form of informal or administrative recognition. It functionally recognizes the community's historical presence and validates their role as partners in protecting the park.

However, it is not a formal land title. It operates as a "license" or agreement that depends on the continued goodwill and policy direction of the Parks authority. While it solves the immediate problem of "illegality" for the community, it does not grant them permanent ownership rights over their ancestral domain.

## 4.4. Coastal and Mangrove Stewardship (Sg. Eloi)

The Sg. Eloi community in Pitas relies entirely on the mangrove forests at the mouth of the Pitas River for their livelihood and cultural identity. Unlike the terrestrial or riverine systems discussed above, the legal status of the Sg. Eloi ICCA presents a unique and particularly difficult challenge: the land has been alienated to a private entity.

### 4.4.1. Spiritual Stewardship: The *Momokan* Ritual

The community practices a specific stewardship system governed by strict protocols and the *Momokan* ritual. This ritual is performed to awaken the spirits of nature within the mangrove forest, petitioning them to aid the community in protecting the area from trespassers. Breach of these protocols traditionally incurs an *adat* (customary) fine. However, without formal recognition, these spiritual boundaries are invisible to state planners and private developers.

### 4.4.2. The "Alienated Land" Barrier

The primary obstacle for Sg. Eloi is that their traditional territory is no longer State Land; it has been alienated for a large-scale shrimp farming project.

Under the Sabah Land Ordinance, once a title is registered to a private owner, it confers a high degree of control and indefeasibility. This makes it extremely difficult for the community to assert Native Customary Rights (NCR) or management rights over the land, as the state has effectively transferred ownership to a third party.

While the *Environment Protection Enactment 2002* requires an Environmental Impact Assessment (EIA) for large-scale aquaculture, the EIA for the project affecting Sg. Eloi was approved despite community objections, highlighting that the current regulatory framework prioritizes industrial development over indigenous stewardship.

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### 4.4.3. Evaluation of Recognition Pathways: The Water Conservation Area

Given that the land is alienated, the standard pathways for recognition (such as Native Title or Forest Reserves) are largely foreclosed without costly litigation. However, the Sabah Water Resources Enactment 1998 provides a critical, non-tenure-based pathway for recognition.

As previously mentioned, section 38 of the Enactment allows for the declaration of a Water Conservation Area over any land in Sabah, regardless of whether it is state land or alienated private land. This represents the only viable administrative route to impose stewardship obligations on the private landowners. By defining the mangroves as a "water body" (which includes wetlands) critical for water quality, the community can advocate for the protection of the remaining mangroves.

If successful, the terms of the Water Conservation Area could incorporate community protocols into the management plan, effectively overriding the private owner's absolute discretion to clear the land, thereby legally validating the Momokan stewardship system even on private title.

It is yet to be seen whether the 2025 amendments of the Land Ordinance will provide a solution for Sg. Eloi in this regard.

## 4.5. Protection of Traditional Knowledge and Culture

Unlike land rights, the protection of intangible culture and Traditional Knowledge (TK) lacks a cohesive framework.

### 4.5.1. Sabah Biodiversity Enactment 2000

The Sabah Biodiversity Enactment 2000 is at the moment the most progressive statute regarding Traditional Knowledge (TK) in the state. Section 9(1)(j) explicitly mandates the creation of a system to ensure Indigenous and local communities are recognized as the "legitimate creators, users and custodians of traditional knowledge" and shall collectively benefit from its use.

However, the Enactment establishes a structural disconnect that subordinates this custodianship to state control. The entire framework for bio-prospecting operates via a State-controlled Access Licence system (Section 15). Critically, Section 16(b) requires this licence for access to biological resources found on:

"...any reserves, natives customary lands or any other sites over which indigenous and local communities exercise community-based or customary rights."

By mandating a state-issued licence for access even on Native Customary Lands, the Enactment effectively places the Sabah Biodiversity Council as the de facto gatekeeper, prioritizing administrative control over the inherent right of custodianship. This structural barrier, combined with the long-standing delay in passing the necessary specific regulations (Rules) under Section 37 to operationalize community benefit-sharing and protection, means that the communities' "custodianship" remains a legal theory rather than an enforceable proprietary right.

### 4.5.2. State Heritage Enactment 2017

The State Heritage Enactment 2017 provides a statutory basis for conservation and establishes the State Heritage Council. While the original text of the Enactment is progressive in its legal definitions, it explicitly includes Intangible Cultural Heritage (Section 3), covering crucial indigenous elements such as oral traditions, languages, and traditional customs. This definition potentially allows for the formal recognition of dynamic cultural systems like *Boros Puru* (forest language).

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However, the statutory framework itself entrenches a 'top-down' administrative approach. This is evident in the composition of the State Heritage Council (Section 9), where the majority of seats are held by high-level state officials (including Permanent Secretaries and Directors of various departments). Only a maximum of five external members with relevant expertise can be appointed by the Minister. This structure, which lacks a mandate for direct or guaranteed community representation, risks prioritizing a state-centric, or 'museum preservation', model over empowering the indigenous communities who are the living stewards of this heritage.

### **4.5.3. Intellectual Property Gaps (Federal)**

At the federal level, the Copyright Act 1987 protects "works" but is ill-suited for communal folklore. Section 16A gives exclusive rights to performers, but this does not protect the *community's* collective ownership of a song or dance once it is recorded or fixed by a third party.

#### **References for Section 4:**

- *Sabah Inland Fisheries and Aquaculture Enactment 2003, Section 35.*
  - *Forest Enactment 1968, Sections 2, 20(2), 41.*
  - *Sabah Water Resources Enactment 1998, Section 38.*
  - *Parks Enactment 1984, Section 48.*
  - *Environment Protection Enactment 2002.*
  - *Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005.*
  - *Sabah Biodiversity Enactment 2000, Section 9(1)(j).*
  - *State Heritage Enactment 2017, Section 3, 9*
  - *Copyright Act 1987, Section 16A.*
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## 5. Alignment with International Commitments (Objective 3 & 4)

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This section evaluates the degree to which Malaysia's domestic legal and policy frameworks align with its international obligations regarding Indigenous Peoples. Malaysia is a signatory to the Convention on Biological Diversity (CBD) and voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

However, a significant "implementation gap" persists between these international commitments and domestic legislation. While international standards increasingly mandate the recognition of indigenous territories and the right to give or withhold consent, domestic laws in Sabah largely rely on procedural mechanisms of "notice" and "compensation." This analysis contrasts these international standards against the practical realities of land administration and environmental governance in Sabah.

### 5.1. Free, Prior and Informed Consent (FPIC)

Free, Prior and Informed Consent (FPIC) is the cornerstone of indigenous self-determination. It establishes that indigenous communities have the right to be fully informed and to grant or withhold consent for any project that affects their lands, territories, or resources.

#### 5.1.1. The International Standard (UNDRIP)

Under **UNDRIP**, specifically **Article 19** and **Article 32(2)**, States are required to consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions. The objective is to obtain their free, prior, and informed consent before adopting legislative or administrative measures, or approving projects affecting their lands. This standard assumes a process free from coercion, conducted *prior* to authorization, and based on full disclosure of information.

#### 5.1.2. The Domestic Reality: "Constructive Notice" vs. Consent

In Sabah, domestic legislation generally falls short of the FPIC standard. Instead of a "Consent" based framework (Opt-In), state laws operate on a mechanism of "Notification and Objection" (Opt-Out), which places the burden on communities to defend their rights within strict administrative timeframes.

##### The "Notice" Trap

Under Section 13 of the Sabah Land Ordinance and Sections 8 and 9 of the Forest Enactment 1968, the State is legally required only to publish a notice of its intention to alienate land or constitute a Forest Reserve. This is often done via "constructive notice"—posting a notification in the Government Gazette or at a District Office. This presumes that remote communities have regular access to official publications. If no objection is filed within the specified period (typically 3 months), rights are frequently deemed extinguished by default. This procedural mechanism systematically disenfranchises communities who are unaware of the notice until development activity begins.

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### **The "EIA Loophole"**

While the Environment Protection Enactment 2002 requires Environmental Impact Assessments (EIA), a critical regulatory gap undermines the consent process. The Prescribed Activities Order mandates EIAs for logging or agricultural development only if the area exceeds 500 hectares.

Developers often fragment larger projects into smaller parcels (e.g., 490 hectares) to bypass the mandatory EIA requirement. This loophole effectively removes the only statutory window for public consultation and social impact assessment, allowing projects to proceed without any formal engagement with the affected communities.

This is a critical weakness in the Environment Protection (Prescribed Activities) Order. In practice, this threshold is frequently exploited by project proponents who slice larger projects into multiple adjacent parcels (e.g., several lots of 490 hectares) to bypass the EIA requirement entirely. Furthermore, even when EIAs are conducted, the legal framework in Malaysia does not make the findings binding on the approving authority. The process is often non-participatory, with consultants hired directly by the developers, creating an inherent conflict of interest. Consequently, the EIA often functions as a procedural checklist rather than a substantive mechanism for obtaining the Free, Prior, and Informed Consent (FPIC) of the affected communities.

### **Consultation is not Consent**

Even where consultations occur, such as those mandated for larger projects, domestic law treats the community's input as "feedback" to be considered, rather than a binding decision. There is currently no statutory provision in Sabah that grants indigenous communities the right to veto a project on their customary lands once the State has decided it is for a public purpose.

## **5.2. Biodiversity Conservation (CBD) and Stewardship**

Malaysia is a signatory to the Convention on Biological Diversity (CBD), which imposes specific obligations to respect indigenous knowledge and practices. This assessment focuses on the alignment of domestic laws with Article 8(j) (Traditional Knowledge) and Article 10(c) (Customary Use).

### **5.2.1 Strategic Alignment: Kunming-Montreal Global Biodiversity Framework (GBF)**

Malaysia's conservation policy has shifted from the expired Aichi Targets to the Kunming-Montreal Global Biodiversity Framework (GBF), adopted in 2022. The National Policy on Biological Diversity (NPBD) 2022-2030 explicitly internalizes these global goals, providing two specific targets that directly validate indigenous stewardship.

#### **A. Target 3: The "30x30" Goal and OECMs**

Target 3 commits the State to conserving 30% of its land and seas by 2030. Crucially, the policy acknowledges that this cannot be achieved through strict "Protected Areas" (like Parks) alone. It relies on Other Effective area-based Conservation Measures (OECMs)—areas that deliver conservation outcomes outside the formal protected area network. This is the primary entry point for recognizing Indigenous Community Conserved Areas (ICCAs). Unlike a Park which often legally displaces people, an OECM designation recognizes that a community's existing management (e.g., a Tagal river zone or a Taval forest) is effective at conserving biodiversity. This shifts the legal narrative from "prohibiting native use" to "counting native use" towards the national 30% Key Performance Indicator (KPI).

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## **B. Target 22: Full and Effective Participation**

The NPBD 2022-2030 elevates the status of Indigenous rights through its alignment with GBF Target 22. This target specifically mandates ensuring the "full, equitable, inclusive, effective and gender-responsive representation and participation in decision-making" of indigenous peoples, and explicitly calls for "respecting their cultures and their rights over lands, territories, resources, and traditional knowledge." This provides a far stronger international benchmark than the previous Aichi targets, moving beyond merely "respecting knowledge" to explicitly "protecting rights over lands."

### **5.2.2. The "Access and Benefit Sharing" (ABS) Gap (Article 8j)**

Despite the forward-looking policy rhetoric, a major statutory gap remains in the operationalization of Access and Benefit Sharing (ABS).

The Sabah Biodiversity Enactment 2000 is the primary legislation for implementing Article 8(j). Section 9(1)(j) of the Enactment explicitly mandates the creation of a system to ensure that indigenous communities are recognized as the legitimate custodians of traditional knowledge and that they collectively benefit from its use. However, the specific Rules required to enforce this section have faced years of delay. Without these Rules, the "custodianship" remains a paper right without an enforceable mechanism.

The absence of clear ABS protocols leaves communities vulnerable to biopiracy. Initiatives like the Malaysian Traditional Knowledge Digital Library (MyTKDL)—established under the Intellectual Property Corporation of Malaysia Act 2002—have collected ethnobotanical data from communities (often in collaboration with museums) without necessarily acknowledging the specific community sources or establishing clear benefit-sharing mechanisms. Without a binding "Prior Informed Consent" framework, the documentation of knowledge can inadvertently facilitate its appropriation by researchers or commercial entities rather than its protection.

### **5.2.3. Customary Use vs. Criminalization (Article 10c)**

Article 10(c) of the CBD obligates States to protect and encourage the customary use of biological resources in accordance with traditional cultural practices.

The Tagal system (fisheries) stands as the primary example of domestic alignment with Article 10(c). By institutionalizing community harvest protocols under the Inland Fisheries Enactment, the State effectively "protects and encourages" customary use.

Conversely, the Forest Enactment 1968 stands in direct conflict with Article 10(c). By defining traditional swidden agriculture within Forest Reserves as "illegal cultivation" (Section 20), the State criminalizes the very "customary use" it is internationally obliged to protect. This creates a contradictory policy environment where the same community can be hailed as "conservation heroes" for managing river fish, but arrested as "encroachers" for managing forest fallows.

### 5.3. Protection of Culture and Intellectual Property

The protection of intangible culture—oral traditions, spiritual beliefs, and community protocols—reveals a stark disconnect between indigenous reality and the existing Intellectual Property (IP) and Heritage laws in Malaysia. While international standards (UNDRIP Article 31) recognize the right of indigenous peoples to maintain, control, and protect their cultural heritage, domestic laws often fragment this heritage or vest ownership in the State.

#### 5.3.1. The Assimilationist Policy Framework

The foundational barrier to the protection of indigenous culture in Malaysia is the **National Culture Policy of 1971**. This policy outlines that the "National Culture" must be based on the indigenous culture of the region (defined primarily as Malay culture) and Islam, with elements from other cultures accepted only if they are "suitable." This framework is inherently assimilationist. It views Indigenous Peoples' distinct cultures not as autonomous systems to be protected, but as reservoirs of "elements" to be selectively absorbed into the dominant national identity. This policy orientation contradicts Article 8(1) and Article 25 of UNDRIP, which prohibit forced assimilation and protect the right to maintain distinct cultural identities. It creates a policy environment where state funding and support are directed towards "mainstreaming" indigenous communities rather than strengthening their distinct cultural systems.

#### 5.3.2. The "Author" Problem in Intellectual Property Laws

The current IP framework in Malaysia is ill-suited for protecting indigenous cultural heritage, which is typically communal, oral, and evolving, rather than individual, fixed, and static.

##### *Copyright Act 1987*

This Act protects works that are "fixed" (recorded or written) and have an identifiable "author." This creates a structural vulnerability for indigenous folklore and oral histories. Because these traditions are often passed down orally, they do not meet the "fixation" requirement. Crucially, if a researcher or outsider records a traditional song or story, the copyright of the recording (derivative work) typically belongs to the researcher, not the community. Consequently, the community effectively loses control over their own cultural expression once it is "fixed" by a third party.

##### *A Positive Exception*

A rare instance of alignment with indigenous rights is found in the Protection of New Plant Varieties Act 2004. Section 12(1)(f) explicitly requires that if a new plant variety is developed from traditional varieties, the "prior written consent" of the indigenous community must be obtained. This statute stands as a solitary model for how FPIC can be codified within IP law.

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### **5.3.3. Cultural Heritage: State Control vs. Community Custodianship**

Legislation governing "heritage" in Sabah tends to view indigenous culture as a national asset to be preserved for tourism or national identity, rather than a living system belonging to the community.

#### **Sabah State Heritage Enactment 2017**

While the State Heritage Enactment 2017 allows for the preservation of heritage sites, it establishes a centralized administrative framework. Section 5 explicitly vests extensive powers for control and preservation in the State Government through the Director of the Sabah Museum, which includes the ultimate authority to designate a site (Section 28) and even initiate compulsory acquisition (Section 33(1)(c)). Critically, the law provides the community with the right to object, but does not recognize indigenous communities as the primary legal custodians or owners of their heritage. This centralized, top-down approach risks reducing living cultural landscapes (such as sacred sites) to static "museum pieces" managed and preserved according to state-sanctioned criteria, rather than dynamic, community-governed territories

#### **National Culture Policy (1971)**

At the federal level, policy guidance is still rooted in the 1971 National Culture Policy, which prioritizes the assimilation of indigenous cultures into a "National Culture" based primarily on Malay and Islamic elements. This outdated framework contradicts the current international emphasis on protecting the distinct cultural autonomy of indigenous peoples.

### **5.3.4. The Native Court: An Underutilized Enabler**

In Sabah, a unique mechanism exists that offers a potential alternative to the restrictive civil law framework. The Native Courts Enactment 1992 empowers Native Courts to adjudicate breaches of "native law or custom" (adat).

Unlike the Heritage Enactment, the Native Court can enforce cultural protection from the bottom up. For example, the desecration of a sacred site or the violation of a Tagal prohibition can be penalized as a breach of adat. This effectively gives legal force to intangible cultural rules. However, this power is often underutilized for broad territorial protection and is currently limited to minor offenses and family law.

### **5.3.5. A Statutory Model for Consent: The Protection of New Plant Varieties Act 2004**

Amidst the general lack of recognition for FPIC, the Protection of New Plant Varieties Act 2004 stands out as a critical, yet underutilized, legal instrument. Unlike the land and forestry laws which rely on "consultation" or "notice," this Federal Act explicitly codifies the requirement for consent. Section 12(1)(f) of the Act mandates that any application for the registration of a new plant variety developed from traditional varieties or indigenous knowledge must be accompanied by the "prior written consent of the authority representing the local community or the indigenous people." This provision is legally significant because it proves that the concept of "Prior Written Consent" is not alien to Malaysian jurisprudence. It provides a concrete statutory model that demonstrates how FPIC can be operationalized within domestic law, serving as a powerful benchmark for advocating similar consent clauses in biodiversity and land legislation.

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## 5.4. Community-Based Reporting (Objective 4)

The Terms of Reference inquire whether the legal framework facilitates community-based reporting to international bodies.

At this moment, there is no specific statutory bar preventing communities from reporting to international bodies (e.g., the UN Permanent Forum on Indigenous Issues or CBD working groups). Civil society organizations in Sabah frequently submit "shadow reports" or statements to these bodies.

However, there is no formal mechanism within the state legal framework to incorporate or respond to such reporting. International recommendations (such as those from the UN Special Rapporteur) often have no binding power in domestic courts. The lack of a domestic "Native Land Tribunal" means that international reporting remains an external pressure mechanism rather than an integrated part of the national policy feedback loop.

### Reference Citations for Section 5:

- *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007), Articles 8(1), 19, 25, 31, 32(2).*
  - *Convention on Biological Diversity (CBD) (1992), Articles 8(j), 10(c).*
  - *Kunming-Montreal Global Biodiversity Framework (2022), Targets 3, 22.*
  - *National Policy on Biological Diversity 2022-2030.*
  - *National Culture Policy 1971.*
  - *Protection of New Plant Varieties Act 2004, Section 12(1)(f).*
  - *Sabah Biodiversity Enactment 2000, Section 9(1)(j).*
  - *Intellectual Property Corporation of Malaysia Act 2002.*
  - *Native Courts Enactment 1992.*
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# 6. Findings and Recommendations (Objective 5)

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This final section synthesizes the analysis of the legal and policy frameworks to provide clear, actionable findings and recommendations. The objective is to identify specific legal levers that PACOS Trust and its partners can use to advance the recognition of Indigenous Peoples' rights in Sabah.

## 6.1. Summary of Key Enablers and Hindrances

The legal landscape in Sabah presents a duality: a robust set of rights established by judicial precedent and constitutional law, often constrained by restrictive statutory definitions and administrative procedures.

### 6.1.1. Key Enablers (Levers for Advocacy)

- **Judicial Precedent:** Court decisions such as the Federal Court's ruling in *Madeli Salleh* are the most powerful legal tool available. *Madeli Salleh* for example confirms that Native Customary Rights (NCR) are pre-existing rights that survive sovereignty and do not depend on the *Land Ordinance* for their existence. This as well as other precedents nullifies the administrative argument that rights only exist if a title is issued.
  - **Constitutional Fiduciary Duty:** The principle established in *Sagong Tasi*—that the State has a fiduciary duty to protect indigenous land rights—provides a strong basis for challenging administrative inaction (e.g., delays in gazetting Native Reserves) as a breach of duty, not just a bureaucratic delay.
  - **Statutory Recognition of Stewardship:**
    - **Native Reserves (Section 78 SLO):** *A powerful but underutilized tool that allows for communal ownership without the strict agricultural requirements of individual titles. Though, the State propensity of issuing reserves only for occupational purposes instead of more dynamic and flexible conditions is still an administrative limitation to this tool's effectiveness.*
    - **Community Managed Fishing Zones; e.g. Tagal System (Inland Fisheries Enactment):** *A proven model of statutory recognition for indigenous resource management that can be cited as a precedent for recognizing other forms of stewardship (like forest Taval).*
    - **Community Hunting Areas (Section 32 Wildlife Conservation Enactment):** *A rare statutory acknowledgement of foraging rights that can be leveraged to legitimize presence in conservation areas.*
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### 6.1.2. Key Hindrances (Barriers to Overcome)

- **Constructive Notice:** The reliance on *Gazette* notifications (under Section 13 SLO and Section 8 Forest Enactment) rather than actual service of notice is a primary mechanism of dispossession. It effectively extinguishes rights by default because communities are unaware of the need to object.
- **Agrarian Definition of NCR:** Section 15 of the SLO defines NCR largely through settled agriculture (fruit trees, cultivation). This definition fails to capture the broader territorial domains required for hunting, foraging, and water catchment protection, leaving these areas vulnerable to alienation as "State Land."
- **Indefeasibility Conflicts:** Once land is alienated to a third party (e.g., a plantation company), the principle of indefeasibility of title often makes it difficult to reclaim the land, even if NCR claims were ignored during the alienation process (though judicial precedent offers a legal route to challenge this).

## 6.2. Strategic Recommendations

Based on these findings, the following recommendations are proposed:

### Recommendation 1: Challenge "Constructive Notice" in Land Alienation

Advocate for a policy shift or judicial review to mandate **Actual Notice** for any land alienation or forest gazettement affecting indigenous territories.

**Legal Basis:** Leverage the Federal Court decision in *Tunku Yaacob Holdings*, which ruled that mere gazettement is insufficient if it does not effectively communicate the decision to the affected person. This precedent should be applied to challenge the extinguishment of NCR under Section 13 of the SLO.

### Recommendation 2: Operationalize the "Statutory Exception" for NCR Inquiries

Systematically file applications for "Post-Alienation Land Inquiries" on disputed titled lands, citing Section 88A(4)(c) of the Land (Amendment) Enactment 2025 and the *Alfeus Yahsu* precedent.

**Rationale:** Historically, once a title was issued to a third-party company, communities were advised that their only option was a difficult civil suit to declare the title void, a route often blocked by the defense that the company was a "bona fide purchaser." However, the 2025 Amendment fundamentally changes this legal battlefield. Communities should now adopt a strategy of demanding the *determination* of rights rather than the immediate *cancellation* of title.

- **The Legal Argument:** The strategy involves submitting to the Assistant Collector of Land Revenue (ACLR) that Section 88A(4)(c) provides a statutory guarantee that the existence of a registered title cannot "prejudice or prevent the determination" of NCR.
  - **The Procedural Authority:** This submission should be supported by the binding precedent of *Assistant Collector of Land Revenues v Alfeus bin Yahsu [2016]*, where the Court of Appeal ordered the Collector to hold an inquiry even though the land was already titled to a company.
  - **The Outcome:** If the inquiry confirms the existence of NCR, the State is then legally bound to resolve the conflict, either by excising the land from the company's title or paying compensation. This effectively bypasses the company's "indefeasibility" defense entirely.
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### **Recommendation 3: Formalize Watershed Stewardship**

Propose the gazettelement of community-managed water catchments (especially those supporting Gravity Feed Systems) as **Water Conservation Areas** under Section 38 of the *Water Resources Enactment 1998*.

**Rationale:** This utilizes an existing environmental statute to secure tenure over communal forests that might otherwise be rejected as NCR land due to a lack of "cultivation." It frames indigenous stewardship as a public service (water security).

### **Recommendation 4: Strategic Use of Native Reserves**

Prioritize applications for **Native Reserves (Section 78 SLO)** over Communal Titles for areas intended for conservation or communal use.

**Rationale:** Unlike the new "State Communal Titles" which are often tied to joint-venture developments, Native Reserves are explicitly for the "protection and well-being" of natives and do not require the land to be cleared for agriculture to prove ownership.

### **Recommendation 5: Amend Section 15 & 65 of the Land Ordinance Action**

Advocate for the amendment of Section 15 to include "community forest conservation areas" as a valid basis for NCR, and Section 65 to explicitly recognize the "fallow period" as active occupation.

**Rationale:** To remove the "agricultural bias" that forces communities to clear forests to prove ownership.

### **Recommendation 6: Mandatory Social Impact Assessments (SIA) Action**

Lobby for amendments to the *Environment Protection Enactment* to make SIAs mandatory for *all* development projects affecting NCR land, regardless of size (closing the 500-hectare loophole).

**Rationale:** To ensure that "Constructive Notice" via Gazette is replaced by active, participatory impact assessment.

### **Recommendation 7: Harmonize Biodiversity Rules with the Plant Varieties Act Action:**

Advocate for the delayed *Rules of the Sabah Biodiversity Enactment 2000* to adopt the consent language found in the *Protection of New Plant Varieties Act 2004*.

**Rationale:** The *Protection of New Plant Varieties Act* (Section 12) already establishes a federal statutory precedent requiring "prior written consent" for the use of indigenous genetic resources. This precedent should be leveraged to demand that the State's biodiversity access and benefit-sharing (ABS) mechanisms meet this same federal standard, moving the state framework from "consultation" to "consent."

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### 6.3. Conclusion

The legal framework in Sabah offers a mix of rigid statutory hurdles and powerful common law rights. While the *Land Ordinance* and *Forest Enactment* contain provisions that have historically marginalized indigenous communities, the "saving clauses" within them—combined with strong judicial precedents—provide a viable pathway for rights recognition. The key to success lies in moving beyond the defensive posture of "objecting" to state actions, and instead proactively using these specific legal levers to formalize indigenous stewardship as a legitimate component of the state's land and resource management system.

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# 7. References

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## A. Statutes and Regulations

### International Instruments

- *Convention on Biological Diversity* (1992).
- *International Labour Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* (1989).
- *Kunming-Montreal Global Biodiversity Framework* (2022).
- *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* (2007).

### Federal Legislation (Malaysia)

- Copyright Act 1987 [Act 332].
- Federal Constitution of Malaysia.
- Intellectual Property Corporation of Malaysia Act 2002 [Act 617].
- Protection of New Plant Varieties Act 2004 [Act 634].

### State Legislation (Sabah)

- Environment Protection Enactment 2002
- Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005.
- Forest Enactment 1968 (No. 2 of 1968)
- Forest Rules 1969
- Forests (Constitution of Forest Reserves and Amendment) Enactment 1984
- Land Ordinance (Sabah Cap. 68)
- Land (Amendment) Enactment 2025
- Native Courts Enactment 1992
- Parks Enactment 1984 (No. 6 of 1984)
- Sabah Biodiversity Enactment 2000
- Sabah Climate Change and Carbon Governance Enactment 2025.
- Sabah Inland Fisheries and Aquaculture Enactment 2003
- Sabah Water Resources Enactment 1998
- State Heritage Enactment 2017
- Wildlife Conservation Enactment 1997

## B. Policies

- Ministry of Natural Resources and Environmental Sustainability. (2022). *National Policy on Biological Diversity 2022-2030*.
  - Ministry of Tourism, Arts and Culture. (1971). *National Culture Policy (Dasar Kebudayaan Kebangsaan)*.
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## C. Case Law

- *Assistant Collector of Land Revenues & Ors v Alfeus bin Yahsu & Anor* [2016] 1 LNS 397 (Court of Appeal).
  - *Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors* [1998] 2 MLJ 458 (Court of Appeal).
  - *Kerajaan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2005] 6 MLJ 289 (Court of Appeal).
  - *Rambilin bte Ambit v Assistant Collector of Land Revenues Pitas* [2007] 1 MLJ 715 (High Court).
  - *Superintendent of Lands & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677 (Federal Court).
  - *TH Pelita Sadong Sdn Bhd & Anor v TR Nyutan Jami & Ors* [2017] 6 MLRA 189 (Federal Court).
  - *Tunku Yaacob Holdings Sdn Bhd v Pentadbir Tanah Kedah & Ors* [2015] 4 CLJ 18 (Federal Court).
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