



**ENVIRONMENTAL LAW AND POLICY IN SABAH:
FROM RIDGE TO REEF**

VOLUME 8: BIODIVERSITY AND TRADITIONAL KNOWLEDGE

DRAFT FOR PEER REVIEW

Disclaimer, Acknowledgements and Call for Inputs

Disclaimer: This legal brief is intended as a means to engage with the relevant law and policy, and should not replace a thorough reading of the official documents themselves, which can be found online.

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OVERVIEW

There are six pieces of legislation that together provide the overarching regulatory framework for Sabah's biodiversity. These include:

- Sabah Biodiversity Enactment (2000),
- Forest Enactment (1968),
- Parks Enactment (1984),
- Wildlife Conservation Enactment (1997),
- Water Resources Enactment (1998), and
- Environment Protection Enactment (2002).

This brief provides an overview of each law, details of the institutional arrangements, and sets out the relevant case law. With the exception of the Sabah Biodiversity Enactment, all laws referenced in this brief are set out in chronological order and do not reflect their relative importance.

1. SABAH BIODIVERSITY ENACTMENT

Purpose

The *Biodiversity Enactment (2000)* provides the cornerstone of Sabah's biodiversity-related legislation, and establishes rules relating to the conservation and sustainable use of biological resources. The Sabah Biodiversity Enactment has four major areas of focus. These include:

- Biological Diversity, Biological Resources, and Associated Traditional Knowledge,
- Access licences,
- Restrictions, and
- Authorized officers.

Biological Diversity, Biological Resources, and Associated Traditional Knowledge

Biological Diversity, also referred to as *biodiversity*, encompasses the variability among living organisms from all sources, including plants material, terrestrial, marine and other aquatic ecosystems and ecological complexes.¹ Biodiversity is known as the diversity within species, ecosystems and biological resources.²

Biological Resources are considered genetic resources or materials of plants, animals or any organism with a microbial origin or biotic component of the ecosystem.³ Biological resources are resources that have actual use, potential use or value to humanity.⁴ In order to properly maintain the Biodiversity of Sabah individuals are

¹ Sabah Biodiversity Enactment, 2000, section 2, 'biodiversity'.

² Sabah Biodiversity Enactment, 2000, section 2, 'biodiversity'.

³ Sabah Biodiversity Enactment, 2000, section 2, 'biological resources'.

⁴ Sabah Biodiversity Enactment, 2000, section 2, 'biological resources'.

shifting towards obtaining Traditional Knowledge from indigenous communities in order to maintain the diversity of the State's natural resources.

Associated Traditional Knowledge is a concept that promotes the interaction between indigenous communities and individuals seeking natural resources. Traditional Knowledge is used in order to maintain and profit from biological resources.⁵ Malaysia has been recognized for its rich biodiversity however, a majority of these rich areas are occupied by indigenous communities.⁶ Since indigenous communities have lived on this land for centuries they have developed a strong knowledge base for properly managing natural resources. Associated Traditional Knowledge uses the knowledge obtained by indigenous peoples to develop methods for sustainable resource management.⁷

Anak Negeri of Sabah

One of the case studies conducted in Sabah for Associated Traditional Knowledge is on *Anak Negeri*⁸. The study looks at the knowledge obtained by the natives on resource management in order to evaluate the benefits of recognizing Traditional Knowledge.

The study points out problems that the indigenous populations currently face, including problems with policies on the management of Conservation and Protected Areas prohibiting indigenous peoples from using these areas or requiring them to relocate. Another problem stresses the lack of understanding by authorities about Traditional Knowledge. This lack of understanding prevents the proper facilitation of the knowledge in the States education systems. Lastly, the study concludes that the commercialization of Traditional Knowledge and natural resources does not promote the sustainability of these products. The current mode of commercialization encourages communities to explore practices that produce monetary benefits short-term benefits instead of sustainable practices.⁹

After surveying the Anak Negeri the following recommendations were made:

- To review policies and laws that impact on indigenous knowledge and biodiversity,

⁵ Nicholas, Colin & Lasimbang, Jannie, Deliberations at the National Roundtable on Biodiversity and Indigenous Knowledge Systems in Malaysia, Background to the Roundtable, <http://www.coac.org.my/codenavia/portals/coacv2/images/articles/IPs%20and%20Biodiversity.pdf>, 2004, p. 5-6.

⁶ Nicholas, Colin & Lasimbang, Jannie, Deliberations at the National Roundtable on Biodiversity and Indigenous Knowledge Systems in Malaysia, Background to the Roundtable, , 2004, p. 5-6.

⁷ Ahtoi, Gallus, Deliberations at the National Roundtable on Biodiversity and Indigenous Knowledge Systems in Malaysia, Anak Negeri of Sabah – Towards to Recognition of Traditional Knowledge, <http://www.coac.org.my/codenavia/portals/coacv2/images/articles/IPs%20and%20Biodiversity.pdf>, 2004, p. 9-12.

⁸ “*Anak Negeri*” also referred to as Natives in Sabah who make up 60% of the State's population. Ahtoi, Gallus, Deliberations at the National Roundtable on Biodiversity and Indigenous Knowledge Systems in Malaysia, Anak Negeri of Sabah – Towards to Recognition of Traditional Knowledge, <http://www.coac.org.my/codenavia/portals/coacv2/images/articles/IPs%20and%20Biodiversity.pdf>, 2004, p. 17.

⁹ Ahtoi, Gallus, Deliberations at the National Roundtable on Biodiversity and Indigenous Knowledge Systems in Malaysia, Anak Negeri of Sabah – Towards to Recognition of Traditional Knowledge, <http://www.coac.org.my/codenavia/portals/coacv2/images/articles/IPs%20and%20Biodiversity.pdf>, 2004, p. 17-19.

- To impress upon religious authorities the importance of understanding the values and concepts of indigenous belief systems,
- To correct general misconceptions about (the absence of) indigenous knowledge systems,
- To reverse the trend that sees biodiversity and indigenous knowledge as something to exploit for private profit, and
- For the formal education system to acknowledge the contribution and importance of indigenous knowledge and to include it within the national curriculum.¹⁰

Access Licences

Any time a person wants access to biological resources they must apply for an Access Licence (a Licence). A Licence can be obtained from the Sabah Biodiversity Council (the Council) through a written application.¹¹

a. Application for an Access Licence

Access Licence applications should only request access to biological resources found on State land, reserves, native customary land, indigenous and local community sites, rivers, tributaries, waterways and other areas covered by water and territorial areas of the State.¹² Access Licence applications should include the identity of the Collector¹³, and documents proving his legal capacity to contract. Details of the proposed activity should include the following:

- Biological resources that are requested for access,
- Purpose for access to resources (including intention to commercialize),
- Name of institution that will conduct the collection, research and development or foreign sponsor if applicable,
- Site being requested to access including status of land and the location of resource,
- Time of proposed access,
- Primary and probable destination of the resource,
- Benefits of the access,
- Description of the biological resources, and
- Potential environmental and socio-economic impacts from the access.¹⁴

b. Application fees and costs

¹⁰ Ahtoi, Gallus, Deliberations at the National Roundtable on Biodiversity and Indigenous Knowledge Systems in Malaysia, Anak Negeri of Sabah – Towards to Recognition of Traditional Knowledge, <http://www.coac.org.my/codenavia/portals/coacv2/images/articles/IPs%20and%20Biodiversity.pdf>, 2004, p. 19.

¹¹ Sabah Biodiversity Enactment, 2000, section 15 (1).

¹² Sabah Biodiversity Enactment, 2000, section 16, (a)-(c).

¹³ 'Collector' individual or group applying for access to a biological resource, Sabah Biodiversity Enactment, 2000, section 2.

¹⁴ Sabah Biodiversity Enactment, 2000, section 17, (a), (b) (i)-(x).

The Collector is the person responsible for covering the costs and expenses for making the application, complying with the conditions of the Council and fulfilling all requirements of the Enactment throughout the application process.¹⁵ The Council can also establish an application fee that must be paid at the time the application is submitted.¹⁶

c. Reviewing an application for access

When the Council is reviewing an application for a Licence it should consider the following issues:¹⁷

- Effect(s) access activity will have on the biological resources,
- Impacts of access on biological diversity and the environment, including adverse effects, and
- Impact of access activity on indigenous and local communities.

c. Approval of access application

After the Council has reviewed an application for access it has the authority to approve a Licence.¹⁸ All application decisions should be given in writing and should include whether the application was approved, approved with conditions or rejected.¹⁹ If the Council is unsure of its decision, it may request more information from the applicant before it makes a decision.²⁰ A person can appeal its decision to the State Cabinet if they are not satisfied with the Council's decision.

d. Waivers to the application process

The Council has the authority to waive an individual or research institution from applying for an access licence. Waivers for access rights should only be used for access to academic and non-profit research.²¹ The application process does not apply to public officers who may need access to biological resources to perform the responsibilities of their position.²²

e. Conditions of acceptance

The Council can approve a Licence application with conditions attached. The attached conditions must be met before the application is approved.²³ The Council may impose the condition of including a local institution as a collaborator for the research for the Licence or a foreign institution that will act as the sponsor

¹⁵ Sabah Biodiversity Enactment, 2000, section 19, (a)-(c).

¹⁶ Sabah Biodiversity Enactment, 2000, section 18.

¹⁷ Sabah Biodiversity Enactment, 2000, section 20.

¹⁸ Sabah Biodiversity Enactment, 2000, section 21 (1).

¹⁹ Sabah Biodiversity Enactment, 2000, section 21 (1), (a)-(b).

²⁰ Sabah Biodiversity Enactment, 2000, section 21 (2).

²¹ Sabah Biodiversity Enactment, 2000, section 15 (3).

²² Sabah Biodiversity Enactment, 2000, section 15 (3).

²³ Sabah Biodiversity Enactment, 2000, section 23 (1).

organization.²⁴ Other conditions that can be attached to a Licence depends on Governmental discretion.²⁵ Conditions can also be imposed after the Licence has already been approved and in use. Additional restrictions on activities of the Licence can be imposed if they cause any of the following:

- Adverse effects on biological diversity including endangered taxa, endemism or rarity,
- Adverse effects on quality of life or cultural values of indigenous and local communities,
- Undesirable or difficult to control environmental impacts,
- Danger of genetic erosion, ecosystem loss or loss of resources and components,
- Adverse effects on human, animal and plant health, and
- Use or potential use of resources that are not in the interest of the State.²⁶

f. Terms and revocation of an Access Licence

When the Council approves a person or institution for an Access Licence it should issue the Access Licence in the prescribed form including terms and conditions attached to the access.²⁷ The Council has the authority to terminate an Access Licence when a Licence holder has violated provisions of the Enactment.²⁸ The Council is not responsible for any claim for loss, damage or compensation if a Licence is terminated.²⁹

Prohibited acts and restrictions on Biological Resources

Any person that engages in, participates in an activity without a Licence, withholds or does not provide information, or removes biological resources of the State without approval will be guilty of an offence. All offences listed above will have a penalty of fifty thousand ringgit or imprisonment for a not more than five years, or both.³⁰

a. Unauthorized taking

Any person who takes away or makes use of biological resources, material or information by the Biodiversity Centre without authorization will be guilty of an offence and will be liable to a fine of thirty thousand ringgit or imprisonment for not more than three years, or both.³¹

b. Restrictions on exportation for research

²⁴ Sabah Biodiversity Enactment, 2000, section 23 (1), (a)-(b).

²⁵ Sabah Biodiversity Enactment, 2000, section 23 (2).

²⁶ Sabah Biodiversity Enactment, 2000, section 25, (1), (a)-(f)

²⁷ Sabah Biodiversity Enactment, 2000, section 24

²⁸ Sabah Biodiversity Enactment 2000, section 25 (2)

²⁹ Sabah Biodiversity Enactment, 2000, section 25 (3)

³⁰ Sabah Biodiversity Enactment, 2000, section 26, (a)-(c)

³¹ Sabah Biodiversity Enactment, 2000, section 27

It is prohibited to export biological resources for research from alienated land, Conservation Areas, Forest Reserves, Parks, Protected Areas, Water Protection Areas, waterways, territorial waters or any of State land without a licence from the Council.³²

Special provisions for authorized officers

a. Power to enter and investigate

The Secretary or other authorized officers³³ have the power to enter land without warrant where there is access activity to biological resources of the State. The authorized officers have the power to investigate and inspect land, activities and request certain documents or items to be presented. If an authorized authority is not in uniform they are required to show their written authority at a person's request.³⁴

b. Search and seizure

The Secretary and other authorized officers have the authority to enter and search land without warrant or assistance if necessary where they believe an offence has been committed. The officer can search the person if he has concerns over the control or management of an employee or agent of the land owner.³⁵ When an officer enters an area of land for investigation they also have the right to seize or detain material or other objects suspected of being used in the offence.³⁶ Materials seized can be sold or disposed of if and order by the court. If seized materials are sold proceeds should be returned to the owner unless the profits do not cover the sale and seizure.³⁷

c. Power to arrest

The Secretary and authorized officers have the power to arrest a person without a warrant if it is reasonably suspected that they are committing, attempting, or aiding a person in an offence of the Enactment. Officers can also arrest a person who refuses to give their name, address, is suspected of giving false information, gives an address outside of Malaysia or is suspected of escaping.³⁸ Any person that is arrested should be brought to a police officer as soon as reasonably possible.³⁹

d. Obstruction of an officer

³² Sabah Biodiversity Enactment, 2000, section 29.

³³ Cross-referenced in brief under 'Institutional Arrangement'.

³⁴ Sabah Biodiversity Enactment, 2000, section 29.

³⁵ Sabah Biodiversity Enactment, 2000, section 30.

³⁶ Sabah Biodiversity Enactment, 2000, section 31 (1).

³⁷ Sabah Biodiversity Enactment, 2000, section 31 (3).

³⁸ Sabah Biodiversity Enactment, 2000, section 32 (1), (a)-(c).

³⁹ Sabah Biodiversity Enactment 2000, section 32 (2).

If a person prevents an officer from performing their authorized duties they will be guilty of an offence and will be subject to imprisonment for not more than one year and a fine of ten thousand ringgit, or both.⁴⁰

e. Immunity

The Secretary and authorized officers cannot have an action against them that involved the entry, investigation, seizure, removal or detention of good of materials if they had permission to seize the items.⁴¹

2. FOREST ENACTMENT

Please note that there is a dedicated brief on the *Forest Enactment (1968)* and related legislation. This section only sets out information from the Forest Enactment that is relevant to biodiversity. The *Sabah Biodiversity Enactment* focuses on the conservation and protection of biological resources but also provides access licences to these resources on State Land. Forest Reserves are considered State Land.

Purpose

The *Forest Enactment (1968)* provides the cornerstone for Sabah's forest-related legislation, and establishes rules relating to the preservation of forests, regulation and control of forest produce.

Representation on the Sabah Biodiversity Council

The Director of Forestry, or an authorized representative from the department, should be one of the members that makes up the Sabah Biodiversity Council.⁴²

3. PARKS ENACTMENT

Please note that there is a dedicated brief on the *Parks Enactment (1984)* and related legislation. This section only sets out information from the Parks Enactment that is relevant to biodiversity. The Sabah Biodiversity Enactment focuses on the conservation and protection of biological resources but also provides access licences to these resources on State Land. Parks and Nature Reserves are considered State Land.

Purpose

The *Parks Enactment (1984)* establishes Sabah's laws relating to National Parks and Reserves.

Representation on the Sabah Biodiversity Council

The Director of Sabah Parks, or an authorized representative from the Department,

⁴⁰ Sabah Biodiversity Enactment, 2000, section 33.

⁴¹ Sabah Biodiversity Enactment, 2000, section 31 (2), permission to seize found in section 31 (1).

⁴² Sabah Biodiversity Enactment, 2000, section 3 (2), (a)-(i).

should be one of the members that makes up the Sabah Biodiversity Council.⁴³

4. WILDLIFE CONSERVATION ENACTMENT

Please note that there is a dedicated brief on the *Wildlife Conservation Enactment (1997)* and related legislation. This section only sets out information from the Wildlife Enactment that is relevant to biodiversity. The Sabah Biodiversity Enactment focuses on the conservation and protection of biological resources but also provides access licences to these resources on State Land. Wildlife Sanctuaries and Hunting Areas are considered State Land.

Purpose

The *Wildlife Conservation Enactment (1997)* provides the cornerstone of Sabah's conservation-related legislation, and establishes rules relating to the conservation and management of wildlife and its habitat.

Representation on the Sabah Biodiversity Council

The Director of Wildlife, or an authorized representative from the department, should be one of the members that makes up the Sabah Biodiversity Council.⁴⁴

5. WATER RESOURCES ENACTMENT

Please note that there is a dedicated brief on the *Water Resources Enactment (1998)* and related legislation. This section only sets out information from the Water Resources Enactment that is relevant to biodiversity. The *Sabah Biodiversity Enactment* focuses on the conservation and protection of biological resources but also provides access licences to these resources on State Land. Water Protection Areas and Water Conservation Areas are considered State Land.

Purpose

The *Water Resources Enactment (1998)* provides the cornerstone of Sabah's water resource-related legislation, and establishes rules relating to the sustainable management and efficiency of water activities, Water Conservation Areas and Water Protection Areas.

Representation on the Sabah Biodiversity Council

The Director of Water Resources, or an authorized representative from the department, should be one of the members that makes up the Sabah Biodiversity Council.⁴⁵

6. ENVIRONMENTAL PROTECTION ENACTMENT

⁴³ Sabah Biodiversity Enactment, 2000, section 3 (2), (a)-(i).

⁴⁴ Sabah Biodiversity Enactment, 2000, section 3 (2), (a)-(i).

⁴⁵ Sabah Biodiversity Enactment, 2000, section 3 (2), (a)-(i).

Please note that there is a dedicated brief for the *Environment Protection Enactment (2002)* and related legislation. This section only sets out information from the enactment that is relevant to biodiversity.

Purpose

The *Environment Protection Enactment (2002)* establishes Sabah's laws for the protection of the environment and all other related matters.

Establishing protection policies and areas

The Minister has the authority under the *Environment Protection Enactment* to establish an environmental protection policy for an area where pollution is significant or likely to become significant for the environment.⁴⁶ In addition the Minister also has the authority to establish Environmental Protection Areas for the protection on the environment by notification in the *Gazette*.⁴⁷

7. INSTITUTIONAL ARRANGEMENT

Sabah Biodiversity Council

The Sabah Biodiversity Council (the Council) is established to advise the State Government on areas of conservation and sustainable use of biological resources.⁴⁸ The Council should be involved in reviewing the State policy on biotechnology, and coordinating local, state and national activities for the use and research of biological resources and biodiversity.⁴⁹ The Council is overseen by the Minister of Tourism, Culture and Environment (the Minister) and will be composed of the following members:

- A Chairman (who is also the Minister),
- Attorney General,
- Secretary of Natural Resources,
- Director of Forestry Department,
- Director of Sabah Parks,
- Director of Wildlife Department,
- Director of Environmental Conservation Department,
- Director of Water Resources, and
- Not more than seven other members who have experience and expertise in the field, appointed by the Minister.⁵⁰

Sabah Biodiversity Centre

⁴⁶ Sabah Environment Protection Enactment, 2002, section 9, 10 (1), (a)-(b).

⁴⁷ Sabah Environment Protection Enactment, 2002, section 11.

⁴⁸ Sabah Biodiversity Enactment, 2000, section 3 (1)(a).

⁴⁹ Sabah Biodiversity Enactment, 2000, section 3 (1), (d)-(e).

⁵⁰ Sabah Biodiversity Enactment, 2000, section 3 (2), (a)-(i).

The Sabah Biodiversity Centre (the Centre) is established in the Enactment and should be maintained by the Biodiversity Council listed above.⁵¹ The Centre should provide the Government and other organizations with information, data, policies and guidelines for the distribution and use of biodiversity in the State.⁵² The list of responsibilities for the Centre includes establishing a system for the protection of biological resources so that the indigenous and local communities shall, at all times and in perpetuity, be the legitimate creators, users and custodian of such knowledge, and shall collectively benefit from the use of such knowledge.⁵³ A full list of the responsibilities for the Centre is listed in the Annex.

Secretary

The Secretary of the Council is appointed by the Minister and should be a member of the State Public Service. The Secretary can attend all Council meetings but has no vote.⁵⁴ As stated in the *special provisions for authorized officers* section above, the Secretary has the authority to perform a *search and seizure*, *has the power to enter and investigate*, *has the power to arrest* and is granted *Immunity* from any actions brought against him or her while performing these duties.⁵⁵

Authorized officer

An authorized officer is considered any police officer, customs officer, the Secretary of Council and any other person that is authorized in writing by the Secretary.⁵⁶

Collector

The Collector is an individual, group of individuals, educational and research institution or corporate entity that is seeking access to biological resources or relevant knowledge. The Collector is considered a representative of the organization that the access licence is granted to.⁵⁷

8. CASE LAW

The authors are grateful for any information about relevant case law.

⁵¹ Sabah Biodiversity Enactment, 2000, section 9 (1).

⁵² Sabah Biodiversity Enactment, 2000, section 9 (1), (a)-(b).

⁵³ Sabah Biodiversity Enactment, 2000, section 9 (1), (j), List included in Annex.

⁵⁴ Sabah Biodiversity Enactment, 2000, section (3), (3).

⁵⁵ Cross referenced, full description of authority is listed in 'Special provisions for authorized officers' section above.

⁵⁶ Sabah Biodiversity Enactment, 2000, section 29.

⁵⁷ Sabah Biodiversity Enactment, 2000, section 2, 'Collector'.

ANNEX

Sabah Biodiversity Centre

The list of responsibilities for the Centre established under the Enactment includes the following.⁵⁸

- (a) Providing the Government and other institutions approved by the Government with accurate information or data on the status, magnitude, distribution, usage and value of the biodiversity in the State;
- (b) Managing and sustaining utilisation of the biodiversity of the State, including determining policies and guidelines for scientific research or experiment related to the access to and use of biological resources of the State for pharmaceutical, medicinal and other specific purposes;
- (c) Carrying such activities in association or collaboration or in joint venture with other bodies or persons including the departments or agencies of the Government or the Federal Government for the improvement and enhancement of conservation and management of biological resources of the State;
- (d) Formulating programmes for systematic surveys of biodiversity and the collection and analysis of data thereto;
- (e) Identifying the priorities for research on biodiversity in order to enhance undertaking, conservation and sustainable utilisation of biodiversity and biological resources, including ethnobotany, taxonomy and traditional uses;
- (f) Promoting the identification of new natural and biotechnological products derived from the biodiversity and biological resources of the State;
- (g) Planning and initiating programmes for the utilisation, conservation, protection and sustainable development of biological resources;
- (h) Establishing a database system of all exhibits, published and written records regarding the use, cultivation and management of biological resources of the State;
- (i) Establishing a network of researchers in institutions of higher learning, research institutes, libraries and documentation centres to assist in building or be part of the system of recording such knowledge;
- (j) Establishing or caused to be established a system for the protection of biological resources so that the indigenous and local communities shall, at all times and in perpetuity, be the legitimate creators, users and custodian of such knowledge, and shall collectively benefit from the use of such knowledge;
- (k) Establishing linkages with other institution or bodies, within or outside the State, with a view to enhancing the management, protection, preservation, research and utilisation of the biodiversity and traditional knowledge of the indigenous or local community of the State;
- (l) Carrying on of all activities of which appears to the Council to be necessary, advantages or convenient for or in connection with the discharge of its duties; and
- (m) Generally to promote education and knowledge of the biodiversity of the State.

⁵⁸ Sabah Biodiversity Enactment, 2000, section 9 (1), (a)-(m).