

BWI complaint against BILT

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18 December 2015

Recommendation to the FSC Board of Directors

Impartial Complaints Panel consisting of Balu Perumal, Leo van der Vlist, Bert van Hensbergen

FSC shall not disassociate from BILT (Conditional Association)

FSC shall disassociate from SFI

BWI complaint against BILT

List of Abbreviations

ASI	Accreditation Services International
BILT	Ballarpur Industries Limited
BIGPH	Ballarpur International Graphic Paper Holdings B.V. (now Bilt Paper B.V.)
BPH	Ballarpur Paper Holdings B.V.
BTTL	BILT Tree Tech Limited
BWI	Building and Woodworkers International
CoC	Chain of Custody
DGIR	Director General Industrial Relations
FSC	Forest Stewardship Council
GA	General Assembly
HCV	High Conservation Value
IFC	International Finance Corporation
ILO	International Labour Organisation
IRA	Industrial Relations Act 1967
ITP	Industrial Timber Plantation
MTUC	Malaysia Trade Unions Council
NFM	Natural Forest Management
PfA	Policy for Association
RA	Rainforest Alliance
RLI	Responsible Low Impact
SFI	Sabah Forest Industries
SFIEU	Sabah Forest Industries Employees Union
STIEU	Sabah Timber Industries Employees Union
TUA	Trade Unions Act 1959

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1 Executive summary

A policy for association complaint was raised by BWI (Building and Woodworkers International) against BILT (Ballarpur Industries Limited) and accepted by the FSC on 13th July 2015. The PfA complaint follows earlier complaints by BWI to the certification body (Rainforest Alliance, RA) in relation to non-compliance with the controlled wood standard and subsequently to Accreditation Services International (ASI) in relation to the failure of RA to correctly evaluate SFI according to the standard.

The complaints all concern the behaviour of Sabah Forest Industries (SFI) in failing to recognise the Union (STIEU or its predecessor SFIEU) at its sites in Sipitang. At the time of the complaint SFI is a step down subsidiary of BILT held through its subsidiary registered in the Netherlands. BILT owns in excess of 98% of the shares in SFI and therefore has effective control over the company. The complaint alleges that by failing to recognise the union at SFI that BILT is in violation of the PfA by being involved in an unacceptable activity specifically: - *Violation of any of the ILO Core Conventions*. As companies do not ratify these ILO Conventions and can therefore not formally violate them the complaints panel has interpreted this as *violation of any of the fundamental principles and rights at work as defined in the ILO Declaration on Fundamental Principles and Rights at Work and laid down in the ILO Core Conventions*. The two core ILO Conventions in question are Convention 87 on Freedom of Association and Convention 98 on Union Recognition and Collective Bargaining.

Workers at SFI have been attempting to achieve union recognition since the early 1990s but for the purpose of the PfA only events that have occurred since the PfA came into force in July 2009 can be considered. BILT took control of SFI in 2007 so that all actions at SFI after July 2009 are the responsibility of BILT. Specifically, the responsibility for almost all decisions regarding union recognition at SFI is formally retained by the CEO of BILT.

SFI is located at Sipitang in Sabah State on the island of Borneo and is therefore located in the Malaysian Federation.

Malaysia is a member of the ILO (International Labour Organisation) however it has not yet ratified convention 87. It has ratified convention 98. Malaysian Labour Law is largely contained in two acts the Trade Union Act of 1959 and the Industrial Relations Act of 1967. This legislation does not itself comply with ILO convention 87 since it restricts the scope of unions limiting them to a single industry or employer, requires all unions to be registered and disqualifies large numbers of workers from being union members based on the type of work they do. In addition, the law severely limits what may be included in collective bargaining agreements.

However although these limits exist it appears as if there is a high degree of flexibility in the way that industrial relations are actually practiced depending on the willingness of the employer to deal with unions. Thus although collective bargaining agreements may not include retrenchment in their terms they regularly do and these are approved by the authorities. Similarly employers may choose to voluntarily recognise unions but can also be forced to do so by law even if they do not want to recognise them.

In practice many employers in Malaysia only recognise in house unions or avoid unionisation by repeatedly resorting to legal and judicial means when they are ordered to recognise unions and are often able to resist union recognition indefinitely by resorting to technical objections. Nevertheless, the case of SFI is deemed exceptional even in the Malaysian context in terms of duration of the recognition process and the repeated applications for judicial review.

SFI has refused to recognise any union on a voluntary basis. SFI has refused to recognise the union STIEU on several occasions since 2009 and following secret ballots indicating that the majority of workers wished STIEU to represent them. SFI has repeatedly challenged instructions by the minister ordering the company to recognise the union. These challenges have been based on several issues:

- The Predecessor to STIEU, SFIEU was not formally dissolved so that according to law STIEU could not represent workers at SFI.
- The scope of STIEU as a Timber Industry Union could not include the pulp and paper sector.
- Workers who wished to vote in secret ballots were considered to fall in the classes of workers (executive, managerial, confidential and security) not permitted to be union members.

At the time of writing SFI is engaged in a judicial review of the decision of the minister in classifying workers into managerial, confidential and security classes.

SFI claims that to accept the classification of the minister would result in the company breaking the law and that therefore it has no choice but to resort to judicial review. The panel considers that while the company may be acting within the rights conferred on it by the Malaysian law it would not be committing any offence by recognising the union on a voluntary basis.

In an attempt to avoid having to recognise STIEU SFI has sought to re-establish the former Union SFIEU as a purely in house union. SFI has clearly encouraged this and supported the activity of a disaffected former president of SFIEU and has offered to voluntarily recognise this unrepresentative grouping of workers. SFI has also sought to persuade STIEU to change its constitution to redefine the scope of its membership.

In an attempt to minimise the size of the union SFI has sought to dissuade migrant workers from Nepal and Indonesia from participating in union activities by informing them that this is in violation of their residence permits. There is only one restriction placed on foreign workers in relation to union affairs and that is, that they may not be union officers. SFI attempted to convince the panel that migrant workers were not permitted to be union members by presenting the panel with an immigration regulation which did not cover the class of migrant workers employed at SFI and which in any case did not forbid membership of a registered trade union.

On the basis of the evidence presented in the report the complaints panel considers that there is clear and convincing evidence that SFI has failed to respect the ILO fundamental principles and rights at work laid down in the ILO core conventions by refusing to recognise and engage in collective bargaining with a workers union of the free choice of the SFI workers.

The panel considers that the impacts of failure to recognise a union at SFI were significant but not grievous. It is likely that as a result of the failure to negotiate a collective agreement that the workers have been disadvantaged financially but more importantly they have lacked the protection at an individual level that comes from the collective protection afforded by a union. This has resulted in individual workers being disciplined for failure to carry out dangerous actions and workers not being paid compensation as ordered by the court.

BILT is in the process of selling SFI and as a result will no longer be responsible for what happens there in the future. As a result of this the panel has deemed it necessary to make separate recommendations to the board for BILT and for SFI.

In the case of BILT the panel has recommended that the company may maintain their association with FSC under certain conditions which include compensating the affected workers by making a

payment in trust to be used to subsidize the union dues of all STIEU members for a period of five years.

In the case of SFI the panel recommends disassociation from FSC until, amongst other conditions, the company has concluded a collective bargaining agreement with a union of the workers' free choice.

2 The Complaints Panel

Balu Perumal, for the **Malaysian Nature Society**, Environmental Chamber South, organisational member.

Mr. Perumal is Head of Conservation at the Malaysian Nature Society (MNS). He has worked extensively with ministries, government agencies, international aid-agencies and civil societies at various different capacities within the platform provided by environmental non-governmental organisations. His experience ranges from field-based research officer to head of the forest unit with WWF Malaysia, project leader at Wetlands International, to regional coordinator at the Global Environment Centre. A key focus of Mr. Perumal's work has been capacity and institutional development of government agencies and stakeholders in environmental and biodiversity management. MNS is an organizational member of FSC International and Mr. Perumal is member of the environmental chamber of the board of FSC Malaysia.

Mr. Leo van der Vlist, for the **Netherlands Centre for Indigenous Peoples (NCIV)**, Social Chamber North, organisational member.

Mr van der Vlist is a lawyer by training and has over 25 years of working experience with indigenous peoples worldwide. Leo is Director of the Netherlands Centre for Indigenous Peoples (NCIV) which is a Dutch-based NGO that advocates the rights of indigenous peoples. NCIV is an organizational member of FSC International and Leo is member of the social chamber of the board of FSC Netherlands. He has a long working relationship with several NGO's in Malaysia regarding indigenous peoples' rights and recently worked on assessing complaint mechanisms of six different certification schemes, including FSC. Leo is co-author of FSC's Guidelines on the implementation of the right to Free, Prior and Informed Consent and now works on field-testing these guidelines. Currently he also works on making Centralized National risk Assessments for FSC's Controlled Wood label on category 2: Wood harvested in violation of traditional and human rights for a large number of countries. These risk assessments include labour rights.

Berty van Hensbergen, Economic Chamber North, individual member.

Mr. van Hensbergen is currently President of SSC Forestry Group and most of the companies in the Group, including SSC Forestry AB (Consulting), SSC Americas SA (Consulting), SSC Africa Ltd (consulting), SSC Wood Technologies (Small Fair Traded Sawmill in Chile), Wildhorus Ltd (Consulting) and a Director of Viteca SA (Nursery and Teak Plantation) an SSC Joint Venture company. He is a forestry and environmental consultant focusing mainly on responsible forest management including standards development and compliance preparation. In this capacity, Mr. van Hensbergen worked for large and small companies, governments, multilateral and development agencies. He carried out a number of consultancies for NGOs including a report on timber tracking technologies for WWF and legality compliance in Ghana for ITTO. He is the first author of a report on the social impacts of Forest Certification for WWF and an unpublished WWF report on the social responsibilities of large plantation companies. He was formerly Professor of Nature Conservation at the University of Stellenbosch and in this capacity was a

member of the environmental committee of Forestry South Africa. He was also the President of the South African Statistical Association in 1997 and served on the Board of the South African Wildlife Management Association from 1990 until 1999. Mr. van Hensbergen was a Complaints Panel Member in the complaints filed by Global Witness against Dalhoff Larsen & Horneman (DLH) and the Vietnam Rubber Group (VRG).

3 The Complaint

BWI (Building and Woodworkers International) has raised a complaint¹ against BILT (Ballarpur Industries Ltd) Graphic Paper Products Ltd. in relation to non-compliance with the FSC policy for association². The specific allegation is that the BILT subsidiary Sabah Forest Industries (SFI) is in violation of the PfA by 'Violation of any of the ILO Core Conventions, as defined in the ILO Declaration on Fundamental Principles and Rights at Work.'³ The complaint relates to freedom of association and union recognition and therefore specifically refers to ILO convention 87⁴ and 98⁵.

The complaint centres on the long history of attempts by the workers at SFI to achieve union recognition. The first union Sabah Forest Industries Employees Union (SFIEU) was registered with the Trade Union Department in 1991 and at the time of writing neither the original union nor its successors have achieved union recognition from SFI.

The complaint alleges that SFI has used a variety of union busting tactics to prevent the recognition of a union at SFI, that the company has attempted to interfere in the internal affairs of the union and that the company is seeking to establish a union which is not of the workers' free choice.

SFI has repeatedly blocked attempts by workers at SFI to form a union and to have it recognised by the company since 1991. In relation to the current complaint only events following the approval of the FSC PfA in July 2009⁶ can be considered. BILT have been the owners of SFI since 2007.

The company has challenged every directive to recognise the union coming from the relevant government departments. It has done this by seeking judicial review of every decision made by the minister in respect of union recognition at SFI.

In 2009 the workers at SFI sought to dissolve the former union SFIEU and to establish a new union at SFI which was done by joining the already existing state wide union Sabah Timber Industries Employees Union (STIEU).

A secret ballot indicated that 85.90% of workers voted to be represented by STIEU and SFI was ordered to recognise STIEU by the minister.

SFI challenged this directive on the basis that STIEU could only represent those workers in the 'Timber Industry' being narrowly defined as sawmilling and excluding both forestry and pulp and paper.

¹ A. Yuson (2015a) Formal Complaint Regarding BILT's violation of FSC_POL-01-004 Policy for the Association of Organisations with FSC

² FSC (2011) FSC-POL-01-004 V2-0 EN Policy for the association of organizations with FSC

³ ILO (1998) ILO Declaration on Fundamental Principles and Rights at Work

⁴ ILO (1948) Freedom of Association and Protection of the Right to Organise Convention. Convention 87

⁵ ILO (1949) Right to Organise and Collective Bargaining Convention. Convention 98

⁶ FSC (2011) FSC-POL-01-004 V2-0 EN Policy for the association of organizations with FSC

SFI also challenged the decision of the minister on the basis that SFIEU (which it had always refused to recognise) was still operating and that STIEU could therefore not represent workers at SFI. In March 2014 STIEU again filed a claim for union recognition. Under ministerial guidance this claim had by September 2014 reached the stage at which the process of verification of eligible employees for the purpose of voting was to be carried out prior to a secret ballot for union recognition by the workers before the end of 2014.

At meetings in late 2014 SFI sought to exclude approximately 300 workers from voting on the basis that they were in the executive, managerial, security or confidential capacity which under Malaysian law may not be members of a union⁷. In late November and early December the ministry interviewed the affected workers and in March 2015 issued their decision on who could participate in the secret ballot. In May 2015 SFI once again sought judicial review of the minister's decision on the basis of inconsistencies and incompleteness. Thus delaying further the process of union recognition.

SFI is alleged to have interfered in internal union affairs in several ways.

In 2013 the company sought to establish a Joint Consultative Committee as a forum for airing employees grievances at a time when there was already a union, STIEU in place.

In 2014 and 2015 the company has sought to persuade STIEU members to accept an in-house union (SFIEU) instead of the state-wide STIEU. It has done this by several means including by a circular of SFI's CEO to all employees stating that the company will only support the in house union SFIEU⁸ and asking officials of STIEU to write letters in their personal capacity instead of as representatives of STIEU.

When these officials have refused to comply the company has *castigated union leaders and asked why they are allowing themselves to be dominated by Ms Engrit Liaw, STIEU secretary.*

In addition to these complaints made against BILT and SFI the complaint document has made a variety of criticisms of the certification body Rainforest Alliance (RA) and of the review of the certification body's actions as carried out by Accreditation Services International (ASI). These complaints are not the focus of this investigation however the complaints panel has reviewed them and will make confidential recommendations to the FSC board in respect of these alleged failings of the FSC system.

3.1 History of the complaint.

3.1.1 Complaint relating to non-compliance with FSC Controlled Wood Standard (FSC-STD-30-010, version 2-0).

The issue of union recognition was first raised by the union in relation to a non-conformance with principle 4 (Table 1) of the FSC controlled wood standard. Principle 4 of the controlled wood standard specifies compliance with the ILO fundamental principles and rights at work.

⁷ Government of Malaysia (1967) Industrial Relations Act (Act 177) Clause 9

⁸ Circular of CEO of SFI to all employees, dated 7 November 2014

Prior to the RA annual surveillance visit of 2013 representatives of STIEU contacted RA by a letter dated 18th March 2013⁹ to raise the issue of union recognition. RA following their review of the issue on site issued an observation in their audit report.

On 7th May 2014 BWI raised a complaint with ASI in relation to the failure by RA to correctly identify the union recognition issue as a major failure to comply with the standard.

ASI accepted the complaint on 18th June 2014¹⁰ and published their report on 12th December 2014. The report recognised some failings on the part of RA but did not consider the auditors to have erred significantly in their judgement.

Table 1 Principle 4.1 of the Controlled Wood Standard.

4.1. There is evidence of no violation of the International Labor *Organisation* (ILO) Fundamental Principles and Rights at Work in the FMU.

The ILO Declaration on Fundamental Principles and Rights at Work is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values - values that are vital to our social and economic lives. The Declaration on Fundamental Principles and Rights at Work covers four areas:

- Freedom of association and the right to collective bargaining;
- The elimination of forced and compulsory labour;
- The abolition of child labour, and;
- The elimination of discrimination in the workplace.

3.1.2 Complaint relating to non-compliance with FSC PfA.

On 6th March 2015 BWI raised a complaint against BILT as the owners of SFI in relation to the failure to recognise unions at SFI. The complaint was accepted by FSC on 13th June 2015.¹¹

In keeping with the FSC procedures¹² prior to instituting a full complaint process FSC IC sought to establish a mediation process between the parties¹³. However this process could not be instituted due largely to incompatible expectations of the mediation outcome on the part of STIEU and BILT^{14,15} and the wish of STIEU to simultaneously pursue the complaint¹⁶ and the attempt was therefore terminated by FSC on 3rd June 2015¹⁷.

⁹ ASI (2014) Building and Wood Worker's International (BWI) vs. Rainforest Alliance (RA) at SW-CW_FM-004704 (Sabah Forestry Industries) Complaint Investigation Report

¹⁰ ASI (2014) Building and Wood Worker's International (BWI) vs. Rainforest Alliance (RA) at SW-CW_FM-004704 (Sabah Forestry Industries) Complaint Investigation Report

¹¹ <https://ic.fsc.org/bilt-graphic-paper-products-limited-bilt.928.htm>

¹² FSC (2014) Processing Policy for Association Complaints in the FSC® Certification Scheme FSC-PRO-01-009 V3-0 EN

¹³ FSC (2015a) Letter to Ms Engrit Liaw.

¹⁴ STIEU (2015) Letter from STIEU to FSC

¹⁵ BILT (2015) letter to FSC dated 9 May 2015

¹⁶ STIEU (2015) Letter from STIEU to FSC

¹⁷ FSC Internal e-mail correspondence between Thomas Colonna and Kim Carstensen

3.2 Background to the Inclusion of the ILO core principles in the Policy for Association.

The Inclusion of the ILO core principles in the PfA derives from decisions made by the FSC membership at the 2008 General Assembly (GA) held in Cape Town. The social chamber being concerned that companies with CoC certificates were not complying with ILO core principles presented a motion to the GA which would have required all CoC certificate applicants to be audited for compliance with the core principles prior to receiving a certificate. The economic chamber being concerned by the high cost of verification of this particularly for smaller organisations negotiated a compromise which is in many ways more powerful.

Under this compromise compliance with ILO core principles was to be included in the PfA instead of in relevant CoC standards. Since all organisations associated with FSC are required to adhere to the PfA this becomes a requirement for all types of certificate. The consequences for failure would not necessarily be restricted to failure to obtain a certificate but could also lead to a disassociation and loss of certificates in associated companies.

Thus although the PfA was principally introduced to prevent ‘greenwashing’ by preventing badly behaved organisations from certifying only a small part of their interests it is also to be used in cases where certificate holders are failing to comply with ILO core principles in operations for which they hold certificates.

4 Evaluation of the complaint

4.1 Methodology and data collection

4.1.1 Criteria and Indicators for assessing compliance with ILO core principles

Because FSC currently does not have a framework for measuring compliance with the ILO Fundamental Principles and Rights at Work (see par. 4.4.1.) the Complaints Panel developed, in consultation with the coordinator of the ILO Working Group established by FSC, *ad hoc* Criteria and Indicators for assessing compliance with two ILO core principles relevant to the complaint . These *ad hoc* Criteria and Indicators are presented in table 1 and have been used by the Complaints Panel as a frame of reference for evaluating the complaint.

Table 1: *Ad hoc* Criteria and Indicators for assessing compliance with ILO core principles

Core Principles of ILO Declaration	<i>Ad Hoc</i> Criteria & Indicators	Convention (& Article)	Explanatory Notes
(a) freedom of association and the effective recognition of the right to collective bargaining;	1.1. The Organization* shall* uphold* the principles of freedom of association and the effective recognition of the right to collective bargaining as expressed in the ILO Declaration on Fundamental Principles and Rights at Work (1998) and its related ILO Core Conventions 87 and 98.	87, 98	Similar to IGI 2.1
	1.1.1. Workers* are able to establish or join or associate with labour organisations of their own choosing without fear of intimidation or reprisal and subject only to the rules of the labour organization concerned.	87 (2), 87 (3.1), 87 (5), 98 (1), 98 (2.2)	Similar to IGI 2.1.2 This also covers anti-union discrimination against both individual workers and union representatives carrying out union tasks.

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	1.1.2 The Organization shall recognize and accept labour organizations that represent its workers according to laid down procedures taking into consideration a reasonable time limit for recognition.	98 (4)	Observation of CEACR adopted in 2014 on implementation of ILO 98 for Malaysia suggests that delays in recognition of a labour organization in excess of 9 months are excessive, while 6 months is considered reasonable by the Malaysian Trade Unions Council (MTUC).
	1.1.3. Collective bargaining with representative labour organisations is carried out in good faith and with best efforts to come to an agreement.	98 (4)	The principle of good faith implies that the parties make every effort to reach an agreement, conduct genuine and constructive negotiations, avoid delays in negotiations, respect agreements concluded and applied in, and give sufficient time to discuss and settle disputes.
(b) the elimination of all forms of forced or compulsory labour;	2.1 The Organization shall uphold the principle of prohibition of forced and compulsory labour as expressed in the ILO Declaration on Fundamental Principles and Rights at Work (1998) and its related ILO Core Conventions 29 and 105.	29, 105	
	2.1.1 Employment relationships are voluntary and based on mutual consent, without threat of a penalty.	29 (2.1)	
	2.1.2 There is no evidence of any of the types of forced labour practices, including the following: • Physical and sexual violence • Bonded labour • Withholding of wages • Restriction of mobility • Retention of documents • Threats of denunciations to the authorities		

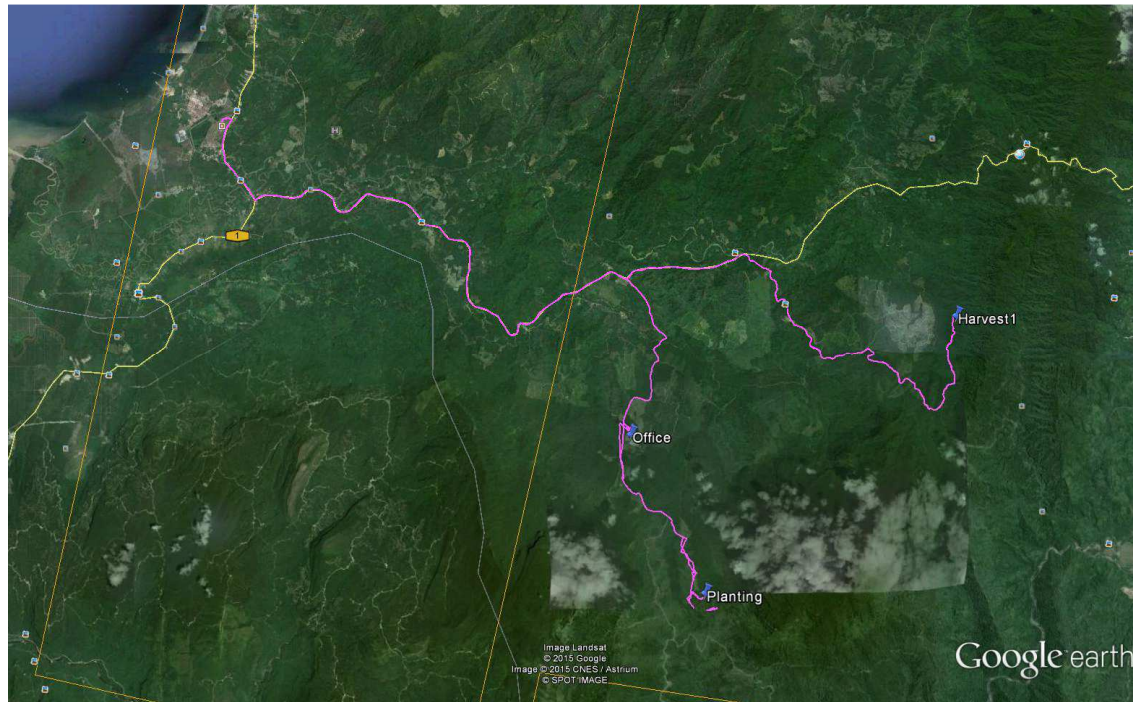
4.1.2 Field Visit to SFI Sipitang

The complaints panel visited Malaysia from 25th to 30th October 2015.

Date	Meetings and Visits Held
26th October	Complaints Panel Meeting in Kuala Lumpur. Meeting with Malaysia Trade Union Council.
27th October	Travel to Sipitang
28th October	Opening Meeting with Bilt and SFI management Meeting with STIEU Further Meeting with Bilt and SFI management
29th October	Visit to Plantations, Field Operations, Migrant Workers Housing, Interview with Migrant Workers. Formal Interviews with a selection of workers nominated by STIEU and a selection of workers nominated by SFI. Visit to Integrated Timber Complex
30th October	Visit to SFI Nursery Visit to Oil Jetty

	Visit to Pulp and Paper Plant. Interviews with randomly selected employees during visit. Close out meeting with SFI in Sipitang Panel meeting at Kuala Lumpur Airport.
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Figure 1 Route taken during field visit. The location labelled as office is also the site of the labour village visited.



4.1.3 Documentary evidence

The complaints panel reviewed a wide range of relevant documentary evidence. This included documents of the following types.

Paper correspondence between parties, electronic correspondence between parties, published scientific papers, newspaper articles, national and state laws and regulations, complaints documents provided by the parties, company records including financial records and correspondence from experts.

4.1.4 Expert sources

The panel made contact with relevant experts both within and outside Malaysia. These experts were principally consulted on union practices so that comparisons could be made between different systems. Experts were also asked about specific issues such as union membership of migrant workers and anti-union practices of companies in Malaysia.

4.2 Documents and sources (description, refer to annex for bibliography)

The complaints panel made use of a wide range of documentary evidence including documents provided by the parties, documents available from internet sources and other published information.

The full range of publicly available sources is given in the Bibliography while confidential documents are provided in the Annexes for review by the FSC board.

4.3 Stakeholders interviewed

The panel interviewed a range of stakeholders, these included representatives of BILT, representatives of SFI, representatives of STIEU, representatives of BWI, individual workers including workers in the pulp mill and plantations, workers selected at random and workers recommended by both SFI and STIEU and also Malaysian workers and migrant workers from Nepal. The full list of workers interviewed and interview notes are provided in the appendices.

As many as possible of the interviews were conducted in private however some were conducted at the workplace and it was clear from the behaviour of the interviewees that they were in these cases uncomfortable with the possibility of being overheard.

In addition, the panel made contact with expert witnesses both in Malaysia and elsewhere to evaluate if the restrictions placed on union activities were commonplace in other countries and the extent to which these types of restrictions are being used to defeat the organisation of unions.

4.4 Impediments to the evaluation

4.4.1 Lack of a framework for dealing with ILO issues in the FSC system.

FSC currently does not have a framework for measuring compliance with the ILO Fundamental Principles and Rights at Work.¹⁸ FSC has established the ILO Working Group to define what compliance with the principles of the ILO Core Conventions means at the level of certificate holders, namely in the area of Chain of Custody (CoC), Forest Management (FM) and FM Controlled Wood. To this end a set of generic criteria and suggested indicators will be developed that are commonly applicable to all certificate holders and that consider the legal framework they operate in.¹⁹ The results of the ILO WG meetings were still confidential and the WG did not yet have a draft zero available at the time of writing of this report. For this reason the Complaints Panel developed, in consultation with the coordinator of the ILO Working Group, ad hoc Criteria and Indicators for assessing compliance with two ILO core principles relevant to the complaint (see par. 4.1.1.).

4.4.2 Other issues

A significant problem affecting the evaluation of the complaint was the refusal of the relevant Malaysian and Sabah government departments to respond to the questions of the complaints panel. This refusal was on the basis that the case between SFI and the Malaysian Government is currently *sub judice* and awaiting the outcome of the hearing of 3rd December 2015 and any subsequent appeals by either party.

4.5 Clear and convincing evidence for demonstrating that BILT & SFI are in violation of the PfA

4.5.1 Background to the organisation

4.5.1.1 BILT

Ballarpur Industries Limited (BILT) is India's largest manufacturer of writing and printing paper. BILT's subsidiaries include BILT Graphic Paper Products Limited (BGPPL), Sabah Forest Industries (SFI), and BILT Tree Tech Limited (BTTL). BILT and BGPPL have six manufacturing units across India, which give the company geographic coverage over most of the domestic market. BILT has a dominant share of the high-end coated paper segment in India. It accounts for over 53% of the coated wood-free paper

¹⁸ ILO (1998) ILO Declaration on Fundamental Principles and Rights at Work

¹⁹ FSC (2015) Terms of reference for the ILO Working Group. At: <https://ic.fsc.org/preview.ilo-working-group-tor.a-4521.pdf>

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market, an impressive 80% of the bond paper market and nearly 35% of the hi-bright Maplitho market, besides being India's largest exporter of coated and uncoated paper.

BILT's acquisition of SFI in 2007 was a watershed event – it was the first overseas acquisition by an Indian paper company, and transformed BILT into a major regional player, and elevated BILT's ranking among the global top 100.

BILT is a member of the Avantha Group²⁰ which is an unlisted company (its shares are not for sale in the stock exchange)²¹ registered in India. Avantha Group is controlled by Guatam Thapar and has interests in power generation, food, pulp and paper, forestry and infrastructure amongst others. Avantha group holds just less than 50% of the shares in BILT with most of the remainder held by various institutional investors.²²

The company has a number of FSC certificates for its operations in India as well as the two certificates that it has held at SFI (Table 2).

Table 2 List of Bilt Certificates valid as of 1 December 2015. N.B. 004676 is a multi-site CoC certificate.

Certificate Code	Certificate Status	CW	License Number	License Status	Name	Site/ Member	Country	Issue Date	Expiry Date
SCS-COC-003041	Valid	yes	FSC-C051272	yes	BILT Corporate Office	yes	INDIA	23/02/2015	22/02/2020
SCS-COC-003040	Valid	yes	FSC-C068115	yes	Bilt Graphic Paper Products Limited - SEWA Unit		INDIA	03/03/2015	02/03/2020
SCS-COC-004676	Valid		FSC-C117585	yes	BILT P3		INDIA	25/07/2013	24/07/2018
SCS-COC-004676	Valid		FSC-C117585	yes	BILT P3	yes	INDIA	25/07/2013	24/07/2018
SCS-COC-004676	Valid		FSC-C117585	yes	BILT P3	yes	INDIA	25/07/2013	24/07/2018
SCS-COC-004676	Valid		FSC-C117585	yes	BILT P3	yes	INDIA	25/07/2013	24/07/2018
SCS-COC-004676	Valid		FSC-C117585	yes	BILT P3	yes	INDIA	25/07/2013	24/07/2018

4.5.1.2 SFI

SFI is one of Malaysia's largest timber growers and wood processors. It manages a forest estate totaling 288,000 hectares, pulp and paper manufacturing facilities, and an integrated timber

²⁰ <http://www.avanthagroup.com/avantha-holdings.asp>

²¹ http://www.bseindia.com/stock-share-price/stockreach_annualreports.aspx?scripcode=949676&expandable=0

²²

http://www.bseindia.com/corporates/ShareholdingPattern.aspx?scripcd=500102&flag_qtr=1&qtrid=87.00&Flag=New

BWI complaint against BILT

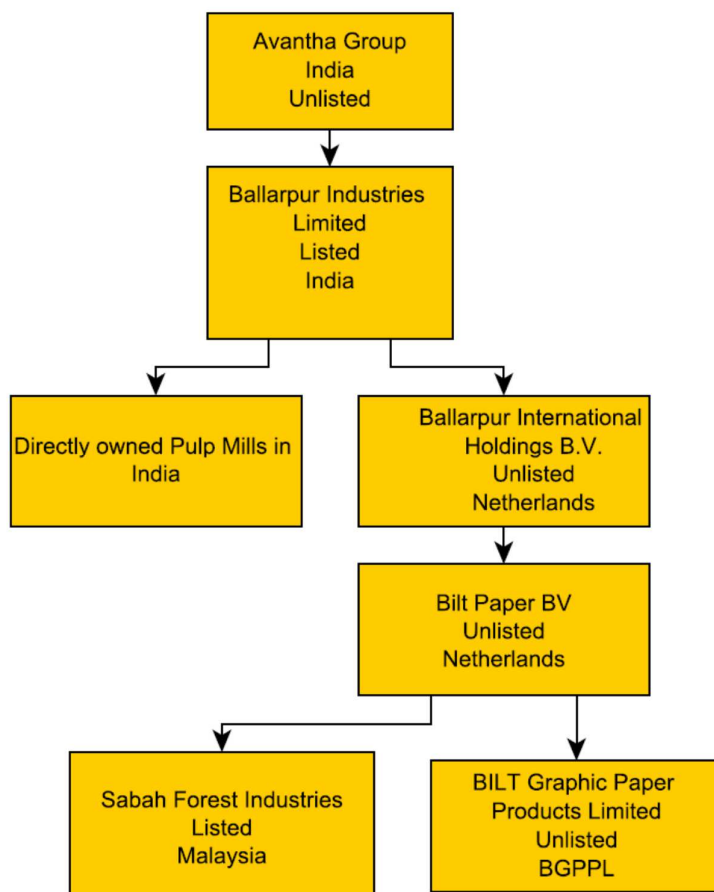
complex consisting of a saw mill and a veneer and plywood factory. SFI also operates a berthing facility for ships to export the pulp to BILT's India operations.

SFI is Malaysia's only integrated pulp and paper manufacturer. The majority owner of SFI is Ballarpur Industries Limited (BILT) which in turn is part of the Avantha Group of companies.

SFI was set up as a government owned and managed integrated pulp and paper unit in 1982. In addition, it had a saw mill and a plywood mill established in 1996 and 1999 respectively. To ensure sustainability of raw material supply, a captive forest cum plantation concession was leased to the SFI plant. SFI was sold by the government to Lion Group in 1994. The forest concession along with two timber License Agreements were leased to the Lion Group in 1996. BILT acquired SFI in 2007 from the Lion Group including the forest cum plantation concession lease.

Following various restructuring in recent years BILT now owns SFI through a Netherlands registered subsidiary Ballarpur International Holdings B.V. and a step-down subsidiary BILT Paper B.V. as shown in Figure 2. Ballarpur Paper B.V. was formerly known as Ballarpur International Graphic Paper Holdings B.V. (BIGPH)

Figure 2 Corporate Structure of BILT²³



²³ Constructed on the basis of information from the Netherland Chamber of Commerce (<http://www.kvk.nl/zoeken/#!zoeken?q=Ballarpur&index=4&site=kvk2014&start=0>), <http://www.kvk.nl/orderstraat/product-kiezen/?kvknummer=343011280000> and the Bilt annual report 2013-

BWI complaint against BILT

At the time of writing SFI no longer has any valid FSC certificates, the last certificate it held (SCS-COC-004438) has been terminated at the end of November 2015 due to Major non-compliances not related to Labour issues.

4.5.1.3 Impact of BILT disposal of SFI

On 24 September 2015, BILT announced that its step down subsidiary, Ballarpur Paper Holdings B.V. (BPH) has entered into a Share Sale Agreement ("Definitive Agreement") for the divestment of its entire equity stake of 98.08% in SFI to Pandawa Sakti (Sabah) Sdn. Bhd., a wholly owned subsidiary of Pandawa Sakti Sdn. Bhd. at an enterprise value of USD500 million ("Enterprise Value") corresponding to 100% interest in SFI on a cash free debt free basis. The completion of the Transaction is expected within 3 months and is subject to satisfaction of certain conditions precedent as set out in the Definitive Agreement, including approvals from the Government of Sabah (Malaysia) and Pandawa Sakti's financing agencies.

4.5.2 State of Responsible Forest Management at SFI

4.5.2.1 Forest Resource Management

SFI is an integrated pulp and paper manufacturing unit with a 243,033 mtpa pulp and 144,210 mtpa paper manufacturing capacity. Aside from pulp and paper, SFI also has an associated operation, integrated timber complex (ITC), where it manufactures 8,000 m³ of ply board and sawn timber every year.

The forest cum plantation concession is a lease on 287,000 ha of forest land, from which it sources the timber for pulp manufacture. These consist of two areas of Government owned Forest Reserve for which SFI holds licenses valid until 2095 and two parcels of land which it owns.

Details of these four areas are shown in Table 3 below.

Table 3 Details of SFI Forest Management Areas

	Tenure	Management Objective	Area (ha)
1	Forest Reserve	Natural Forest Management	104,822
2	Forest Reserve	Industrial Tree Plantation	171,471
3	Titled Land	Industrial Tree Plantation	5,985
4	Titled Land	Industrial Tree Plantation	5,860
			288,138

SFI currently has a eucalyptus and acacia plantation spread over ~54,000 ha within Industrial Timber Plantation (ITP) area and titled land. SFI, at present, plans to add ~30 000ha of plantation to the ITP area. It has rights to log within approximately 17 percent of the Natural Forest Management (NFM) area before 2020 using Responsible Low Impact (RLI) techniques. This right will be exercised subject to their ability to expand plantation area within the ITP area.

See map below for the landuse and forest management within SFI concession:-

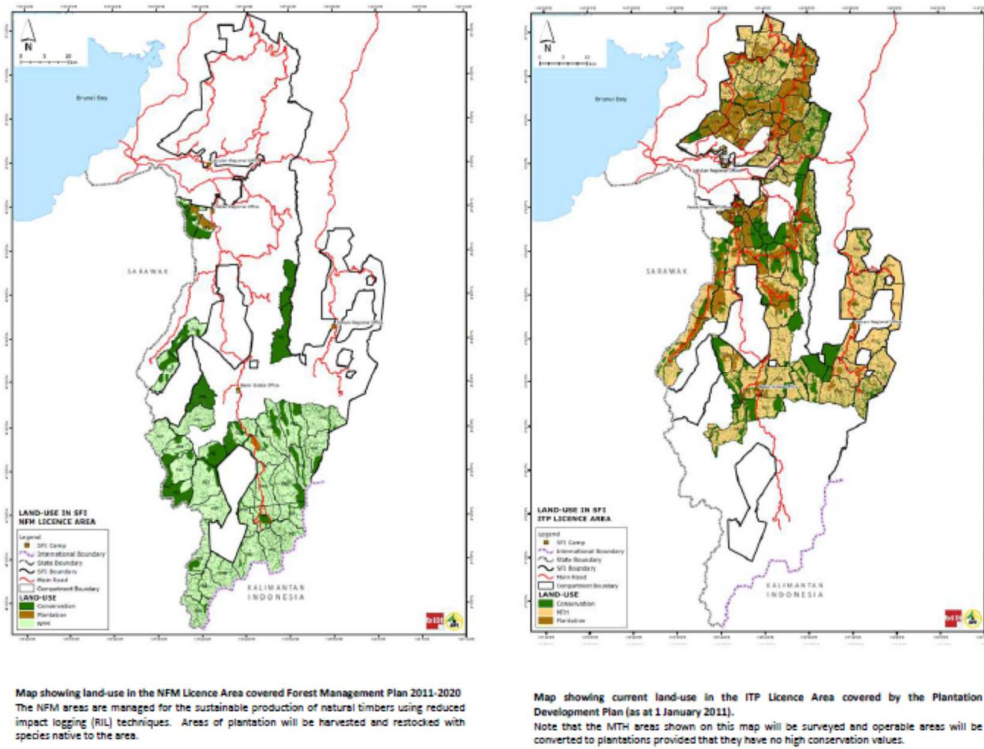


Figure 3 Maps showing land use at SFI. Right hand map showing expected expansion of the plantation area.

Wood for SFI's manufacturing processes comes mainly from wood harvested from the forests which it manages. The timber licence agreements and the special conditions associated with the land titles require SFI to have current 10 year management plans which have been approved by the Director of Forestry.

This is summarised in the following Table 4

Table 4 Areas under different types of ownership and management at SFI

Management Plan	Area (ha)	Reference from table above
Forest Management Plan 2011-20 Timber Licence Agreement (JP (KSG) 108/96 (CO) for parts of the Sipitang and Ulu Sungai Padas Forest Reserves	104,822	1
Plantation Development Plan 2011-20 Timber (Tree Plantation) Licence Agreement (JP (KSG) 107/96 (CO) for parts of the Sipitang Forest Reserve	171,471	2
Plantation Development Plan 2011-20 Land Titles Number CL 195317803 (Ganui) & CL 195317821	11,825	3&4
	288,138	

It is SFI's policy to pursue forest certification against internationally accepted standards using independent auditors. The Sabah Forestry Department has also decreed that all Forest Reserves covered by licenses issued by the State must be certified, using a scheme acceptable to them, by the end of 2014 or licenses may be withdrawn. For all these reasons certification is a business necessity

and is to be accorded the highest priority and is to be achieved in the shortest possible timeframe. In May 2009 the Board of SFI resolved that a committee of senior staff members chaired by the Plantation General Manager be formed to pursue forest certification.

SFI's natural forest management (NFM) operation has in the past been certified to FSC Controlled Wood Standards.

4.5.2.2 Biodiversity Management

The SFI concession covers a large area of lowland and highland forest that has been subjected to varying cycles and intensities of logging since the 1960s to present. This concession is divided into two designated management zones: Industrial Tree Plantation (ITP) and Natural Forest Management (NFM) areas. Plantations are restricted to the ITP area. Existing plantations cover 50,709 ha of ITP area. While the license allows SFI to plant up to 130,000 hectares in the ITP area, current plantation plans require additional conversion of ~30 000 ha of ITP. Existing nature conservation set asides, designated by the company based on High Conservation Value (HCV) assessments, cover 21% (35,755 ha) of the ITP area.

SFI has pledged to protect areas with high conservation values. An assessment of HCV Forests was conducted in 2011 in cooperation with WWF Malaysia and funding from USAid under their Responsible Asian Forest Trade Programme (RAFT). SFI is also committed to develop a detailed schedule and assessment protocol for field-based biodiversity assessments prior to any clearing or logging of any new compartments within the ITP or NFM areas in order to address risk of Critical Habitat triggers and/or other biodiversity values occurring within Modified or Natural Habitats (i.e. Phase 2 Biodiversity Assessment; Due 20 July 2014)

Avantha Rainforest Research and Education Centre (ARREC)

Situated on the margins of 2,000 hectares of virgin forest, ARREC has been established to provide a place for the SFI staff, communities, school children, and university students and staff to learn about and appreciate the natural environment. The aim is to promote environmental awareness and to

accumulate knowledge to assist with managing SFI's large conservation estate.

4.5.2.3 Social Issues other than union recognition

4.5.2.3.1 Health and Safety

Health and Safety has been raised as an issue at SFI with 2 serious injuries and 2 recent fatalities at the plant²⁴. SFI has previously been fined for breaches of health and safety regulations²⁵ in 2012 receiving a fine of 40% of the maximum possible indicating a serious breach of the regulations.

Since health and safety is an issue that is commonly dealt with by trade unions the panel carried out a brief evaluation of health and safety issues at the sites it visited. The panel identified a number of health and safety issues which indicates that there is likely to be a culture amongst management of failing to correctly prioritise such matters.

Health and safety issues were identified both with SFI managed operations and operations managed by their contractors in the field. Due to the nature of the visit the issues identified were mainly structural since the panel was not in a position to spend sufficient time to analyse operations. However one issue reported to the panel by STIEU involved disciplinary proceedings against workers

²⁴ Daily Express (2015) MTUC Sabah is shocked over another SFI death. August 13 2015

²⁵ <http://www.theborneopost.com/2012/05/10/sfi-fined-rm20000-for-safety-offence/>

for refusing to replace cutting blades on a production line while the line was still operating²⁶²⁷. Workers at the Integrated timber complex appeared to be working with inadequate PPE.

The health and safety issues identified included exposed pulley wheels and chains on cable yarding equipment belonging to subcontractors, improperly terminated wires in the mill, missing grating covers, potholes in concrete floors etc as illustrated below (Figure 4) It should be noted that almost identical photographs of trip hazards can be found in the ERM audit report of 2014²⁸.

Figure 4 Health and safety issues identified during panel visit.



In addition one person interviewed stated that in relation to maintenance the company prioritised production issues over health and safety issues.²⁹

The panel noted that workers operating in isolated situations did not have access to radios³⁰ or telecommunications for communication and that there are no vehicles in stand-by in case of emergencies, this included both migrant workers operating in teams and local staff engaged in survey and mapping work.

It should also be noted that complaints about health and safety equipment are specifically excluded from the company grievance procedure. External auditors have recommended that the grievance procedure is made free of all restrictions³¹.

²⁶ Internal SFI mail from Abd Razak Masjid to Chong Soon Foh 22/10/2012

²⁷ Response from BWI to complaint panel questions.

²⁸ ERM (2014) Labour and working conditions audit: Sabah Forest Industries (SFI) Malaysia. Draft Final Report. June 2014 P97

²⁹ Interview with anonymous stakeholder.

³⁰ Interview with anonymous stakeholders.

³¹ . Aecom (2014) Quarterly EHS&S Audit Report: Sabah Forest Industries, Malaysia as per IFC Sustainability Framework AUGUST-SEPTEMBER 2014 P17,35

The same external auditors also identified further health and safety failings in relation to use and storage of pesticides³².

In conclusion; the panel is concerned by failures in health and safety at SFI and that the failings were identified in spite of the company having a valid OHSAS 18001 certificate. It is clear to the panel that there is significant room for improvement; however, the panel does not believe that the lack of union recognition is the major causal factor.

4.5.2.3.2 Migrant Labour

SFI is an important user of migrant labour from Nepal and Indonesia mainly in the plantations but also in the integrated timber complex. As of 30 September 2015 there were 525 migrant workers almost 25% of the workforce. There is widespread international concern about the situation of migrant workers and for this reason the compliance audits carried out on behalf of the International Finance Corporation have paid significant attention to this issue, in particular on the issue of withholding passports of the migrant workers.³³³⁴ In addition ERM reports that some of the contractors used by SFI in the plantations also employ migrant workers.

SFI uses government approved agents for hiring migrant workers and travels with its own personnel to Indonesia and Nepal to oversee the recruitment process. BILT covers the transportation. Agency fees are paid by the workers, usually around 1,000 Ringgit to be paid within one year. Migrants get a feedback checklist to report if any additional amounts are being charged by the agents.

Informants mentioned that monitoring of migrant labour by the government of Malaysia is low and that there are significant illegal and sometimes even violent practices related to migrant labour.³⁵ Informants did not report any major issues in relation to migrant workers working for SFI, but a case was mentioned of a migrant worker who was hurt and was not treated to avoid records. Only after union involvement with the health and safety committee the migrant worker got treatment. Poor living conditions for Nepalese workers were also reported. In general, migrant workers have access to hospitals and there is a medical assistant in the camp area.

All Indonesian workers are on minimum wage (1,000 Ringgit per month). The Nepalese workers make a minimum of 900 Ringgit but their salary can go up to 2,000 Ringgit a month. They work between 4-8 hours a day for 7 days a week on a voluntary basis – the more they work, the more money they get. There is a levy of 37 Ringgit per months for the fuel of the generator and other expenses. They are staying in a dorm in the forest, a longhouse, and buy their own food. Rainwater is captured for drinking. The accommodation generally meets the IFC standards for labour accommodation although the use of bunks is discouraged³⁶.

The migrant informant confirmed that his passport is with the company but he has a copy and his ID card in the camp. The main concerns mentioned is lack of telecommunications in cases of emergency and that before he used to get a uniform but now he has to buy his own clothes.

³² Aecom (2014) Quarterly EHS&S Audit Report: Sabah Forest Industries, Malaysia as per IFC Sustainability Framework AUGUST-SEPTEMBER 2014 P26

³³ Aecom (2014) Quarterly EHS&S Audit Report: Sabah Forest Industries, Malaysia as per IFC Sustainability Framework AUGUST-SEPTEMBER 2014

³⁴ ERM (2014) Labour and working conditions audit: Sabah Forest Industries (SFI) Malaysia. Draft Final Report. June 2014

³⁵ Philip S. Robertson Jr. (2008) Migrant Workers in Malaysia – Issues, Concerns and Points for Action Commissioned by the Fair Labor Association

³⁶ IFC & EBRD (2009) Workers' accommodation: processes and standards. A guidance note by IFC and the EBRD

Regarding accidents, a supervisor mentions that sometimes workers cut themselves with the machete.

4.5.2.3.3 Working conditions

The Sabah Labour Ordinance (SLO) is the minimum floor for terms and condition for workers in Sabah which is similar to the Employment Act in West Malaysia. In absence of a proper employment offer letter and regarding other matters concerning workers term and condition, the SLO must apply.³⁷

Workers have a contract and used to get a copy of SFI's General Terms and Conditions, but new workers don't get this anymore, according to SFI because it is being revised. 50% of the employees are on minimum wage. SFI complies with Malaysian regulation that no more than 108 hours of overtime per month are allowed. The working week is 48 hours.

The current work rhythm of 10, 5 working days and 3,5 days off does not comply with SFI's General Terms and Conditions. BILT explains that this is a system they inherited and the company moved everybody to this regime, because it makes management more efficient and brings concrete benefits to people working in the field, especially the people working in camps as they lose less time going home for their days off.

According to some informants, the salary increments since 2013 were discounted with 1%, in breach of SFI's General Terms and Conditions. According to SFI, salary increments nevertheless still take place and bonuses are paid despite the difficult financial situation of SFI. SFI is slashing production at the plant (40% capacity) because they have no money for investments but still, increments are paid to employees.

One case is mentioned of a division in ITC where some were paid minimum wages, and some were paid less. Allowances previously paid were taken from the workers and in the end some employees were paid less than before. Some informants also claimed that overtime was not paid in some instances, however, the Complaints Panel verified the payment of overtime and did not find any problems.

Transport to the work place is provided to employees and transport is provided to families when they need to visit the hospital. Transport to the town is provided for employees who live in the forest.

Informants confirmed there is no child labor in SFI and no gender discrimination.

Informants mentioned that individual workers have been terminated without justification or have not been paid compensation as ordered by the court. Most workers don't have money for legal proceedings after they make a claim to the Industrial Relations Department.

Informants reported that SFI doesn't answer complaints by the Union as SFI does not recognize the union. Complaints can be filed to the labor department. The complaints procedure foresees a panel but according to informants SFI is not taking it seriously and workers are afraid of consequences. There is no form for filing complaints and therefore it is very difficult to check whether the complaint is being processed. A lack of documentation of grievances at SFI is also reported in the AECOM evaluation report.³⁸

³⁷ State of Sabah, Labour Ordinance (Sabah Cap. 67)

³⁸ Aecom (2014) Quarterly EHS&S Audit Report: Sabah Forest Industries, Malaysia as per IFC Sustainability Framework AUGUST-SEPTEMBER 2014, p. 17-18

4.5.2.3.4 Local and Indigenous Communities

All 34 communities impacted by SFI are 100% indigenous of Sabah, Murut, Lundayeh, Bisaya, Kadazandusun, Kedayan and Brunei. According to the AECOM evaluation a baseline study of communities in affected areas has been completed. Verification of claims is underway following which SFI will implement mitigation measures to address the impacts. The framework used to implement the right to free prior and informed consent of the affected indigenous communities mirrors customary practices for engagement and dispute resolution referred to as *Sumuku* and is therefore dubbed the “Sumuku Accord”.³⁹ The Complaints Panel did not further investigate this issue as it is not related to the complaint. Malaysian Trade Union Law, Union Recognition for Collective Bargaining and ILO issues

4.5.2.4 A brief history of unions in Malaysia.

Trade unions have been operating in the Malaysian economy since before independence. Trade unions in Malaysia first emerged in the 1920s when the Communist Party of Malaya encouraged unskilled workers to unionise, with an emergence of organizations functioning as unions in the estates and tin mines. In 1940, a Trade Unions Enactment was passed in the Federated Malay States, which was extended throughout the Federation in 1946. The enactment made it necessary for all trade unions to be registered. The current legislative instruments regulating trade unions and trade union activities in Malaysia are the Trade Unions Act 1959 (TUA) and the Industrial Relations Act 1967 (IRA). The TUA regulates trade union activities; the IRA regulates employer- union relations.⁴⁰

Historically, the union movement in Malaysia has had moments of militancy but since the late 1970s strike action has been reduced to the point of insignificance. Legislation makes it very difficult for unions to organise legal strikes, with the potential consequences including union deregistration and detention of activists.⁴¹

In Malaysia, even though workers have the right to form and join trade unions (Section 5 of the Industrial Relations Act, 1967), their movements are carefully monitored and controlled under various labour legislations. Besides legislation, the growth of trade unions in Malaysia is also influenced by other economic factors. Favourable legislative and business conditions in the mid-1970s provided the most fertile period for union growth. As a result, there was a remarkable rise in trade union growth at an average of 15 percent between 1974 and 1975 as the gross domestic product rose at an average of 10 percent. Severe recessions in the middle of the 1980s and at the end of the 1990s posed difficulties for the expansion of labour movement. Even though there were short run fluctuations in the union growth rate, union membership growth, on the average, revealed a decreasing trend over the past 25 years. The extent of trade union growth in Malaysia is also largely influenced by government regulation and policy in the past.

The former Prime Minister of Malaysia Dr. Mahathir had declared in 1982 that trade unions were ‘superfluous’.⁴² Malaysia’s ambition to attract investors for their low-cost, export-oriented industrialization strategy induced industrial relations policies of extensive State control guaranteeing a high level of managerial prerogative within the workplace, minimal overt conflict and very little bargaining power for labour. The later adopted goal of a developed country status by 2020 has not changed the labour union policies. Two tenets of Malaysia’s Industrial Relations policy – the

³⁹ Aecom (2014) Quarterly EHS&S Audit Report: Sabah Forest Industries, Malaysia as per IFC Sustainability Framework AUGUST-SEPTEMBER 2014, p. 30-32

⁴⁰ Baker & McKenzie (2009) Worldwide Guide to Trade Unions and Works Councils, p.169-175

⁴¹ Todd Patricia (2001) Malaysia Industrial Relations at Century’s Turn: Vision 2020 or a Spectre of the Past?

⁴² Ramasamy Nagiah (2008) The Future of the Trade Union Movement in Malaysia, p. 2

provision of a plentiful supply of cheap unskilled labour and the maintenance of tight restrictions on labour's ability to bargain within the workplace – remained largely the same.

Trade unionism in Malaysia is therefore still characterized as a state-employer dominated model. As a consequence, there is a low trade union density and trade union participation. Union formation and union recognition is made difficult through union influencing and union busting.⁴³ Unionism is further declining because of an unfavourable political and legal environment for collective bargaining, increased management resistance to new unionism and reduced worker interest in unions.⁴⁴

Union size and structure is heavily regulated through laws administered by the states; unions may not operate across industries, and industries are narrowly defined to minimise union reach and size.⁴⁵ Malaysian unions are therefore generally small, fragmented and regional.⁴⁶

The Malaysian Trades Union Congress represents 800,000 members, around 7 % of the total workforce, including Government employees. In the most developed countries, unionization reaches around 20% but face declining membership as well.

The government policy of segregating trade unions and promoting enterprise unions over national and industry unions has stifled the trade unions movement. Only 3% of private sector workers are trade union members, and less than 2% are covered by collective agreements. While the number of trade unions has increased most of the unions are in-house unions with less than 100 members.⁴⁷

4.5.2.5 Strategies used by Malaysian companies to prevent union recognition

Employer opposition to unionisation of workplaces has been widespread in Malaysia and the state has been reluctant to challenge such opposition, leaving workers unprotected against those employers refusing to recognise legitimate claims for union coverage.⁴⁸ Several tactics have been used by employers to prevent unionisation of their workplace including indefinitely delaying union recognition applications, or the formation of company-sponsored or in-house unions.⁴⁹

Management actions such as creating additional pseudo-managerial posts have also been used.⁵⁰ This action relates to the requirement of the Trade Union Act 1967 which determines that managerial, executive, confidential and security employees may not be members of a workers union. This restriction is not unique to Malaysia for example it is also included in US union law⁵¹ but it is not included in UK union law⁵². However it is to be noted that in the US case the discretion on whether to treat a worker as a supervisor rests with the employer.

Reported cases of employer victimization can include unfair dismissal, refusal to renew the employment contract, purposely closing down the division of unionized workers and transferring or

⁴³ Ramasamy Nagiah (2008) The Future of the Trade Union Movement in Malaysia, p. 1

⁴⁴ Ramasamy Nagiah (2008) The Future of the Trade Union Movement in Malaysia, p. 2

⁴⁵ Todd Patricia (2001) Malaysia Industrial Relations at Century's Turn: Vision 2020 or a Spectre of the Past?

⁴⁶ Ramasamy Nagiah (2008) The Future of the Trade Union Movement in Malaysia, p. 2

⁴⁷ https://en.wikipedia.org/wiki/Trade_unions_in_Malaysia

⁴⁸ Todd Patricia (2001) Malaysia Industrial Relations at Century's Turn: Vision 2020 or a Spectre of the Past?

⁴⁹ Ramasamy Nagiah (2008) The Future of the Trade Union Movement in Malaysia, p. 8

⁵⁰ Ramasamy Nagiah (2008) The Future of the Trade Union Movement in Malaysia, p. 2

⁵¹ US National Labor Act 1935 Sec. 14. [§ 164. Construction of provisions] (a) [Supervisors as union members] Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [subchapter] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

⁵² E-mail from Trade Union Congress of the UK.

promoting union leaders to a level where they were no longer eligible to be union members. All of these tactics would severely discourage workers from being actively involved in trade union activities. Also the possibility of being unemployed might bring a heavy psychological impact and other human costs of unemployment that potential workers would be reluctant to join unions immediately.

4.5.2.6 The relationship between the Malaysian Federation and the State of Sabah

Malaysia is a Federation of 13 States. The two States Sabah and Sarawak are situated on the island Borneo, all the others States are part of peninsular (West) Malaysia. Sabah (formerly British North Borneo) and Sarawak were separate British colonies from Malaya, and did not become part of the Federation of Malaya in 1957. However, each voted to become part of the new Federation of Malaysia along with the Federation of Malaya and Singapore in 1963. Thus Sabah and Sarawak retained a higher degree of local government and legislative autonomy than other states in West Malaysia. The East Malaysian states also have separate laws governing its land and resources.

The Malaysian Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation while the Legislature of a State may make laws for the whole or any part of that State.⁵³ If any State law is inconsistent with a federal law, the federal law shall prevail and the State law shall, to the extent of the inconsistency, be void.⁵⁴

4.5.2.7 Formation and Membership of Trade Unions, Union Recognition and Collective Bargaining under Malaysian Laws

4.5.2.7.1 Formation and Membership of Trade Unions in Malaysia

While the Malaysian constitution guarantees the right of all citizens to form associations, it also stipulates that restrictions on this right may be imposed by any law relating to labour.⁵⁵ The Industrial Relations Act 1967 (IRA) confirms the rights of workmen and employers to form and assist in the formation of and join a trade union and to participate in its lawful activities.⁵⁶ However, there are several restrictions imposed by the laws relating to trade unions, i.e. the Trade Unions Act 1959 (TUA) and the Industrial Relations Act 1967 (IRA).

The Trade Unions Act 1959 does not allow general unions for workers, but confines membership of any trade union to only those who are employees of a particular establishment, trade, occupation or industry.⁵⁷ For example, a bank employee could only be a member of a banking union, but cannot be a member of an airline union or teachers union while a hotel employee, a timber worker or a labourer could not be members of the same union.

For establishment or in-house unions, membership is confined to employees of that particular establishment or company - employees of the company's subsidiary or an associate company could not join that union. Most of the unions in Malaysia are in-house unions with less than 100 members.

A trade union by trade, occupation or industry can draw its members only from Peninsular Malaysia, or Sabah, or Sarawak. A federation of trade unions is a combination of trade unions from similar industries, trades, or occupations. Where in doubt, the DGTU has the right to decide what are similar

⁵³ Constitution of Malaysia, article 73.

<http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/44034/117925/F1077439210/MYS44034.pdf>

⁵⁴ Constitution of Malaysia, article 75

⁵⁵ Constitution of Malaysia, article 10.

⁵⁶ Industrial Relations Act 1967, section 4.

⁵⁷ Trade Unions Act 1959 - Incorporating all amendments up to 1 January 2006 (Act 262), Art. 2 and Art. 9

industries, trades, or occupations. Unlike trade unions, a union federation is not restricted geographically; it can be pan-Malaysian.⁵⁸

The Industrial Relations Act 1967 determines that managerial, executive, confidential and security employees cannot be members of a non-executive union, nor can they be represented by a union for the purpose of collective bargaining. The definitions of these terms are left to the employers' discretion. In practice, some employers classify all clerical staff as working in a confidential capacity and production workers as working in a security capacity since they oversee their machines. Any disputes about the classification of workers may be referred by parties to the Director General of Industrial Relations (DGIR). The DGIR may take steps or enquiries to resolve the matter. If the DGIR cannot resolve the matter, he shall notify the Minister of Human Resources who will then give his decision in writing to the parties.⁵⁹

Temporary workers, contract workers including foreign workers could also join a union as members. Both the Trade Unions Act 1959 (TUA) and the Industrial Relations Act 1967 (IRA) as well as the Sabah Labour Ordinance determine that any person who is engaged for hire or reward on a full-time or part-time basis shall be deemed to be an employee or workman, and a "trade union" means any association or combination of workmen or employees.⁶⁰ However, most of these workers could be reluctant to join a union for fear that their contract might not be renewed or work permit cancelled, making it difficult for a union to represent them.

The IRA protects workers from being victimised by an employer for joining a union. However, the same section of an act states explicitly that an employer may dismiss, demote, transfer or refuse to promote a worker on other grounds.⁶¹

4.5.2.7.2 Union Recognition and Collective Bargaining

Registration of a union gives it the legal right to exist, but recognition by an employer gives it the right to represent the employees, including for collective bargaining. In order to achieve this, a trade union needs to file a claim for recognition of their union to the employer and the company has to respond within 21 days.⁶² The response should be whether to grant recognition or not. If the response is negative or if there is no response at all by the company, the union has to report this within 14 days to the Director General of the Industrial Relations Department (DGIR). The relevant union then has to undergo a check by the DGIR to ascertain their competence to represent the workmen in respect of whom the recognition is sought and, by way of secret ballot, whether the majority of the class of workers of the enterprise had become members of the union seeking recognition.⁶³

The IRA accords the employers the right to query whether the majority of the employees have agreed to form the union as well as the scope of representation of the employees in the union. When it is verified by the authorities that the majority wish to form a union and that its membership does not include employees engaged in managerial, executive, confidential or security capacities, the employers would be directed by the Minister to recognize the union and to enter into collective bargaining with the union.⁶⁴ However, the law also allows an aggrieved party to apply for a judicial

⁵⁸ Baker & McKenzie (2009) Worldwide Guide to Trade Unions and Works Councils, p.169-175

⁵⁹ Industrial Relations Act 1967, section 9.

⁶⁰ Trade Unions Act 1959, Art. 2; Industrial Relations Act 1967, Art. 2; Sabah Labour Ordinance, Art. 2.

⁶¹ Industrial Relations Act 1967, part II, section 4 and 5

⁶² Industrial Relations Act 1967, section 9.

⁶³ Industrial Relations Act 1967, section 9.

⁶⁴ Industrial Relations Act 1967, section 9

review at the High Court against the decision.⁶⁵ Collective agreements are an important means of determining wages, terms of service, and working conditions in the private sector, and the process of collective bargaining is provided for in Part IV of the Industrial Relations Act 1967.

Trade union effectiveness in securing decent collective agreements and to protect workers are restricted because, as mentioned above, unions must obtain recognition from the employer after it can prove by secret ballot that the majority of the eligible employees are its members. It's a very cumbersome process - according to one informant it can take on average from 1 to 2,5 years - and disputes normally take years to resolve. Very few companies recognize unions voluntarily.

Even if the union finally obtains the necessary recognition to represent the workers, the ability to negotiate for better benefits is further restricted as it is virtually impossible for a union to strike.

The bargaining process begins when a trade union submits a proposal for a collective agreement to an employer and invites the latter to commence collective bargaining. The employer has 14 days in which to reply to the invitation. If the employer accepts the invitation, collective bargaining must begin within 30 days. If the employer refuses to negotiate, or fails to reply, a trade dispute is deemed to exist and the union may notify the DGIR, who will take steps toward conciliation. If the parties are still unable to agree on terms, the Minister of Human Resources may refer their dispute to the Industrial Court for arbitration.⁶⁶ Decisions of the Industrial Court may be challenged further in the high court, the appeals court and the federal court.

A collective agreement cannot contain any term or condition of employment that is less favourable than, or in contravention of, any workmen's laws in Malaysia, and it must not include matters that are considered managerial prerogatives, such as promotions, transfers, appointments, terminations for redundancy, dismissals, and assignment of duties. However, questions of a general nature relating to the procedures for promotion of workmen may be discussed. Once taken cognisance of by the Industrial Court, the agreement becomes binding on all parties to the agreement and all employees employed in the undertaking, regardless of whether or not they are union members.⁶⁷ The law allows for duration of collective agreements to be at least three years.

4.5.2.8 ILO conventions and adherence to ILO core principles under Malaysian Law.

Malaysia is a member of the ILO since 1957 and has ratified 6 of the 8 core ILO conventions, while one of the ratified core conventions is no longer in force. Malaysia is among the few countries who failed to ratify ILO Convention no. 87 (Freedom of Association and Protection of the Right to Organize Convention 1948). Convention No. 87 states that all workers' and employers' organisations have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration, to organize their activities and to formulate their programs. Failure by the government to ratify this convention is seen as a denial of the freedom of association. Malaysia also did not ratify ILO Convention 111 (Discrimination (Employment and Occupation) 1958). Convention 105 (Abolition of Forced Labour Convention 1957) was ratified, but denounced on 10 Jan 1990 and is no longer in force.

Overall, Malaysia has ratified 17 ILO conventions, with 16 are in force and 1 Convention denounced. *Please see below for detailed list of ratified conventions in Malaysia*⁶⁸.

⁶⁵ Order 53 of the Rules of Court 2012: Application for judicial review

⁶⁶ Baker & McKenzie (2009) Worldwide Guide to Trade Unions and Works Councils, p.169-175

⁶⁷ Baker & McKenzie (2009) Worldwide Guide to Trade Unions and Works Councils, p.169-175

⁶⁸ <http://webfusion.ilo.org/public/db/standards/normes/appl/appl-byCtry.cfm?lang=en&CTYCHOICE=0820>

Fundamental

Convention	Date	Status	Note
C029 - Forced Labour Convention, 1930 (No. 29)	11 Nov 1957	In Force	
C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)	05 Jun 1961	In Force	
C100 - Equal Remuneration Convention, 1951 (No. 100)	09 Sep 1997	In Force	
C105 - Abolition of Forced Labour Convention, 1957 (No. 105)	13 Oct 1958	Not in force	Denounced on 10 Jan 1990
C138 - Minimum Age Convention, 1973 (No. 138) <i>Minimum age specified: 15 years</i>	09 Sep 1997	In Force	
C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)	10 Nov 2000	In Force	

Governance (Priority)

Convention	Date	Status	Note
C081 - Labour Inspection Convention, 1947 (No. 81)	01 Jul 1963	In Force	
C144 - Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)	14 Jun 2002	In Force	

Technical

Convention	Date	Status	Note
C050 - Recruiting of Indigenous Workers Convention, 1936 (No. 50)	11 Nov 1957	In Force	
C064 - Contracts of Employment (Indigenous Workers) Convention, 1939 (No. 64)	11 Nov 1957	In Force	
C065 - Penal Sanctions (Indigenous Workers) Convention, 1939 (No. 65)	11 Nov 1957	In Force	
C088 - Employment Service Convention, 1948 (No. 88)	06 Jun 1974	In Force	
C095 - Protection of Wages Convention, 1949 (No. 95)	17 Nov 1961	In Force	
C119 - Guarding of Machinery Convention, 1963 (No. 119)	06 Jun 1974	In Force	
C123 - Minimum Age (Underground Work) Convention, 1965 (No. 123) <i>Minimum age specified: 16 years</i>	06 Jun 1974	In Force	
MLC - Maritime Labour Convention, 2006 (MLC, 2006) <i>In accordance with Standard A4.5 (2) and (10), the Government has specified the following branches of social security: medical care; sickness benefit and employment injury benefit.</i>	20 Aug 2013	In Force	
C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)	07 Jun 2012	In Force	

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) reviews the reporting on the implementation of the ILO Conventions. With regard to the complaint the most relevant ratified ILO core convention is 98 (Right to Organise and Collective Bargaining 1949).

The CEACR had requested the Government of Malaysia to indicate the average duration of proceedings for the recognition of a union, as well as the requirements for obtaining recognition. In 2014, the CEACR notes the Government's indication that, under the new legislations, the average duration of proceedings for the recognition of a union is nine (9) months, provided that the parties involved do not challenge the process through judicial review in the court or raise issues that could cause delays. The Committee considers that this average duration of proceedings is excessively long and requests the Government to take measures to modify the legislation in order to reduce the length of proceedings for the recognition of trade unions.⁶⁹

In its previous comments, the Committee had noted the Government's statement about the comments previously made by the International Trade Union Confederation (ITUC) with regard to the inefficiency of labour courts concerning the application of the provisions of the Convention. On

⁶⁹ http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3188473:NO

this matter, the Committee had noted the ITUC's comments that the Government failed to apply any sanctions against employers who opposed the directives of the authorities granting trade union recognition or who have refused to comply with Industrial Court orders to reinstate unlawfully dismissed workers. The Committee had requested the Government to submit its observations on these matters.

The Committee notes the Government's indication that: (i) the Industrial Court has jurisdiction for trade disputes under section 26 of the IRA and in cases of dismissals under section 20 of the IRA; (ii) under section 56(1), (3) and (4) and section 60 of the IRA, there are procedures and sanctions applicable against employers who opposed the directives of the authorities granting trade union recognition or who have refused to comply with Industrial Court orders to reinstate unlawfully dismissed workers; and (iii) the Industrial Relations Department has set up a Legal Division to initiate legal proceedings against any errant party that contravenes the law. In these circumstances, the Committee requests the Government to provide details about the composition and functioning of the Legal Division of the Industrial Relations Department, and to provide a copy of its Rules of Procedures. The Committee also requests the Government to provide information and statistics on any sanctions against employers who opposed the directives of the authorities granting trade union recognition or who have refused to comply with Industrial Court orders to reinstate unlawfully dismissed workers in the last two years.⁷⁰

4.5.2.9 The situation of Migrant Labour and Unions in Malaysia.

According to the Human Resource Ministry of Malaysia 2013 data, there are 11.3 million people as the total workforce in Malaysia, from which some 2.47 million are migrant (or foreign) workers. In terms of sectors, migrant workers are predominantly employed in the manufacturing sector at 35 per cent, followed by plantation 26 per cent, construction sector 20 per cent, as domestic workers 7 per cent, and the rest in other sectors. Providing for cheap unskilled labour happens mainly through allowing the immigration of temporary migrants from Indonesia, Nepal, Bangladesh and other countries in the region.⁷¹

Scope of protection for migrant workers under Malaysia Labour laws

Government policy since 2007 is that organising workers has to include foreign workers and this is also recognised in Malaysian Labour Laws, including the following:

- The EA (Employment Act 1955)
Applies to all employees, irrespective of their occupation, who are paid less than a specified rate (First Schedule, EA, as amended by the EA Amendment Act, 1980). In 1955, the EA's scope of application was limited to the West Malaysia. In 2000, it was extended to the Federal Territory of Labuan (sec. 1, EA).
- The IRA (Industrial Relation Act 1967)
Applies to all "workmen" and defines "workman" widely, to include any person employed by an employer under a contract of employment, including apprentices (sec. 2, IRA).
- The TUA (Trade Unions Act 1959)

⁷⁰ http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3188473:NO

⁷¹ Todd Patricia (2001) Malaysia Industrial Relations at Century's Turn: Vision 2020 or a Spectre of the Past?

Applies to all “employees”, and defines “employees” as any person who is engaged for hire or reward on a full-time or part-time basis (sec. 2, TUA).

- The SLO (Sabah Labour Ordinance)

Applies to all employee(s) and “employee” or “employees” is defined as any person or class of persons specified in the order. 9(sec. 2, SLO)

- The Employment (Termination and Lay-off Benefits) Regulations

Apply to all employees with at least one year of service, except outworkers (*secs. 3 and 7* of the Regulations).

Malaysian labour laws do not prohibit migrant workers from joining trade unions. The only prohibition in the Trade Union Act Section 28(1) is that they are not allowed to become office bearers. They are also not allowed to form their own union.

Yet, though the laws of Malaysia allow migrant workers to unionise and enjoy the rights and benefits contained in any Collective Bargaining Agreement between the union and the employer, in practice, the rights of migrant workers are not well protected. While illegal immigrant workers have no protection at all because they cannot be identified in the formal system, legal immigrant workers face various tactics by employers and contractors to keep them out of trade union membership. According to informants this includes discouraging to attend union meetings, cutting off water and electricity supplies in their compounds, sending the workers home, or even beating people up. Employers may also include prohibitions on the joining of local associations in contracts for example, or will deliberately misconstrue certain laws.⁷²

Moreover, the very nature of their short-term employment means that they may not be keen to take up membership, which poses a challenge for unions to offer protection to this group of workers.⁷³ The weak position of migrant workers affects core workers as well as they are threatened with the prospect of having to compete with cheaper guest workers from neighbouring countries.⁷⁴

Migrant workers therefore suffer from non-payment of wages, wrongful deduction of wages to cover work permits, long working hours, sub-standard living conditions, no insurance coverage, travel documents withheld by employers and unfair dismissal. Precarious workers – in most cases are migrant workers; are effectively excluded (by employers!) from joining union, and thus from enjoying equal benefits in the collective bargaining and other benefits e.g : pension funds, social insurances, etc.

4.5.3 History of Union Recognition at SFI

Workers at SFI have been attempting to achieve union recognition since the late 1990s having first established an in house union SFIEU in 1991⁷⁵⁷⁶. The first attempt in 1998 was frustrated when the company argued that the membership include workers in classes not permitted to be union members⁷⁷. In 2003 the workers again attempted to achieve union recognition and the Minister

⁷² <http://www.cleanclothes.org/issues/migrants-in-depth/issues/migrants-fight-to-organise>

⁷³ Ramasamy Nagiah (2008) *The Future of the Trade Union Movement in Malaysia*, p. 8

⁷⁴ Ramasamy Nagiah (2008) *The Future of the Trade Union Movement in Malaysia*, p. 9

⁷⁵ Aecom (2014) *Quarterly EHS&S Audit Report: Sabah Forest Industries, Malaysia as per IFC Sustainability Framework AUGUST-SEPTEMBER 2014* p22

⁷⁶ Liaw Engrit (2014) Letter from STIEU to Neehar Aggrawal COO of SFI

⁷⁷ Government of Malaysia (1967) *Industrial Relations Act (Act 177)* clause 9.

directed the company to recognise the union. The company requested a judicial review of the minister's decision and won this on the basis of inclusion of workers in classes not permitted to be in a union. Further events that fall in the scope of the PfA complaint are dealt with below. However, it should be recognised that at the time of writing SFI has not recognised any union. One stakeholder noted that the delays in the SFI case were exceptional.

4.5.3.1 *Role of BILT in SFI decisions related to Union Recognition*

The relationship between BILT and SFI management is set out in detail in 3 documents provided to the panel by BILT. These are the delegation of authority matrices for Sabah Forest Industries, SFI ITC and SFI – Plantation Division.

In these documents the authority for all matters relating to unions and arrangements between the company and its employees is given to the MD & CEO of BILT and Avantha Group, Mr. Yogesh Agarwal.

It is clear from correspondence elsewhere⁷⁸ that BILT was completely involved in all decisions taken in respect of union recognition and that they specifically gave approval for all actions taken by SFI.

4.5.3.2 *Timeline of Union recognition related events at SFI*

A partial timeline of events since the first formation of a Union at SFI is presented below, the table listing those events that fall specifically during the period since the FSC PfA came into force in July 2009. A more detailed and annotated timeline with sources is provided for the FSC board in the full report.

Date	Occurrence
24 October 2009	Workers decide to join STIEU(Sabah Timber Industries Employees Union)
2009	SFI refuse to recognise STIEU on grounds that it represents only timber processing workers and not forest related workers.
2010	In a secret ballot the majority of the workers votes to be represented by STIEU
26 January 2011	DGIU orders SFI to recognise STIEU
? 2011	SFI files for Judicial Review questioning ability of STIEU to represent SFI workers as STIEU's competency is limited to timber processing workers
10 August 2011	High Court dismissed SFI's Judicial Review Application
17 August 2011	SFI's lawyers filed Notice of Appeal to court of appeal.
19 September 2011	High Court has granted an order in terms of SFI's application to stay the decision of High Court.
27 November 2012	Court of Appeal ruled in favour of SFI
June 2013	SFI invites employees to form a Joint Consultative Committee Employees have boycotted these meetings.
20 June 2013	STIEU letter to SFI explaining reason for not supporting formation of JCC
Late 2013	SFI offers to hold in house forum to resolve the dispute with STIEU.

⁷⁸ SFI (2015c) e-mails between SFI and Bilt in relation to union recognition.

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14 February 2014	DGIR convenes meeting between SFI and STIEU committee members.
10 March 2014	Director of IRD allowed STIEU to serve on SFI a fresh claim for recognition
17 March 2014	STIEU files for Union Recognition.
02 April 2014	SFI rejects claim on basis that it may not comply with Malaysian Industrial relations Act of 1967
21 April 2014	Director of Trade Union Department Sabah (TUD) informed SFI that his Deputy Deby Rastman would be visiting SFI to ascertain the eligibility of STIEU to represent the employees of SFI
21 July 2014	DGIR requests SFI to submit list of employees eligible for union. (<i>Exhibit SM 8</i>)
22 August 2014	SFI submits list to DGIR
12 September 2014	Letter of DGIR to SFI regarding secret ballot meeting for 22 nd September
17 September 2014	Letter of SFI to DGIR to request to postpone meeting on 22 September pending visit of TUD and reply from Ministry of Human Resources on the competence of STIEU to represent the employees of SFI
26 September 2014	Hearing to discuss holding of secret ballot.
29 th October	Hearing to Discuss secret ballot. 116 employees fall in disputed category will need to be interviewed ballot not able to take place as planned.
3 and 4 November 2014	Ministry of Human Resources visit to SFI to interview workers in disputed category
7 November 2014	CEO of SFI issues circular to all employees stating company will only support an in house union SFIEU
13 November 2014	STIEU writes to SFI rejecting call for in house union
17 November 2014	Director General Industrial Relations (DGIR) writes to SFI informing them that SFI employees are within the scope of STIEU.
26 November 2014	IFC visit to SFI to mediate between SFI and STIEU. STIEU according to this document agreed to formation of in house union SFIEU
8 December 2014	Department of Trade Union Affairs (DTUA) completed competency investigation to determine electorate for secret ballot.
20 th January 2015	SFI requests STIEU to submit a request for Union Recognition not on STIEU headed paper. STIEU does not comply.
27 th January 2015	SFI again requests letter for union recognition from STIEU but only in relation to 7 th November 2014 circular for in house union.
26 March 2015	Ministry of Human Resources decides on eligibility of SFI employees for secret ballot

15 April 2015	SFI receives letter from ministry (, deciding on eligibility of 116 disputed workers. SFI detects discrepancies in the list and also 50% of workers without a decision.
16 April 2015	Letter from ministry IRD for a secret ballot meeting to be held on 27th April
16 April 2015	SFI writes to DG IRD stating their views on the decision and seeking clarification on the same
20 April 2015	SFI legal advisor S. Vanugopal writes to SFI advising them 1. to proceed with a request for judicial review. 2. Not to communicate with STIEU since this might be construed as recognition of the union. 3. To have discussions with workers who are interested in forming an in house union.
22 April 2015	SFI writes to TUD requesting for a copy of the Constitution of STIEU
24 April 2015	SFI writes to Ministry of Human Resources to notify them of intent for judicial review of the list decision.
27 April 2015	Secret Ballot meeting held. SFI informs STIEU no ballot can take place until list of eligible voters is clarified. Ministry requests SFI to table list at subsequent meeting on 19 May 2015
05 May 2015	SFI writes to TUD reminder requesting for a copy of the Constitution of STIEU
14 May 2015	SFI files 3 rd Judicial review before Sabah Supreme Court to challenge the order of the Ministry of Human Resources on the eligibility of employees who can vote in a secret ballot election.
19 May 2015	Date originally set for Secret Ballot meeting. Postponed by IRD pending the hearing of SFI's judicial application.
2 July 2015	Sabah Supreme Court reschedules hearing for judicial review to 1 October 2015
1 October 2015	Hearing of the third judicial review was planned but is postponed to 3 rd of December 2015 to allow Senior Federal Counsel an extension of time until 30 Oct 2015 to file the Affidavit In Opposition. The Counsel for the Union also requested for extension of time .

4.5.4 Specific Actions by BILT/SFI to delay or prevent union recognition.

4.5.4.1 Judicial Review

SFI has repeatedly resorted to judicial review in order to prevent the company having to recognise a labour union. It has done this both prior to July 2009 and twice since that date. It has challenged the

decisions of the minister requiring it to recognise STIEU in 2011⁷⁹ and again in 2015⁸¹ on different grounds. In 2011 in order to challenge the competency of STIEU to represent workers in the Pulp and Paper Sector and in 2015 in order to challenge the minister's decisions in relation to the allocation of workers to restricted classes. When it has failed to achieve its aim in the lower court it has lodged appeals to higher courts and has been successful with these appeals.

The facts of these events are not disputed by either party to the complaint.

It should be stated that the panel does not consider that the company has at any time broken any law of either the State of Sabah or of the Malaysian federation. It has indeed exercised the full arsenal of legal recourse available to it to prevent the recognition of a union at the company.

However the issue before the panel is not if the actions of SFI are legal but rather if the behaviour of the company is in conflict with the key labour rights stipulated in the ILO Core Conventions.

It should be noted that the panel has evidence that SFI is using the classification of workers to the managerial categories in a way that is not consistent with the requirements of ILO convention 87 on freedom of association. As discussed in section 4.5.2.5 the company has used job titling to reduce the number of workers eligible for union membership. The panel interviewed one worker who had the job title of 'executive' (a prohibited category) but who himself reported to an assistant manager and whose workers if they had problems went directly over his head to the assistant manager.⁸²

In addition, the company has repeatedly questioned the scope of STIEU to represent workers at SFI arguing that Pulp and Paper is not a timber industry. This continues in spite of the company having received a directive from the DGIR to the effect that STIEU is competent on 17 November 2014.⁸³

In summary the panel finds that there is clear and convincing evidence that SFI has used repeated resort to judicial review to needlessly delay union recognition for the entire time that BILT has been in control. Therefore, the company has not been in compliance with the panels criterion 1.1.2 (The Organization shall recognize and accept labour organizations that represent its workers according to laid down procedures taking into consideration a reasonable time limit for recognition.)

4.5.4.2 Misrepresentation of the rights of migrant labour.

Although the Malaysian legislation clearly determines that foreign workers can join unions⁸⁴, and several informants confirmed this, BILT informed the Complaints Panel during the field visit that they had verified with the immigration department that foreign workers cannot join a union and referred to the Immigration (Amendment) Regulations 2011, which reads in Article 6 on restricted activities:

⁷⁹ Liaw Engrit (2014) Letter from STIEU to Neehar Aggrawal COO of SFI

⁸⁰ Aecom (2014) Quarterly EHS&S Audit Report: Sabah Forest Industries, Malaysia as per IFC Sustainability Framework AUGUST-SEPTEMBER 2014 p22

⁸¹ STIEU letter to Kim 26 May 2015. P2

⁸² Interview with anonymous stakeholder.

⁸³ E-mail from Mr Vanugopal to Susiman Many.

⁸⁴ Robertson P. Jr. (2008) Migrant Workers in Malaysia – Issues, Concerns and Points for Action Commissioned by the Fair Labor Association

⁸⁵ Republica (2015) Malaysia flouts own law on migrants' trade union rights - See more at: <http://www.myrepublica.com/politics/story/23544/plight-of-nepalis-in-malaysia-flouting-own-law-malaysia-prevents-migrants-joining-trade-union.html#sthash.7rgNaqMq.dpuf>

“6. The new Regulation 16A(5) restricts the holder of a Residence Pass from being involved in the following activities without the written consent of the DG:

(a) giving any form of political lectures, speeches, talks or engage in any political activity; or

(b) being a member of, or associating with, any organization, society union, association, or any activity affiliated to any religious or social body which is not officially recognized under any other written law.”

However, trade unions are officially recognized under the Trade Union Act, so this stipulation does not apply to trade union membership.

The fact that BILT misinformed the Complaints Panel on this issue, suggests that the migrant workers at SFI are also misinformed by the management of BILT regarding their rights to become a member of a trade union.

In Summary the panel finds on the balance of probabilities that BILT has interfered in the freedom of association of migrant workers. This is evidence of a failure of BILT to comply with the panels criterion 1.1.1. (Workers are able to establish or join or associate with labour organisations of their own choosing without fear of intimidation or reprisal and subject only to the rules of the labour organization concerned.)

4.5.4.3 Formation of a company sponsored union

SFI has made it clear that they are prepared to recognise an in house union. On 7 November 2014 the CEO of SFI issued a circular to all employees stating that the company will only support an in house union.⁸⁶ The company maintains that this is in order to avoid having to deal with union representatives from other sectors such as building and construction who would not have a clear understanding of the economics of the pulp and paper sector⁸⁷. According to one informant⁸⁸ this may be because this could be used as a means of excluding migrant workers from union membership.

It is also clear that there is a company sponsored move to resurrect the former in house union, SFIEU, under the leadership of a former union president who was voted out of office by the members prior to the dissolution of SFIEU. This new union has already prepared its registration with the TUD.

This move was supported by the company lawyer Mr Vanugopal in an e-mail to Mr Susiman Many the HR Manager of SFI.⁸⁹

⁸⁶ Circular of CEO of SFI to all employees, dated 7 November 2014

⁸⁷ Interview with BILT and SFI management.

⁸⁸ Interview with anonymous stakeholder.

⁸⁹ The email correspondence is confidential .

This is a clear attempt to interfere with the freedom of association of workers by introduction of a union which will be more compliant to the wishes of the company. According to interviewees this organisation currently consists of 14 members although a claim was made that there could be as many as 700. This is unlikely since none of the workers interviewed were members of SFIEU and only one worker had heard of the move to reinstate the old union. This contrasts with the obvious support for STIEU since 2 out of the 4 workers selected for random interview were union members and one supervisor clearly knew so much about the history and support from BWI that this person was also most likely a member.

In Summary the panel finds that there is clear and convincing evidence that SFI has interfered in the freedom of association of workers by attempting to form a company sponsored union. This is evidence of the company's failure to comply with the panels criterion 1.1.1. (Workers are able to establish or join or associate with labour organisations of their own choosing without fear of intimidation or reprisal and subject only to the rules of the labour organization concerned.)

4.6 Assessment of counterevidence and counterarguments

The principal argument used in the defence of BILT is that their actions have been fully compliant with the labour laws of Malaysia and Sabah as verified by their success in legal challenges to the attempts by the workers to form unions and in overturning the directives of ministers to recognise unions. However this complaint does not centre on the legality of the behaviour of BILT and SFI but on whether the actions taken by BILT have violated the FSC policy for association specifically by violating any of the ILO core principles laid down in the ILO core conventions. There is some difficulty of interpretation in respect of this since the core conventions are the basis for multilateral agreements about the treatment of labour and are not instruments directly applicable in their entirety to companies. On ratification of a convention countries are required to ensure that their internal legislation becomes compliant. In this case Malaysia has not ratified ILO convention 87 so that the requirements are not included in Malaysian legislation. Indeed the Malaysian labour law fails to comply on a variety of issues.

However the association between FSC and other entities is based on voluntary agreements between parties, part of which are covered by the PfA. Organisations are expected to respect labour rights in line with the ILO Declaration on Fundamental Principles and Rights at Work. Unfortunately FSC does not at this time have a framework for assessing compliance with this aspect of the PfA. For this reason the complaints panel has developed its own *ad hoc* criteria for this purpose.

For all purposes FSC sees legal compliance as being the minimum standard of behaviour for associated entities but often demands much more. In this case the argument that BILT complied with Malaysian law is probably true but this is no defence in cases where the ILO conventions are not ratified and effectively implemented in the country.

4.6.1 Role of government in delaying recognition proceedings

BILT may argue that the reasons for delaying union recognition is due to repeated errors made by the government when dealing with recognition of unions at SFI.

There do appear to have been repeated failures of government agents to behave in ways that are fully compliant with all aspects of the relevant laws. These failures have been instrumental in permitting SFI to delay union recognition for long periods by successfully challenging government rulings in court. In the most recent case it was the government that requested the postponement of the Judicial Review hearing in order to better prepare its case.

However it is clear that it would not have been illegal at any time for SFI to voluntarily recognise STIEU and to enter into collective bargaining. At best the actions of the company in for example questioning the rights of individuals to be union members is an interference in the rights of freedom of association (as enshrined in ILO core conventions) at worst it is an attempt to indefinitely delay recognition.

4.6.2 Failure of mediation

It is a core principle of the FSC dispute resolution system that disputes should be resolved in the first place by discussion and negotiation or mediation. Therefore, FSC proposed a resolution of the conflict between SFI and STIEU through mediation with the help of a professional mediator, which requires the consent of both parties.⁹⁰

STIEU in their response underlines their long term efforts to seek a solution for the conflict and endorses to continue with the Policy for Association complaint while at the same time accepting the offer of FSC to conduct a mediation intervention, as a parallel process. STIEU put the condition on the FSC-led mediation, that it should lead to SFI compliance to ILO core conventions.⁹¹ ⁹² SFI in its response welcomed any conciliatory efforts by FSC, but only to achieve an effective in-house union in SFI.⁹³

Due to the incompatible expectations of the mediation outcome on the part of STIEU and BILT and the wish of STIEU to simultaneously pursue the complaint, and as the objective of mediation is to prevent a formal procedure, FSC decided not to continue with the attempt for mediation and accepted the complaint.

It is clear that the failure of mediation is partly due to the wish of STIEU to pursue the complaint simultaneously. However the mediation process was proposed after unions had been striving for recognition for almost 20 years at SFI. So the failure by STIEU to finally agree to the mediation without pursuing the complaint at the same time can in no way absolve BILT from responsibility for failing to recognise STIEU prior to the mediation attempt.

4.6.3 Offer to recognise an in-house union

BILT may argue that it is compliant with the spirit of the ILO conventions by its offer to recognise an in-house union, namely a reborn SFIEU. However, this demonstrated preference of one type of union over another is a clear violation of the principle of freedom of association and can be seen as an attempt by the company to undermine the leadership of STIEU and to interfere in the internal organisation of the union. In addition by choosing to support the former president of SFIEU in the role of president of the new SFIEU the company can be seen as supporting an individual previously rejected by the mass of the workers.

Therefore, this also cannot be used as an argument in defence of the behaviour of the company.

5 Recommendation(s) to the FSC Board of Directors

Due to the imminent separation between BILT and SFI the panel felt it necessary to deal with the companies separately in making their recommendations to the board.

⁹⁰ Letter of FSC Director General Kim Carstensen to STIEU Secretary Engrit Liaw, dated 22 May 2015

⁹¹ Letter of STIEU Secretary Engrit Liaw to FSC Director General Kim Carstensen, dated 26 May 2015

⁹² Letter of STIEU Secretary Engrit Liaw to FSC Director General Kim Carstensen, dated 26 May 2015

⁹³ Letter of BILT to FSC Director General Kim Carstensen, dated 9 May 2015

The panel finds that there is clear and convincing evidence that SFI has violated labour rights stipulated in ILO Core Conventions during the period starting in 2009 that the FSC PfA has been in force.

The complaints panel considers that there is clear and convincing evidence that SFI has failed to respect the ILO fundamental principles and rights at work laid down in the ILO core conventions by refusing to recognise and engage in collective bargaining with a workers union of the free choice of the SFI workers.

Specifically:-

- SFI has denied union recognition by using legal and judicial instruments to block and delay the recognition. This denial of union recognition has been ongoing and repeated since 2009. The company has routinely challenged almost every ruling made by the minister and in some cases by the lower courts.
- SFI has sought to influence the freedom of association of the union by unreasonably (but legally) seeking to restrict the classes of employees who may be members of the union.
- The information gathered by the CP suggests that SFI has misinformed migrant workers in terms of their rights to join a union of their choice by misrepresenting the legal situation.
- SFI has supported and offered recognition to an alternative in house union (SFIEU) which is not yet registered and is currently unknown to the large majority of the employees.
- SFI has interfered in the internal working of the union by demanding that the union changes its constitution to specify that pulp and paper is included in the scope of the union in spite of the fact that it has already received notification from the minister that STIEU is competent to represent all workers at SFI.

Further that since the association with FSC is voluntary it is necessary to emphasise that organisations associated with the FSC should not be permitted to use national law to frustrate the principles of good governance that are the focus of the PfA as has happened in this case.

It would not have been illegal for SFI to recognise STIEU or its predecessors by following the directives of the Minister. SFI could have accepted these rulings and negotiated the inclusion or exclusion of specific workers at some later date.

5.1 Impacts of the failure to permit union recognition at SFI.

The panel found that the impacts of failure to recognise STIEU at SFI were significant but not grievous. Individual workers at SFI do not benefit from the type of protection and assistance that would be expected where there is a recognised union. This is most evident from the fact that without recognition STIEU was not put in a position to negotiate a collective bargaining agreement with SFI, which could have resulted in better working conditions for the workers. This has also been evident in a few cases where individuals have been disciplined or where the company has failed to pay court ordered compensation to a worker who without union support is unable to afford the costs of legal redress. In one case workers are said to have been disciplined for refusing to replace cutting blades while the paper line was still running.

Although SFI is OHSAS18000 certified there were a range of hazards identified in the processing plants which principally resulted from poor maintenance. A number of these hazards have been identified by the internal safety committee but have not yet been corrected.

In the field cable yarding equipment used by contractors had serious health and safety risks.

Migrant workers appear to have been falsely informed that under the terms of their immigration permit they are not permitted to join unions. This has limited the ability of the union to offer them the support to which they are entitled.

Members of the union have been paying their union membership fees without being able to benefit from the full support of the union.

Finally acting on the recommendation of their lawyers BILT/SFI are refusing to communicate with STIEU representatives since they believe that this might constitute de facto recognition of the union.

5.2 Recommendation in Relation to BILT

The panel recommends that FSC maintain their association with BILT subject to a number of conditions.

BILT should be placed on notice that further solid evidence of anti-union activity during a period of five years – brought to the attention of FSC- will result in disassociation without the need for a further complaints panel investigation.

5.2.1 Conditions for Maintaining the Association

1. BILT shall compensate FSC for the costs associated with the complaint.
2. BILT shall compensate workers for the costs they incurred in paying membership dues while not receiving the benefits of union recognition. This compensation will be used to subsidise the union membership costs of all members registered with STIEU at the date of the complaint panel visit who appear on the list of members provided to the panel. The amount of compensation will be US\$100,000 and will be paid to FSC who will hold it in trust and disburse it to the recognised union in five equal annual instalments of US\$20,000.
3. BILT shall compensate STIEU for any legal costs it has incurred in contesting the judicial review process.
4. These payments will be made within a period of three months from the date on which this decision is communicated to BILT. Failure in making these payments within the given three month period shall lead to FSC's disassociation from BILT.
5. In addition, for a period of five years BILT shall not be permitted to obtain any new FSC certificates outside India unless the entity being certified has a recognised union and the entity has agreed a collective bargaining agreement with the union.

5.3 Recommendation in Relation to SFI

FSC shall disassociate from SFI.

There will be no minimum period for disassociation.

5.3.1 Conditions for ending the Disassociation

FSC shall end the disassociation with SFI when the following conditions have been met.

1. SFI has recognised and completed a collective bargaining agreement with a union of the employees free choice.
2. STIEU shall be given the first opportunity to demonstrate their support in a secret ballot conducted by an independent organisation that meets with the approval of STIEU and SFI. Such support shall be based on a simple majority of the votes cast in such a ballot.

3. If STIEU is not able to demonstrate their support in such a ballot after two attempts with a minimum interval of 4 weeks, then another union shall be given the opportunity to demonstrate support.
4. SFI shall not demonstrate preference for any group of workers over another in the establishment of a union.
5. SFI shall withdraw any further legal action that may be delaying the process of union recognition.
6. SFI will immediately make any payments to any employee that has been ordered by any court in Malaysia since 2009 and that has not already been settled.
7. For a period of five years after re-association SFI shall submit notice of its intent to file any legal action that could affect the union or its members to the FSC disputes resolution manager for approval before filing such actions. Should the FSC consider that this action is not reasonable then proceeding with it will lead to automatic disassociation.
8. SFI will not contest any court award to an employee in a higher court where the amount of the award is RM20,000 or less.
9. Independent third party verification has been conducted and has confirmed that the above listed conditions have been adequately implemented and fulfilled.

6 Annexes

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