

How weak corporate
governance and internal
controls in the palm oil
industry allow abuse of
foreign and local workers and
how ESG investment fails to
recognise these issues

CRUEL OUTCOMES

LIBERTY SHARED

CREATING AN ENVIRONMENT
SAFE FROM TRAFFICKING

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INDUSTRY FAILINGS

This document does not seek to revisit or summarise previous research and conclusions about abuse suffered by migrant workers entering Malaysia to work on palm oil plantations. There are many excellent reports and materials available that examine the abuse of workers and the failures of companies to improve their plantation management practices, such as Amnesty International's *Trapped: The Exploitation of Migrant Workers in Malaysia*, (2010)¹; Business and Human Rights S.L (www.bandhr.com); Fair Labour Association's *Mapping Study on Seasonal Agriculture Workers and Worker Feedback and Grievance Mechanisms in the Agricultural Sector*, (2018)²; Suisse Solidar's *Exploited and Illegalised: The Lives of Palm Oil Migrant Workers in Sabah*, (2019)³, and Earthworm Foundation's *Insights Into Recruitment Costs and Practices Amongst Small-Medium Sized Companies In The Palm Oil Industry In Peninsular Malaysia*, (2019)⁴.

This document argues that, firstly, despite over a decade of reporting and research on abusive recruitment practices and abusive working conditions on plantations and despite the representations and statements set out in the increasingly prolific human rights and sustainability corporate disclosure, it is time to accept that a substantial proportion of the millions of individuals arriving to offer their labour to plantations, of whatever size, do so in a state of vulnerability caused by the manner of their recruitment. Whether due to debt arrangements, poverty, illegal status or deception, the palm oil industry, particularly those who lead the industry, should and must seek to alleviate and resolve these vulnerabilities and not exacerbate and capitalise on them by allowing vulnerability to become a lever for coercive and abusive labour management practices by plantations managers, supervisors and forepeople.

Second, it seems clear that the ongoing industry-wide failure to prevent abusive and coercive practices on plantations is caused by deep structural issues grounded in a long history of terrible labour practices begun in the industrial rubber agricultural sector during the British administration of Malaya and largely continued since then to today.

Third, evidence of the comprehensive and far-reaching work needed to build and implement a governance framework to remedy and rectify this situation, in other words to create businesses and a business-operating environment that actually offers vulnerable workers support to reduce and resolve their vulnerabilities, rather than exploit them, appears sorely lacking.

Fourth, the implementation of corporate sustainability and ethical practices is a desired end state, one that will be dynamic and active. However, there is no chance at all of achieving the creation of an organisation that is sensitive to the wider social and environmental issues without that company having robust, sufficient and well implemented corporate governance, risk management and internal controls (together *organisational corporate governance and controls*). From the examination of annual reports and sustainability statements, and considering what has been learned from workers themselves, it is clear that design and implementation of corporate governance, risk management and internal controls and the design and implementation of a sustainability agenda remain two parallel lines of management activity. Never meeting, the development of sustainability practices and the development of organisational corporate governance and controls are largely considered separately. This is very convenient for many corporations and boards of directors as the arrangements keep the objectives of sustainable practices away from corporate governance, which has regulatory and legal requirements, and therefore avoids creating joint and several obligations and liability on the board of directors and senior executives.

Finally, it is time that the vast cornucopia of public disclosure created in the name of sustainable and ethical practices is linked clearly and transparently to implemented underlying organisational corporate governance, risk management and internal controls and the underlying laws and regulations that require such *organisational corporate governance and controls*. The formulation and publication of these policies, as expensive as the process of creation is, must lead to identifiable ongoing, consistent and monitored corporate procedures and practices that are enforced by the business - it is these that must be clearly disclosed on a regular basis.

Ultimately, the sections of annual reports dedicated to organisational corporate governance and internal controls should set out plantation management of labour and the mechanisms of controlling relevant third party relationships, i.e. recruitment agents. It should be clear how the aims of the sustainability and ethical practices are to be achieved within the organisational corporate governance, risk management and controls. The failure to implement sufficient and robust corporate governance, risk management and internal controls allows the abuse suffered by migrant workers to be compounded once on the plantation and the abuse of future migrants by recruitment agents to continue.

Effective and sufficient corporate governance, risk management and internal controls should create standard management and operational policies, procedures and practices in regard to the

¹ <https://www.amnesty.org/en/documents/ASA28/002/2010/en/>

² https://www.fairlabor.org/sites/default/files/documents/reports/grievance_mechanism_mapping_study_report_final.pdf

³ https://www.solidar.ch/sites/default/files/palmoel_report_2019_e_web.pdf

⁴ <https://www.earthworm.org/uploads/files/recruitment-practices-malaysia-2019.pdf>

management of plantations, the current lack of such practices adds a further dimension to the arguments about the weakness and insufficiency of management in the palm oil industry to provide adequate protection for vulnerable workers on plantations.

SUMMARY

Before considering the methods of recruitment of individuals to the palm oil industry, which can be divided into four categories, it is important to recognise that there are issues for both local and migrant workers. Regardless though of whether the worker is a local or a migrant there are two common stages to consider.

First – the recruitment journey

The first stage is the introduction of the work opportunity and the movement of an individual to a situation in which they can be hired (i.e. form a contractual relationship to work on a plantation in return for payment, directly or indirectly, by that plantation). Palm oil plantation businesses may or may not currently seek to have control over the manner of a worker's journey but they can exert substantial influence over the treatment of the people introduced to them for hiring and they can provide support to workers to remedy and resolve vulnerability.

Second – contracting and onboarding into the plantation workforce

The second stage, the hiring stage, is very much in the plantation's control. It is well documented that recruitment agents regularly provide a contract to individuals in their home country but too often a worker ends up with two or more contracts, if indeed they have one at all. Whether mega business or smallholder, the governance of any business includes the power to control the formation of contractual relationships. Like any business, plantation businesses have the unilateral power to determine how they relate to and how they form relationships with their employees and contracted workers. *Contracting and onboarding* is the process of entering into a legal relationship so the plantation benefits from a worker's labour and in return it provides compensation (such as a wage, safe accommodation, facilities, insurance, medical care and protective equipment) to the worker. A part of that compensation is the onboarding process which includes setting up the administration for their compensation/payment, setting up medical care and provision for accommodation, and the creation of a lawful and conducive, not coercive, work environment. It also includes access to effective grievance mechanisms and ensuring that the work place is safe and secure. For smallholders, who might be much less profitable, the expense of improving governance is likely

challenging and they may well be uninterested but there is little excuse for the large and mega businesses. These are the industry leaders and they have the operating capital, or they can go to the market and raise the capital, to invest in the development of the necessary *organisational corporate governance and controls*. It will be costly to create and implement the needed governance to ensure a safe working environment and to mitigate vulnerabilities arising from workers' journeys to recruitment and to ensure there is a proper contracting and onboarding process that does not create a situation of forced labour.

These two stages should be separate and distinct and where they do and must interface or integrate then the governance and controls should be in place to prevent the workers' vulnerabilities, particularly those arising from the first stage, being further abused.

RECRUITMENT JOURNEY

Personally I am very hesitant to simply call this the recruitment process, as many do, because from interviews with workers and from reviewing the research, it is clear that the process doesn't necessarily end with a contractual relationship with the plantation. It does end with the individual suddenly situated on a plantation but in many cases for migrant workers they are have been given misleading/deceptive descriptions about the conditions. Secondly, the individuals often have no idea of the actual terms of work - basically, they have been identified as being prepared to work and then moved geographically. It is a journey to a place where they will be hired on terms to be determined, some of which are at the sole discretion of the plantation manager or forepeople (mandors).

On a personal note, I have been recruited to jobs a number of times by recruitment agents in Asia, and have myself used many recruitment agents across Asia (including Malaysia) to find employees and the process should involve certainty of contract terms offered to the potential worker. It should involve payment to the agent by the employer, not by the employee and only after successful hiring is completed. It should not involve the worker borrowing money to pay the recruitment agent prior to certainty of contract terms. The experience of individuals heading to palm oil plantations is at best a journey of uncertainty.

FIVE DISTINCT JOURNEYS

There are five distinct methods by which individuals arrive at a position to be contracted and onboarded by a plantation business.

- i. Use of the *Malaysian government's formal system* that facilitates companies to bring individuals from other

⁵ <https://www.forbes.com/sites/stevedenning/2017/07/17/making-sense-of-shareholder-value-the-worlds-dumbest-idea/#695960392a7e>

⁶ <https://www.sc.com.my/regulation/corporate-governance>

countries to Malaysia. As we shall see later this system has been and is open to abuse.

- ii. The *infrastructure of recruitment* (see below) has been used to describe layers of relationships within society, both lawful and unlawful, that together provide passage to Malaysia and to the plantations. This infrastructure of recruitment is not defined by a specific arrangement, process or organised criminal group, but rather by parts of society connecting to each other through social relationships, technology, language, economic interests and criminal activities to offer opportunities to the vulnerable and profit from their needs.
- iii. Many workers from countries with a bilateral agreement with Malaysia are brought to the plantations as a result of direct relationships between specific recruitment agencies and plantation managers/supervisors. These relationships are so well organised that workers are collected from airports by plantation managers and passports are already retained by the agents and directly handed over to the plantation manager. The worker may not see their passport again until they return home three years later.
- iv. A plantation may divide parcels of land for mandors or local workers to manage themselves (sub-managers) and allow them to hire their own workers (sub-contractors). These seem to be essentially 'off-the-book' sub-contractors with the sub-manager given money to sub-manage the parcel as seen fit. The treatment of the sub-contracted workers is at the sole discretion of the sub-manager in charge. Labour may be sub-contracted from the sub-manager's village, family or may be brought to the plantation by smugglers and traffickers.
- v. Finally, there is movement by human trafficking or smuggling via transnational organised criminals in the region, particularly transport via one or more of the many islands in South East Asia.

With each of these methods, the individuals are brought or delivered to the plantation supervisors for *contracting and onboarding into the plantation workforce*.

CONTRACTING AND ONBOARDING

The creation of a contract between the plantation business and the individual is a process that is and should be entirely within the control of the board of directors and senior management of the plantation business. It is a process around which management should have developed consistent administration and governance procedures, it is the most basic of *organisational corporate governance and controls*. The ability to effect and monitor regular payments to employees is

a part of the essential corporate governance of any commercial enterprise, and robust and proper corporate governance is of course a requirement for companies that are listed on stock exchanges, including the Malaysian bourse.

A contract should set out clearly the terms and conditions between the parties. Explanations regarding contract terms must be offered where one party has not had the opportunity of extensive or continuous education and/or does not speak the local language. There are workers from at least Bangladesh, India, Indonesia, Malaysia (locals), Myanmar, Nepal and Pakistan and yet they are expected to understand and interpret local employment laws - instead, all implied terms from local statutes and regulations should be explained. This does not seem to be occurring. Supervisors on plantations should know the laws and regulations by which they must comply and they should be able to explain the terms of the contracts. A review of audit reports of plantations, which for anyone with experience of internal audits in regulated industries like financial services make for depressing reading because of their extreme simplicity, indicate that plantation managers don't even seem fully apprised of the relevant laws with which they have to comply.

From the current wide range of abuse experienced by migrant and local workers, it is hard to be convinced that plantation managers and the mandors should have sole responsibility of onboarding workers into the plantation workforce without proper checks and balances under a proper governance framework.

ORGANISATIONAL CORPORATE GOVERNANCE AND ONGOING INTERNAL CONTROLS

A lawful and well-governed commercial organisation seeks to create a consistent work environment. It is the board of directors' responsibility to ensure investors' capital is utilised to create ongoing lawful business operations, particularly in companies that are listed on a stock exchange. However, as Jack Welch famously declared, a man for whom shareholder value had been an obsession for 20 years, "the dumbest idea in the world. Shareholder value is a result, not a strategy... your main constituencies are your employees, your customers and your products. Managers and investors should not set share price increases as their overarching goal." Welch continued, "Short-term profits should be allied with an increase in the long-term value of a company."⁵

There are many indications of poor and failing corporate governance. Indications of poor and insufficient governance would include variance and inconsistency of conditions experienced by workers in the same role across an organisation, deviation of conditions from the requirements under law and regulations, deviation of conditions from those promised in contracts and from those represented in corporate disclosures. The development,



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⁷ Plantation Systems, Labour Regimes and the State in Malaysia, 1900-2012, Professor Amarjit Kaur, Journal of Agrarian Change, Vol 14 No.2, April 2014 pp 190-213



implementation and ongoing monitoring of corporate governance, risk management and internal controls are a requirement under various securities laws in Malaysia⁶. They are set out very clearly and accessibly on Securities Commission Malaysia's website.

As much as investors in the mega businesses want to assume that the boards of directors and senior management will comply with securities regulation and relevant laws, investors need to be assured that this will happen, particularly those interested in ESG strategies. Similarly, members of civil society very much want to assume that organisational governance and controls are in place to protect workers and prevent abuse, and to confirm the efficacy of such governance and controls by understanding the actual experiences of workers on plantations so that training provided by NGOs becomes fully embedded into organisational governance and controls.

We spoke to workers on plantations, as have many other NGOs, and have reviewed audit reports. We found that workers across different plantations did experience a wide range of treatment and conditions, demonstrating the lack of consistent governance and

controls and an insufficiency of implementation. Audit reports do not capture many of the details, likely because audits are short in duration with notice in advance for preparation. The outcomes for workers on plantations under current governance and control frameworks are inconsistent and abuse is commonplace.

A LITTLE HISTORY

Before the palm oil industry, the Malaysian peninsula was home to the world's largest industrial rubber plantations. The huge 19th-century rubber businesses grew from the support of British rule and administration, with labour brought from the British Empire in South Asia and concessions from China. Workers on these early rubber plantations suffered indentured labour until 1910 when it was abolished and the demand for labour was satisfied by two parallel broker systems. Indian workers came through the *kangani* system which placed the workers on plantations in substantial debt to the agents and on a fixed three-year contract. The other main source of labour were Chinese workers who came through Chinese labour brokers but instead of being employed directly by

the plantation, worked for their brokers who contracted them out in groups. Unsurprisingly, the workers arriving via both systems were often in debt bondage to their brokers who provided - and could therefore withhold - everything. By 1920, many of these workers lived and worked on rubber plantations but under the control of their brokers to whom many owed money. The rubber plantations, like most palm oil plantations today, were run on a purely financial basis, labour was a key variable cost that could be used to pursue profitability. Understanding the relationship between the management of human resources on rubber plantations in the early 20th century and on modern palm oil plantations is crucial to structuring the changes required to create a palm oil industry that protects workers and prevents their abuse. Researching plantations and the history of labour in Malaysia, Professor Amarjit Kaur, University of New England, concluded⁷,

"divided by an interregnum during the quarter of a century immediately succeeding [Malaysian] independence, Malaya/Malaysia's colonial and contemporary plantation labour recruitment systems can arguably be seen as following two almost identical cycles. Both of these cycles rest on two factors: an overwhelming reliance on foreign migrant labour, as local labour is either considered absent in sufficient numbers (the colonial period) or deemed deserving of higher economic status (the contemporary period); and a general coincidence between the interests of plantation owners and government..."

"Naturally, there are also differences between the two cycles described in [the] paper. Principally, these concern the commodity cultivated and the human subjects and objects of the processes described. Oil palm replaces rubber; the Malaysian government and Malaysians replace Britain and British plantation owners; and Indonesians replace Indian workers, while contractors replace kanganis."

The modern recruitment of workers from Indonesia and South Asia, primarily Bangladesh, India and Nepal, to Malaysian palm oil plantations must not be considered in isolation of the management practices of the plantations on which they work.

The protection of workers and the implementation of practices to prevent abuse and create a work environment that reduces vulnerability relies on robust corporate governance controlling the management and supervision of workers which includes the relationship with recruitment agents and organised criminals. Recruitment and migration have now fused to become what Professors Biao Xiang and Johan Lindquist, who have spent considerable time researching and documenting the recruitment of Indonesian migrants, describe as “recruitment infrastructure”. It is no longer simply a process or system but a constant motion, both lawful and unlawful, of at least hundreds of thousands of people directed, often deceptively, to long-term labour activities.

The ultimate fate of foreign workers then is determined by the practices of the plantation management which have been found to be often arbitrary and at the discretion of the plantation managers, supervisors and mandors. Fundamentally, the abuse and coercion of workers, the outcomes of their journeys to recruitment and onboarding - occurs, unsurprisingly, because of weak corporate governance and poor management control arising from an insufficient risk management and internal control framework. Checks and balances must be implemented and in place to ensure that opportunities for plantation management and supervisory personnel to abuse and exploit worker vulnerability are always restricted - but moreover these controls should ensure both foreign and local workers are treated lawfully and that their conditions are consistent. In the end, a wide variety of worker experiences on plantations across the industry, especially involving unlawful and criminal actions, indicates that the current working environment and conditions are not being controlled under a sufficient and effective corporate governance and control framework.

RESEARCH AND METHODOLOGY

Data and information was collected using the survey instrument set out in the Appendix. Interviews were conducted in the presence of at least two interviews and recorded anonymously. In parallel, over the course of over two years, we conducted long form interviews with a number of workers, activists and industry stakeholders. We sought to understand the wider environment and context of the workers' lives during and prior to their employment by plantation businesses.

Some of the interview results from the data and information gathered have been provided to law enforcement as appropriate.

We found that many of the experiences provided by the workers seem to satisfy the forced labour indicators set out by the International Labour Organisation, and the requirements under Malaysia's Anti-Trafficking in Persons and Anti-Smuggling of

Migrants Act 2007 (ATIPSOM) (a law which surprisingly has yet to be really tested in relation to forced labour, LexisNexis has one case in its database⁸). But forced labour is also a crime under the laws of other jurisdictions, such as under United States Criminal Procedure Title 18 §1589 Forced Labour.

In short, recruited workers described coercive actions which appear to be unlawful and/or criminal in nature, allegedly perpetrated by plantation managers and mandors. We had reports of debt bondage with recruitment agents and loan sharking with local workers. Our interviews found retention of passports with no records of consent, theft of wages (consistently failing to pay minimum wage), unexplained wage deductions, threat of sexual abuse as coercion, threat of physical abuse, invasion of accommodation, charging for water and child labour, all of which is wholly unacceptable and should surely result in punitive action against those employees, managers and mandors involved and benefitting. Yet, workers cite no examples of any disciplinary action against perpetrators and most had never heard of any grievance mechanism.

RECOMMENDATIONS

- + **Individuals arrive in a state of vulnerability and there seem to be limited controls to protect them from further exploitation:** the primary recommendation from our research is that companies must invest to improve corporate governance, risk management and internal controls to resolve and remedy the abuses suffered by workers during their journey to recruitment and create lawful and ethical contracting and onboarding. Individuals arrive at plantations vulnerable, often already the victim of coercion but, instead of supporting the remedy or resolution of their vulnerabilities, the abuse is exacerbated. The varied experiences of the interviewed workers raise important questions about the weakness of corporate governance, risk management and internal controls and the degree to which plantation managers and mandors are able to act unchecked and conduct themselves with impunity.
- + **Consistency of worker treatment can only come from consistency of plantation governance:** the governance framework and controls should ensure there is consistent treatment for all workers on plantations, local and foreign, owned and/or run by the same businesses. Sufficient and effective corporate governance, risk management and internal controls should give rise to policies, procedures and practices relating to the conduct of supervisors and mandors, the management of recruiters and ensuring workers are protected. Here, they do not.

⁸ Chin Chiew Sem v Public Prosecutor — [2019] MLJU 1851

+ **Governance of plantations must be part of corporate governance and internal controls:** corporate governance, risk management and internal controls can be assessed by reviewing public disclosure, particularly in the annual reports, and then understanding the degree to which implementation has been successful, for example by comparing stated policies to actual worker experiences or even the findings of an audit. Annual reports for 2018 and 2019 are readily available for FGV, IOI Group, Sime Darby Plantations and Wilmar International. Each must publish statements in their reports concerning their corporate governance, risk management and internal controls which provide details for investors and regulators about the company's policies, systems of checks and balances and how the three lines of defence are structured. The aims and objectives relating to the protection and prevention of local and foreign workers from abusive conditions should be integrated into the corporate governance, risk management and internal controls statements and reports, and integrated into the corporate governance, risk management and internal controls practice throughout the organisations. Sustainability and ethical practices should no longer be treated as a separate ambition of the organisation but as fundamental to its governance and operation; they must converge and be combined, not run in parallel and separately.

+ **ESG needs to look a lot more closely at Governance and Social:** ESG analysts and investors do not seem to be looking closely at the underlying corporate governance and internal controls at the plantation level where the abuse in relation to forced labour is occurring. There is very limited, if any, disclosure by palm oil companies concerning the mechanism of management and accountability of plantation management staff and the mandors who work under them. ESG analysts and investors must at least consider the sufficiency of a company's corporate governance, risk management and internal controls to prevent abuses such as human trafficking, forced labour and child labour and to protect workers who arrive on plantations in situations of considerable vulnerability. Presently, ESG analysis fails to capture much of the detail.

+ **NGOs are not yet able to address compliance, management and governance issues:** fundamentally much of the abuse and ill-treatment of workers on plantations is caused by or facilitated by plantation managers and mandors, and the development and implementation of corporate-wide governance to increase control of these employees is the work of compliance and risk management experts and consultants. Palm oil companies continue to rely on NGOs and civil society to achieve results in areas of corporate development of which most have very limited experience. If there is to be substantial improvement in the conduct of plantation managers and mandors to protect and prevent abuse then there must be



a robust and transparent framework of governance and accountability developed by those who understand and develop corporate governance, risk management and internal controls. These must be created with NGOs, but not by NGOs.

+ **Ensuring vulnerability of new workers is ameliorated:** NGOs are vital in the effort to ensure that palm oil companies are sensitive to the workers' situations as they arrive on the plantations. NGOs need access to workers.

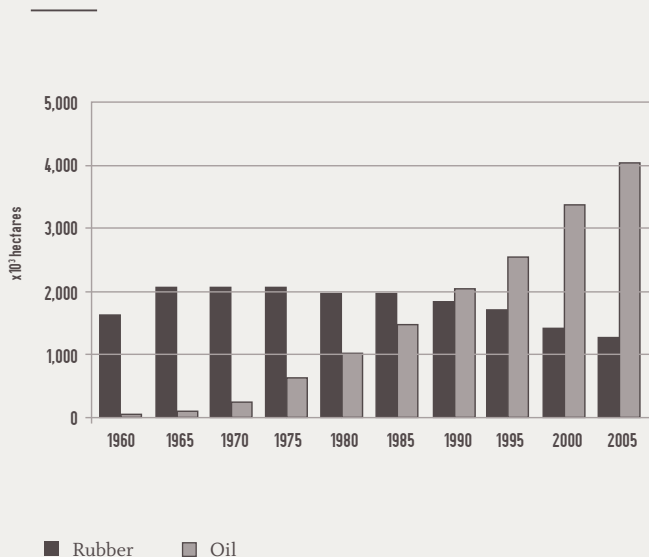
**HISTORY
REPEATING**

INDUSTRY FAILINGS

Efforts to improve the management and treatment of workers on Malaysian palm oil plantations may be better advanced by a greater understanding of how current practices developed and when, if at all, there have been any periods when the treatment of vulnerable foreign and local workers by the agricultural industry in Malaysia was consistently less abusive. Alternatively, if current plantation labour management practices are in fact structural in origin, born from the legacies of historical and traditional practices in the Malaysian agricultural industry, then implementing systemic change may be very challenging.

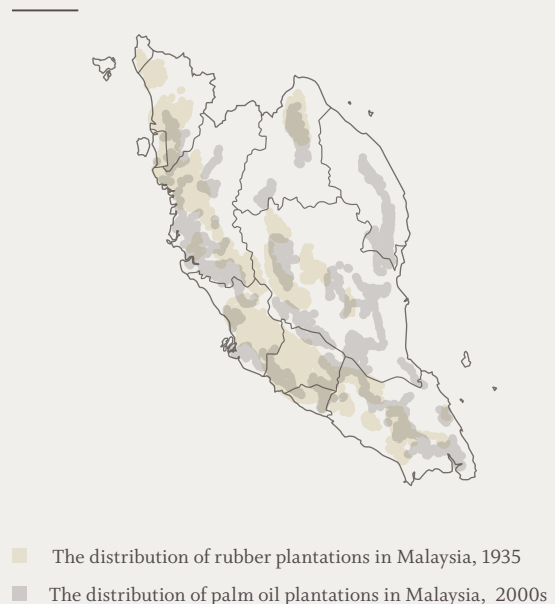
Few should be surprised to learn that many of the plantation management practices used in the palm oil industry were inherited from the rubber industry. During the late 1960s, as part of the new economic strategy of the new Malaysian Government after the formation of Malaysia in 1963, land used for rubber was transitioned to palm oil. As figure X shows below, between 1960 and 1995, there was a purposeful transition of the agricultural

Figure 1: Land under oil palms and rubber in Malaysia, 1960–2005



Source: Basiron (2007, 290)

Figure 2: The rail network and the distribution of rubber in Malaya, 1935



⁹ <https://www.theguardian.com/news/2019/feb/19/palm-oil-ingredient-biscuits-shampoo-environmental>

¹⁰ The Natural Rubber Industry, Colin Barlow Oxford University Press 1978

industry from rubber to palm oil. The sector grows gradually until there was a sudden surge in the global demand for palm oil and production rocketed. More specifically, as explained in the two maps of Malaysia in figure 2, rubber and palm oil take up the same geographic space. As expected, many of the managers and foremen who worked on the plantations with rubber trees simply continued their work but with palm oil trees. These areas were and are farmed by the same communities and often generations of the same families. Their management practices remained the same and became further embedded as one generation of managers and foremen passed their practices to the next, often their own children. The global demand for palm oil increased dramatically as it was sought as a replacement to high saturated fats, an initiative led by Unilever in the 1990s⁹, and as the plantations expanded massively and rapidly to meet the demand the labour management practices were replicated again and again to become hard baked and institutionalised into the modern palm oil industry.

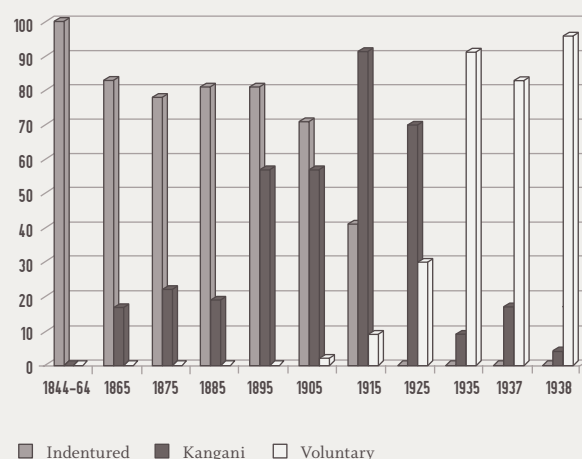
LABOUR PRACTICES TRANSITIONING FROM RUBBER TO PALM OIL

The Malaysian peninsula has been the home to industrialized plantations since the final decades of the 19th century. The early sugar and coffee plantations on the peninsula that grew out of the mid-1800s relied heavily on an indentured labour system and these approaches were quickly applied to the fledgling rubber plantations. Workers were often tied to a three-year fixed-term contract (sound familiar?), with movement heavily restricted, unable to leave until debts were repaid and the three years was finished. Rubber only became a commodity crop in the peninsula after the Brazilian plantations collapsed following the abolition of slavery in 1842^{10, 11, 12}.

By the end of the 19th century, the Malaysian peninsula had replaced Brazil as the primary rubber producer using forced labour. In 1910, indentured labour was abolished to be replaced by a structured and continuous agency and broker system, the *kangani* system. The word *kangani* means “overseer” or “foreman” in Tamil (the word *mandor* in Bahasa Malay is now used to describe the foremen on the palm oil plantations), and the *kangani*, typically a labourer already employed on the plantation, was delegated by his employer to recruit workers from his village. The system was developed to supply Indian workers to Malayan plantations, often leaving the workers in debt and poverty.

Under the *kangani* system, many of these workers lived and worked on rubber plantations but under the control of their agents/brokers to whom they would be in debt bondage. The

Figure 3: Indian labour recruitment by recruitment method, 1844–1938 (percentage). Adapted from Sandhu, *Indians in Malaya*, Appendix 2, pp. 306–309.



workers accepted fixed contracts, found their movement restricted and enjoyed little agency of their own. Technically, employers remained responsible for the costs of recruitment in India and transport to Malaya, with contracting occurring at the time of recruitment in India. Most plantation owners and managers regarded the *kangani* system as an essential tool for labour retention to maintain a stable workforce. Low wages meant that workers were forced to extend their contracts and re-indenture themselves, and did this while bound to their employers during their period of indenture. They were treated as unfree men and if this wasn't enough employers would use various methods such as sanctions to enforce the contracts¹³.

As with palm oil today, rubber planters utilized their own “trusted” workers, the sub-contractors discussed above, as labour brokers and created a chain-migration from southern India. The *kangani* system became a personal or informal recruitment system and it became the primary recruitment method after 1910. The system was preferred because the *kangani*'s (the broker) costs were low compared with the higher costs incurred under the indenture method, which involved payment of fees to recruitment agencies. Crucially, the *kangani* provided the vital connection between poverty stricken rural southern India and the frontier regions of Malaya, and enabled Indian migration to take place. Workers were also less likely to abscond, especially since the *kangani* had a vested interest in ensuring that the labourers remained. Debt repayments were

¹¹ Rubber in Malaya, 1876 – 1922 The Genesis of an Industry, John Drabble Barlow Oxford University Press 1973

¹² Plantation Systems, Labour Regimes and the State in Malaysia, 1900–2012, Amarjit Kaur, *Journall of Agrarian Change*, Vo. 14 No. 2, April 2014

¹³ *ibid*

¹⁴ Labour Brokers in Migration: Understanding Historical and Contemporary Transnational Migration Regimes in Malaya/Malaysia, Amarjit Kaur, *International Review of Social History*, Vol. 57 Special Issue 20, 2012

due to the kangani and the kangani also received “head money” for each day worked by the workers¹⁴. On the plantation the new migrants lived in compound accommodation and the isolation of plantations, timidity of the workers, and the plantation boundary reduced their mobility.

A CASE OF DÉJÀ VU?

The methods of control developed under the kangani system will be very familiar to current foreign workers on modern palm oil plantations. They will recognise the three-year fixed-term contract, payments/debts to the broker, mechanisms to reduce mobility (passport retention) and various arbitrary sanctions/penalties. It is difficult not to agree with Professor Amarjit Kaur’s conclusion that the nature and methods of sourcing and managing labour for palm oil plantations in modern Malaysia have changed little for foreign workers since the days of the rubber plantations.

Between 1980 and 1990, the Malaysian state addressed the issue of labour force growth and its need for a guest worker policy in two ways. First, in 1981 Malaysia introduced a Private Employment Agencies Act allowing private labour brokers and agencies to recruit foreign labour for Malaysian employers. The agencies had to be licensed and their recruitment fees had to comply with government schedules. The foreign workers had to be provided with work permits and their employment had to be regulated under the 1968 Employment Restriction Act and the 1957 Immigration Act. This recruitment policy tied workers to particular employers and localities. The government also formed a Committee for the Recruitment of Foreign Workers in 1982 that was tasked with the allocation of work permits to guest workers.

Towards the end of the century, Malaysia’s growing labour needs were further evaluated in the context of strengthened border controls which primarily concerned the movement of migrant workers. New policy measures were also formulated for the importation of foreign labour. The state’s immigration policy centred on the recruitment of highly educated and skilled migrants, together with the recruitment of low-skilled workers for the labour-intensive sectors.¹⁵ In March 1997, foreign labour recruitment was placed under the Foreign Workers Division of the Immigration Department along with amendments to the Immigration Act in 1997 and again in 2002 to remove ambiguities and tighten regulations; it also further

increased the penalties on both employers and workers in breach of immigration regulations. It thus became a criminal offence for foreign workers to work without a work permit or visa, and the state introduced punitive measures, including judicial caning of workers.

The state recruited the services of a non-state actor, the Ikatan Relawan Rakyat Malaysia (RELA), or Peoples’ Voluntary Corps, in its campaign or “war” against irregular migrants. Formed in 1972 to assist, RELA was supposed to maintain peace and security in the country and to undertake community projects. Volunteers were given training and were “expected to act against virtually all types of anti-government activity”. They were also supposed to promote government objectives. The state subsequently allowed RELA personnel to be armed, and they were tasked with new duties to “stop, search and demand documents, arrest without a warrant, and enter houses or premises believed to house irregular migrants. Consequently, the state has transformed RELA into a valuable ally in Malaysia’s efforts against irregular migrants. RELA personnel also humiliate and carry out judicial caning of undocumented migrants, and “destroy the ID [identification cards] of legal migrants to justify the raids”. They are also “immune from prosecution in relation to their conduct”.¹⁶

In the last four decades, there has been a marked shift in Malaysia’s foreign labour recruitment policy. From a “weak”, or rather ad hoc, start in the 1970s, when Indonesian workers were freely allowed to move to Malaysia, the state subsequently permitted private labour brokers to provide recruitment services. Hundreds, now thousands, of small recruitment agencies flourished, functioning as labour brokers in a highly competitive environment, and this resulted in a steep increase in irregular migration. The government has introduced a small number of legal reforms to regulate foreign labour inflows and crafted policy tools based on labour bilateral accords to attract low-skilled migrant workers. These policy changes underpin the state’s increased drive for labour flexibility and reduced employment entitlements to migrant labour. However, in many respects, the outcomes of the new regime and framework resemble the previous approaches a century ago. Migrant labour is needed for the agricultural industry as much as before but after very brief periods of experimenting with free movement of foreign labour, migrant labour workers on plantations are once again relegated to labouring in a poorly monitored and enforced legal framework that provides them little protection¹⁷.

¹⁵ After Nunukan: The Regulation of Indonesian Migration to Malaysia, Michele Ford, *Divided We Move: Mobility, Labour Migration and Border Controls in Asia*, New York: Palgrave Macmillan, 2006

¹⁶ Labour Brokers in Migration: Understanding Historical and Contemporary Transnational Migration Regimes in Malaya/Malaysia, Amarjit Kaur, *International Review of Social History*, Vol. 57 Special Issue 20, 2012

¹⁷ Plantation Systems, Labour Regimes and the State in Malaysia, 1900-2012, Professor Amarjit Kaur, *Journal of Agrarian Change*, Vol 14 No.2, April 2014 pp 190-213

RECRUITMENT TO MALAYSIA

CREATING CRUEL OUTCOMES

There are perhaps at least one million undocumented Indonesian workers on Malaysian palm oil plantations. As emphasised by Lee Hwok-Aun, Senior Fellow at the ISEAS-Yusof Ishak Institute, and Khor Yu Leng, Head of Research at Khor Reports Segi Enam Advisors Pte Ltd, in their 2018 paper, the number of documented foreign work permit holders has decreased, based on the Ministry of Home Affairs registry, from 2.2 million in 2013 to 2.1 million in 2016 and 1.8 million in 2017¹⁸. The number of undocumented persons has never been robustly computed but official Malaysian disclosures put the overall foreign worker population at 6.7 million in 2014, however this fell precipitously and, they say, implausibly to 3.8 million in 2016¹⁹. Malay Mail journalist Joseph Paul suggested in May 2020 that popular wisdom put the figure of undocumented workers in Malaysia at around three million²⁰.

As discussed, the longer history of foreign labour in Malaysia has great relevance to the structural complexities that have shaped the attitudes and treatment of foreign workers by the Malaysian governments and the Malaysian agricultural industry. Most recently, the enactment of the Immigration Act No.1154/2002 initiated the commencement of mass deportations of undocumented foreign workers which destroyed immigrant settlements and led to the forcible deportation of around 400,000 undocumented Indonesians.

At that time, Nunukan Island was home to approximately 45,000 people but as a one of a small number of deportation transit points it began receiving between 5,000 to 9,000 people daily after the implementation of the abovementioned Immigration Act. Woefully under-resourced, the local community on the island did not have the facilities to cope with the massive influx, and the lack of water, food, medical care and accommodation created a humanitarian disaster. The sudden action against undocumented workers had followed a period of relative acceptance of the need for foreign workers but there had been similar violent reactions before, such as the quick prohibition of Indian and Chinese workers, who had supplied much of the labour for the industrialised rubber plantations, immediately after independence from the British in the mid-1950s. The 80s and 90s had actually seen a period of more thoughtful progress with the signing of labour supply agreements, but then the backward step in 2002 (see page 14) reset the environment to create the situation today.

The tone of Malaysia's attitude toward foreign labour has saw-toothed toward a general societal acceptance of the economic

need for foreign labour by the millions but has vacillated between loathing and forbearance as evidenced by the latest round up of migrant workers in May 2020²¹.

LAWFUL RECRUITMENT

The guest worker programme integrated two basic principles, it is a work permit system that binds the worker to particular employers and localities. The programme was implemented during a time of labour shortages and a fragmentation in the labour market. A range of 'non-standard' or 'atypical' forms of employment appeared on plantations and chief among these was contract labour. Just as seen on plantations today, contract workers were recruited through labour brokers and employers also transferred some labour management tasks to contractors²², but as discussed some of these contractors are local mandors who in turn hire sub-contractors who may source from traffickers and smugglers.

A framework for authorizing licensed private labour brokers and intermediaries under the Private Employment Agencies Act of 1981 set out a schedule of recruitment fees for contract labour on plantations and it became mandatory for foreign workers to possess work permits and visas. Then in 1982, the government formed a Committee for the Recruitment of Foreign Workers that was tasked with the allocation of work permits for plantations in order to provide additional workers through legal channels.

Currently, workers may be lawfully recruited formally through the government mechanism²³ but many are recruited by independent private commercial operations that specialise in identifying, contracting, transporting and placing foreign workers on plantations²⁴. The activities of these independent recruitment agents regularly utilize unlawful practices and as set out below there is a long history of recruitments agents, particularly from India, engaging in such activities. Most recently, Malaysia entered into bilateral agreements with source countries, such as India²⁵, Bangladesh^{26&27} and Nepal²⁸, and it was intended that these would create a legal framework to reduce abuse, criminal recruitment practices and human trafficking.

Without the proper administration and enforcement the recruitment systems developed under the bilateral agreements can become corrupted. In 2018, a human trafficking syndicate, run by a Bangladeshi businessman with alleged political connections with the Home Ministry, made over USD450 million from Bangladeshi workers looking for jobs in Malaysia.

¹⁸ https://www.iseas.edu.sg/images/pdf/ISEAS_Perspective_2018_25@50.pdf

¹⁹ *ibid*

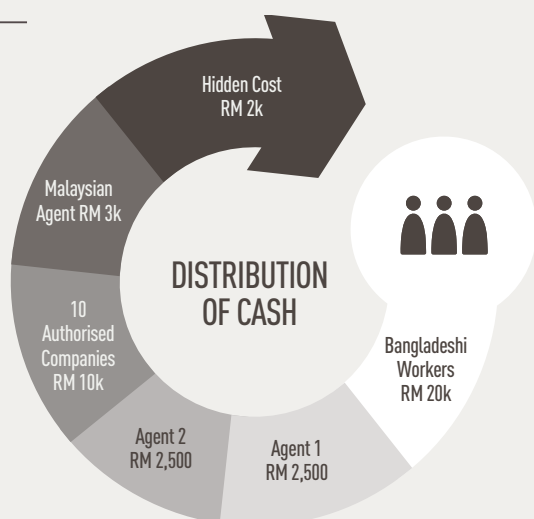
²⁰ <https://www.malaymail.com/news/what-you-think/2020/05/05/why-there-are-so-many-undocumented-migrant-workers-joseph-paul/1863413>

²¹ <https://www.aljazeera.com/news/2020/05/malaysia-detains-migrants-refugees-coronavirus-lockdown-200501134602431.html>

²² Contract Labour in Peninsular Malaysia. Front Cover. Rema Devi P. Institut Kajian Dasar, 1996

The investigation found that each worker paid RM20,000 to their local agents who then paid half of the sum to the syndicate to facilitate work permit approvals and flights to Malaysia. It was reported that ringleader even managed to secure the interest of ten companies and set up a new online registration system called Sistem Perkhidmatan Pekerja Asing (SPPA), the only one that could be used to hire Bangladeshi workers. Employers were required to pay RM305 for each worker hired from Bangladesh under SPPA, which is operated by a private company called Bestinet Sdn Bhd. Bestinet was also the company that developed the Foreign Workers Centralised Management

Figure 1:



System (FWCMS), used by the Immigration Department for foreign workers' visa applications. Monies collected under SPPA then apparently went to Bestinet as a service charge for the distribution of the workers to their employers²⁹.

The one to three million undocumented workers in Malaysia are testimony to the insufficiency of the recruitment system's capacity and the SPPA case above demonstrates how poorly governance and enforcement have been implemented. If the legal mechanism offered by the government does not reliably serve the Malaysian economy, both in relation to meeting

worker demand and in quality of governance, businesses will turn to other means. It would seem the country and the palm oil industry has simply turned back the clock to practices that were never truly expunged or replaced.

INFRASTRUCTURE OF RECRUITMENT AND HUMAN TRAFFICKING

As I wrote in an earlier paper on the palm oil industry *Destined for Trouble?*³⁰, the movement of individuals from other countries to Malaysia for work, particularly for the palm oil industry, is continuous, richly interconnected, sophisticated and complex. Workers do not simply find their way to the plantations. Their movement is directed and coordinated, much more complex and permanent than a simple process or arrangement created between three parties – i.e. agent, individual worker and plantation. Recruitment of workers can be characterised as deliberate and structured to achieve a population movement, a recruitment and migration industry together and as one. Professors Biao Xiang and Johan Lindquist spent considerable time researching and documenting the recruitment of migrants and describe the situation not as a process or network but as “recruitment infrastructure”³¹. This accounts for both documented and undocumented workers:

“This is increasingly obvious today, as more than ever before labor migration is intensively mediated. The notion of ‘migration infrastructure’ the systematically interlinked technologies, institutions, and actors that facilitate and condition mobility, opens up such spaces of mediation to analysis. For analytical purposes, we stipulate five dimensions of migration infrastructure: the commercial (recruitment intermediaries), the regulatory (state apparatus and procedures for documentation, licensing, training and other purposes), the technological (communication and transport), the humanitarian (NGOs and international organizations), and the social (migrant networks). These five dimensions indicate distinct logics of operation rather than discrete domains. For instance, commercial infrastructure functions by interacting with regulatory, humanitarian, social, and technological infrastructures. But in each dimension, the leading actors, the driving forces, the central strategies and rationalities, and the defining modus operandi differ.”³²

²³ <https://www.imi.gov.my/index.php/en/foreign-worker.html>

²⁴ Martin, Philip. *Merchants of Labor* (p. 64). OUP Oxford

²⁵ <http://archive.indianexpress.com/news/malaysia-india-sign-labour-pact/406525/>

²⁶ https://www.ilo.org/asia/publications/WCMS_459065/lang-en/index.htm

²⁷ http://www.ipcs.org/comm_select.php?articleNo=3801

²⁸ <https://www.gfmd.org/pfp/ppd/11125>

²⁹ <https://www.thestar.com.my/news/nation/2018/06/22/human-traffickers-made-rm2bil-syndicate-smuggled-in-over-100000-workers-from-bangladesh>

³⁰ winrock.org/document/destined-for-trouble/

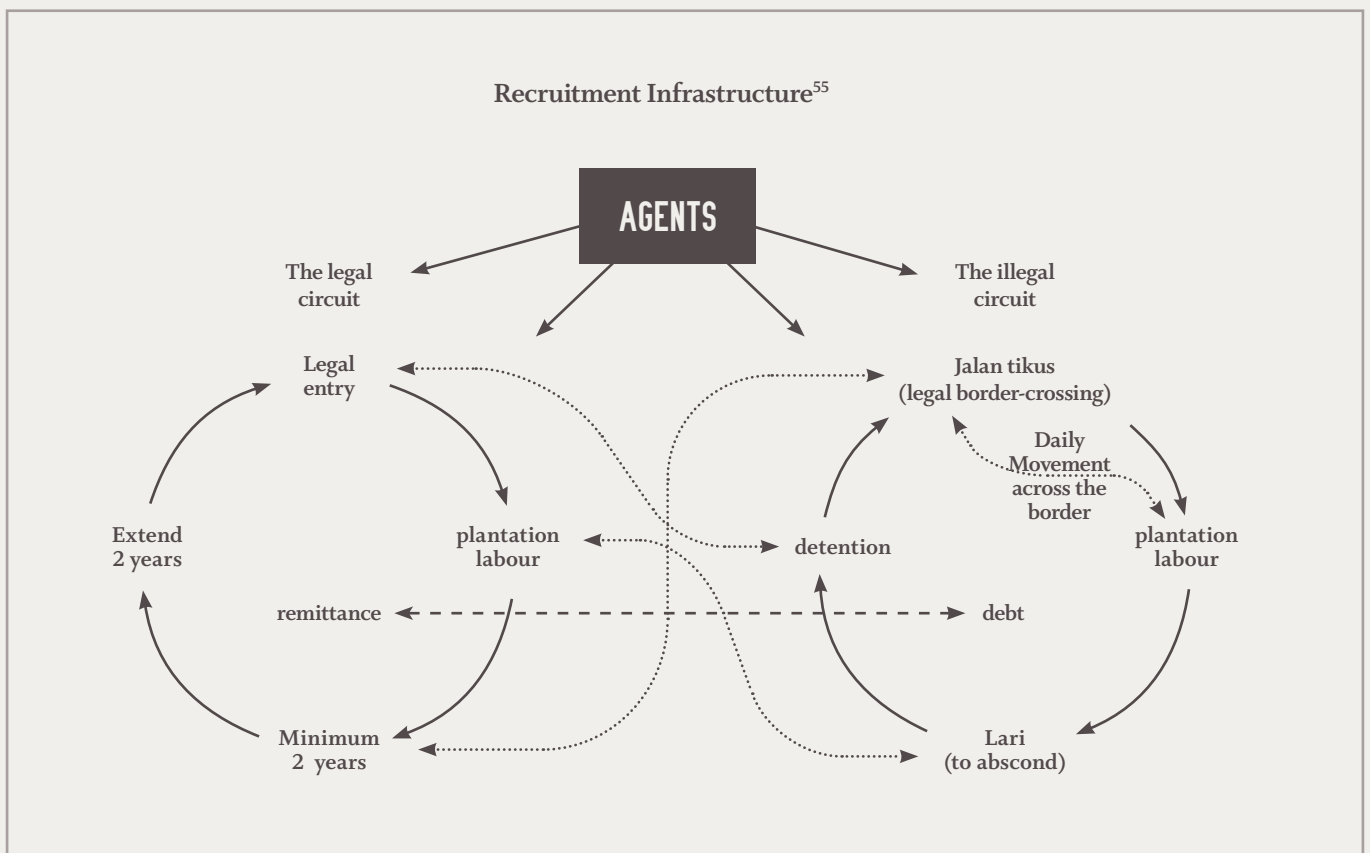
³¹ Biao Xiang and Johan Lindquist, “Migration Infrastructure,” *International Migration Review* Vol. 48 No. S1, 2014, pp. 123

³² Migration Infrastructure, Biao Xiang and Johan Lindquist, *IMR Volume 48 Number S1 (Fall 2014):S122–S148*.

³³ Biao Xiang and Johan Lindquist, “Migration Infrastructure,” *International Migration Review* Vol. 48 No. S1, 2014, pp. 123

³⁴ Biao Xiang and Johan Lindquist, “Migration Infrastructure,” *International Migration Review* Vol. 48 No. S1, 2014, pp. 123

Xiang and Lindquist found that the number of licensed recruitment companies and informal brokers in Indonesia had grown significantly since the 1997 Asian economic crisis.³³ This expansion corresponded with the increasing number of workers being sent abroad, from 200,000 workers in 1995 to 700,000 workers in 2007.³⁴



THEY ARRIVE IN DEBT AND DEFICIT AFTER THEIR JOURNEY

Dr Sunny Sanderson also spent considerable time studying the infrastructure of recruitment between Indonesia and Malaysia and illustrated it thus³⁵:-

The above infrastructure is not human trafficking activity and it is not a process run or coordinated by organised crime. Elements of the infrastructure are indeed unlawful and criminal, as indicated in the diagram above, but human trafficking largely occurs in parallel. Liberty Shared examined a human trafficking route from Indonesia and, similar to the SPPA case above relating to Bangladesh, we believe that traffickers control their entire process. Unlike the infrastructure of recruitment which

³⁵ Chapter 12, The Oil Palm Complex – Smallholders, Agribusiness and the State in Indonesia and Malaysia, Sunny Sanderson (2016)

Lindquist and Xiang described as “systematically interlinked technologies, institutions, and actors that facilitate and condition mobility”, organised crime seeks to maximise their financial profits by taking money from all transactions.

VULNERABILITY

The state of vulnerability of individuals moving to plantations via the “infrastructure of recruitment” is that though they may then be in conditions of forced labour on the plantation, many are not necessarily undocumented. They will have debts, perhaps to family but more likely to loan sharks, their passports will be taken and in order to get home they are going to have to work to make the money to travel. They arrive in debt and deficit after their journey, with no means of returning until they earn the necessary funds from their labour. It should not be necessary to explain this but for the sake of completeness, these are conditions of forced labour.

Below is an example showing how the lack of governance is caught by audit reports concerning the retention of workers’ passports on a plantation, activists confirm workers from this plantation had been interviewed.

Example of failures of corporate governance to resolve vulnerabilities causing forced labour: Passport Retention

+ Excerpt from Audit Report finding May 2016:

Criterion Y. YY No forms of forced or trafficked labour are used.

Findings:

From interviews with foreign workers, there was no evidence found of forced or trafficked labour or evidence of contract substitution. Workers passports are held by company until the worker accomplished thier contracts. This practice is not an efforts to force the workers to work but rather than to prevent the worker take illegal actions such as running away from the company's operations area. As a temporary passport substitution, company provide ID for each worker and provide cover letter if the worker need to go outside XXXXX's operations area. It was confirmed during interviews with sampled foreign workers that their passports are retained by the company, although this is agreed by the workers and they are allowed to return to their countries after completion of their 3 year contract with flight purchased on the company's expense and return on renewed contract.

There is no dedicated labour policy for migrant workers but the company has captured some elements of its commitment against forced labour through its [] Policies dated [] 2015.

+ Excerpt from Audit Report finding 2017:

6.12

No forms of forced or trafficked labour are used.

Indicator 6.12.1

The certification unit has Social Policy Sime Darby Plantations (approved by Managing Director, dated January 2015). This document was explained in point 6 that The certification unit does not condone forced labor or child labor (included trafficked labor). The certification unit had a recruitment agency under the "Workers Management Unit" and all the migrant worker, hiring process are going through the unit under the Human resource department from headquarters. Based on the interview there is no payment requested from the workers. The certification unit is holding the passpoert for each migrant workers and the evidence of the workers handing over the passport to be kept by the management was sighted at the estate and mill including the attendant list and consent agreement. The migrant workers are provided with the copies of passport and Identification Card of foreign workers has been provided by the workers to each of them. In case of the workers want to retrieve the passport, they will get it once they want to back to their own contires once the contract expired or in case of any special occasion / causalties as per management concern on managers approval and workers management unit. Based on the interviews, there is no restriction from the management team to release the workers to leave the operation area on the concern of management team. Process of retrieving the passport will be from the foreman → derk → and manager approval. There is no indication of force labour sighted during the audit at Kerdau POM (Sampling of Sg Mai Estate, Mentakab Estate, and Kerdau Mill).

+ Excerpt from Audit Report finding 2019:

Criterion 6.12:

No forms of forced or trafficked labour are used.

6.12.1	There shall be evidence that no forms of forced or trafficked labour are used. – Major compliance –	<u>All employees are legal with local identification card for local employees and foreign employees are with valid passports and working permits.</u> No evidence of trafficked workers were found during the audit.	Compiled
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+ Responses from activists relating to the same plantation 2020:

Despite the language in findings above from several years of Audit Reports, foreign workers claim they still do not have their passports.

WE FOUND THAT A PARTICULAR CHARACTER OF TRAFFICKING VICTIMS IS THAT THEY ARE MOVED THROUGH THE VARIOUS ISLANDS BETWEEN MALAYSIA, INDONESIA AND SABAH, AND BETWEEN SABAH, INDONESIA AND PHILIPPINES.

Human trafficking gives rise to much more severe vulnerabilities. First, and most obviously, unlike the above *infrastructure of recruitment*, there is no lawful element - it is criminal from the initial deceit of the victim to their delivery on a plantation. The victim will likely have been physically, and possibly sexually, abused, falsely imprisoned, extorted of their money, indebted to the criminal gang, undocumented and transacted into a labour environment that is criminal in nature. They are more likely to work on smallholdings or work as sub-contracted labour under a mandor in some isolated area of a large plantation.

We found that a particular character of trafficking victims is that they are moved through the various islands between Malaysia, Indonesia and Sabah, and between Sabah, Indonesia and Philippines.

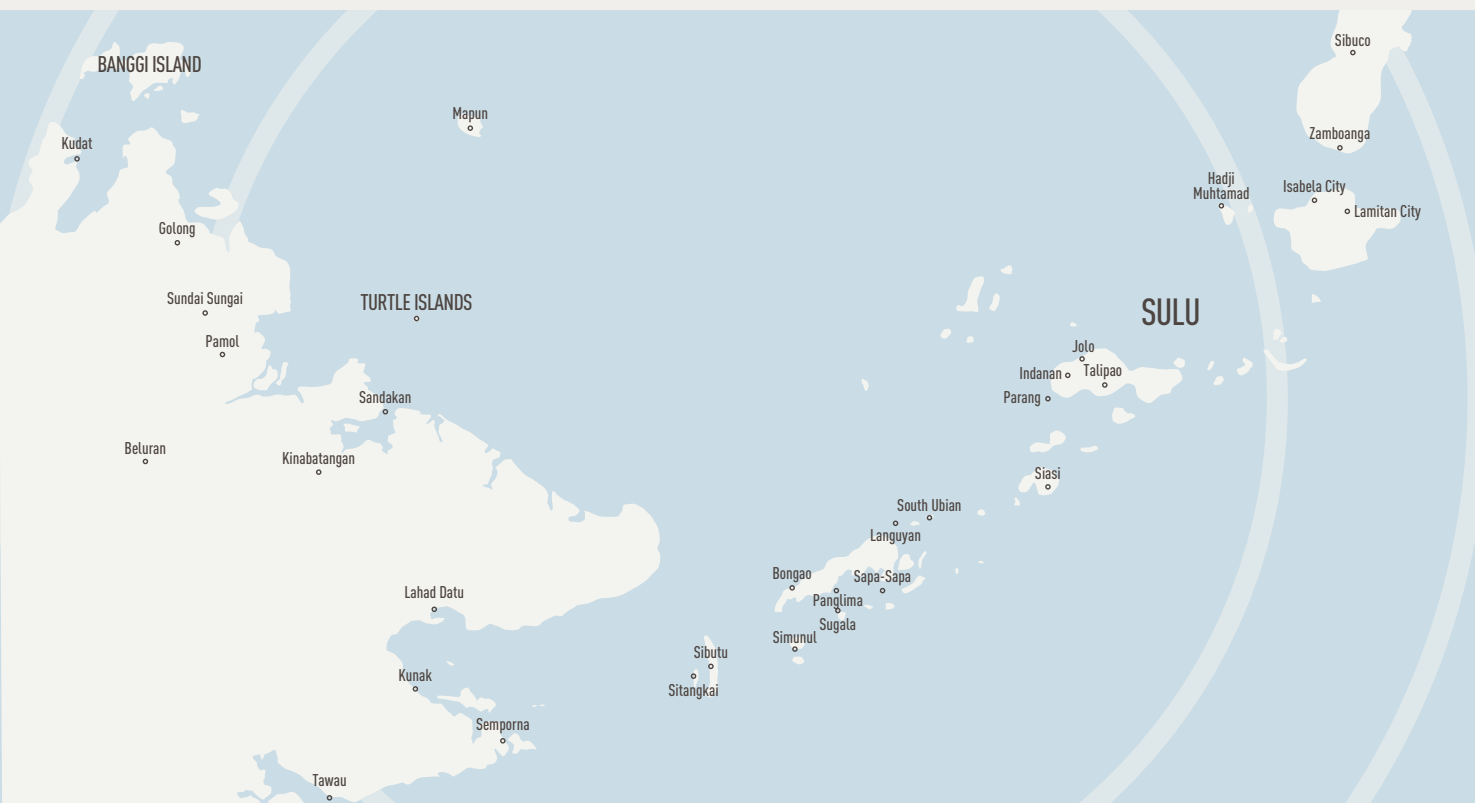
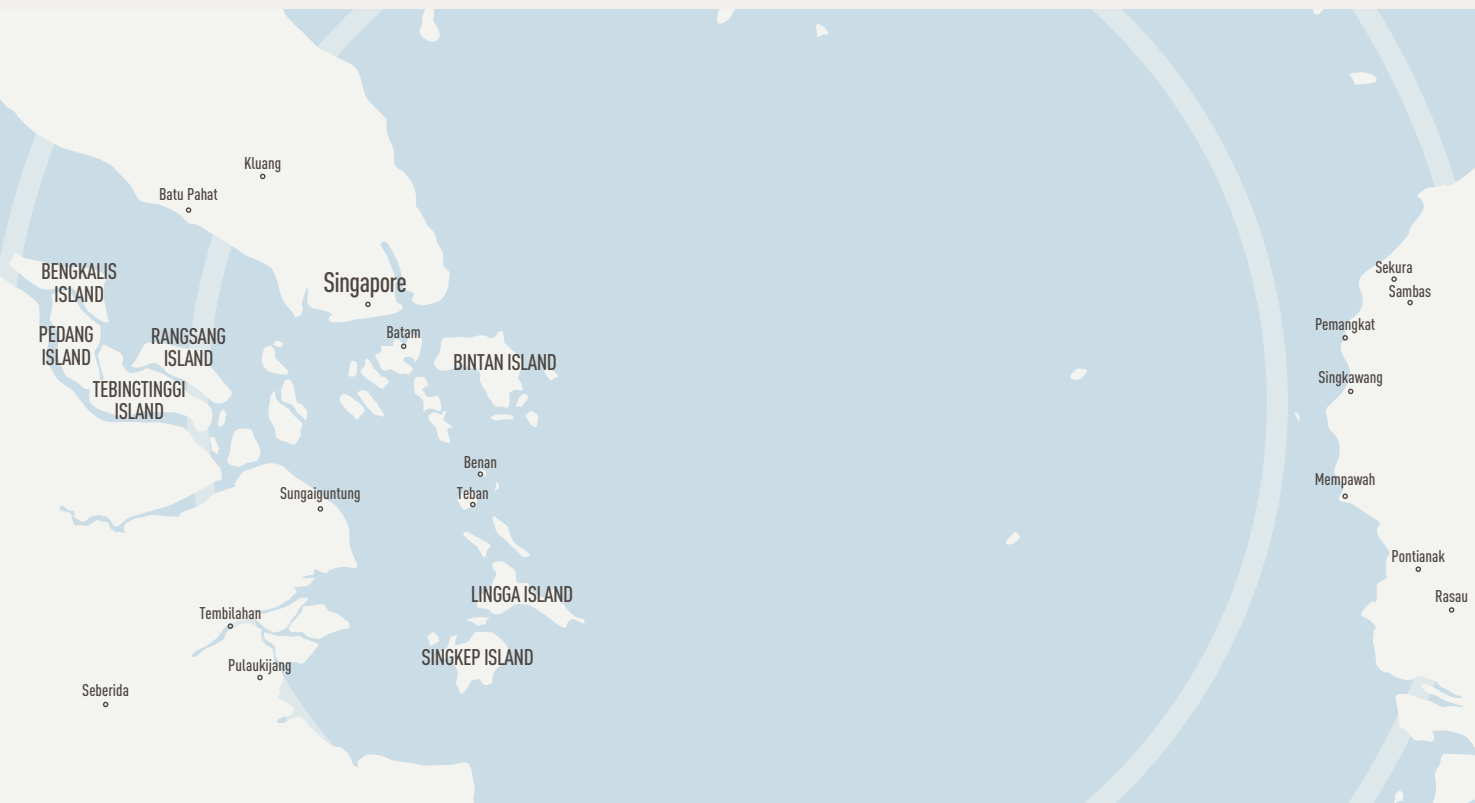
Any business regularly seeking to benefit from the labour of individuals by hiring them or contracting for their labour and who require the individual to be on the plantation continually should surely have the proper governance to ensure those workers are not further abused.

It seems clear that the palm oil industry regularly draws from sources of migrant labour who arrive in various states of vulnerability and that instead of resolving and/or supporting these individuals their situation is exacerbated by a lack of corporate governance and internal controls over plantation managers, supervisors and mandors. At the point a palm oil business contracts and onboards individuals to benefit from their labour, the process should ensure there is a full understanding of the vulnerability of the individuals and clear governance and control over the behaviour and conduct of the plantation managers, supervisors and mandors. There is little evidence of such governance and control from the conditions and treatment described by workers and from inconsistent findings in the audit reports.

CONTRACTING AND ONBOARDING

Any contracting process should involve a meeting of minds between the parties³⁶ but the character of the relationship between workers and palm oil plantations seems one which has the individual worker's expectations confounded and repeatedly undermined. Working conditions, remuneration, contract terms, deductions and management treatment are all different from that expected by workers prior to arriving on plantations. But then many of the actual terms of employment described by numerous workers and activists seem to be unlawful and potentially criminal in nature. Few interested in their own self-preservation would actively pursue these terms and conditions for their daily employment.

³⁶ <https://newjurist.com/fairness-in-english-contract-law.html>



As we have discussed, for many foreign workers their initial recruitment to a plantation is not done directly by employees of the plantation or an affiliated company but by an agency, perhaps registered but perhaps not. Experiences of workers, backed up by activists, describe the relationship between recruitment agent and supervisory plantation employees as very familiar and mutually beneficial. Even a cursory glance at the wide range of experiences of foreign workers prompts questions as to the nature of arrangements between the recruitment agent and plantation supervisors. It is very difficult to be convinced that there is any governance over the recruiting and hiring process. As mentioned, workers interviewed described situations where plantation mandors are given areas of a plantation to “run” and a budget with which they can find any labour to work the land. In these cases, workers interviewed indicated that labour could come from local organised crime using victims of human trafficking.

It’s hard not to be shocked and saddened at the seeming failures across the palm oil industry to implement basic governance and internal controls on their plantations to prevent workers across Malaysia and in Sabah from harm and to provide them with a lawful and acceptable standard of working conditions. There is little, maybe no, public information about white collar workers in the palm oil industry being subject to abuse and so this does not seem to be a systemic failing for workers at every level across the industry, rather it relates to those on plantations. With the appropriate investment in governance, management and controls, the situation of the plantation workers could enjoy a work environment as free of abuse as their white collar colleagues; alternatively history may just simply be against them.

RECRUITMENT DEFINED BY ITS OUTCOMES

As discussed already, the abuse suffered on plantations starts with abuse during the journey to recruitment. While the degree of legal responsibility of the relevant plantation business for that abuse must be debated, it is a mistake to separate the relationship between the abuse suffered during recruitment and that suffered during employment. This would ignore a plantation’s responsibility, at law and by self-disclosure, not to cause or continue abuse and certainly not to exacerbate abuse.

It is true that changes in Malaysian law required companies to enter into direct contracts with workers rather than simply contract directly with agents for the daily provision of labour, i.e. labour as a service, and that recruitment agents have to be registered. The implementation of ATIPSOM in 2007 should also have caused a reaction from the palm oil industry to change the treatment of workers on the plantations. Yet as already explored from a longitudinal perspective, the history

of the agricultural industry on the Malaysian peninsula, which stretches back some 150 years, has yet to record substantial changes in the treatment of foreign and local workers.

LOCAL, FOREIGN AND WHITE COLLAR WORKER CONDITIONS

A wide range of interviews have been conducted with various local and foreign workers over the last few years and it is worthwhile to examine their recruitment and work experiences as set out in the table below. For comparison, I have included my own experiences of roughly 15 years in the finance industry as a white collar worker in Asia Pacific (1999 to 2016) slightly before the period of work of the interviewers.

IT’S HARD NOT TO BE SHOCKED AND SADDENED AT THE SEEMING FAILURES ACROSS THE PALM OIL INDUSTRY TO IMPLEMENT BASIC GOVERNANCE AND INTERNAL CONTROLS ON THEIR PLANTATIONS

	Local	Foreign	The Author
Gender	All	There is no data but experience indicates likely to be greater proportion of males.	Male
Immigration Status	Citizens of Malaysia	Registered immigrant worker or illegal immigrant	HK visa obtained by employer. Singapore permit by employer.
Retention of travels documents	No	Very frequently	No
Payment to recruitment agent	Often recruitment is directly with company employee. Some reports of payments made to employee or sexual harassment in exchange for securing work	Many workers arrive via a recruitment who has often deceived the individual as to their destination and the location, nature and terms/conditions of the work. Many do not know they are to work on a plantation.	No. In fact fees equivalent to two/three months' salary paid by employer to agent
Pay	Complaints of not receiving even 60% of minimum wage	Rarely receive minimum wage but often more than local workers, perhaps as much as 90% of minimum wage	Substantially higher than minimum wage
Accommodation	Each employee can get access to a home for their family which continues as long as that employee remains employed. Contractors are not entitled to accommodation. This is a huge incentive for individuals who struggle to find adequate living conditions. One family per "house". Facilities bare minimum, some hardly sanitary. Often charged for electricity and/or water.	Given accommodation but 3-4 to a room. Rarely as described during recruitment. Facilities at bare minimum and often charged for cooking, electricity and/ or water.	Contribution to accommodation - 20% of salary and entitled me to tax relief at my discretion.
Deductions	Statutory deductions made regularly i.e. provident fund, health insurance BUT limited access to these benefits	Inconsistent deductions, sometimes not listed in payslip and rarely explained	No.
Contract	Many interviewed did not have a contract, verbal representation by supervisor (employee of plantation) and reference to "contract" but no document.	Uncommon, sometimes two contracts one by recruiter and one by plantation supervisor. Often in different languages, Bhasa and English, neither of which the workers understands!	Written and negotiated

	Local	Foreign	The Author
Education to children	Schools are provided for children of workers but often a shortage and not unheard of for children to still be sought for labour	Generally not relevant	No.
Overtime	Overtime assigned but unpaid	Overtime assigned but unpaid	End of year bonus
Remittances home from salary	Generally not relevant	Generally as much as possible	Sometimes
Harassment	Threat and actual sexual and other physical harassment	Potential and actual physical harassment	No.
Isolation	Able to leave the plantation	Many unable to leave due to distance, lack of ID documents and harassment by local law enforcement.	No. But team building sessions and entertainment (rarely attended)
Exposure to organised crime	Loan sharking not infrequent as pay is too low to be sustainable	At the recruitment stage involvement in organised/corrdinated	No.
Complaint mechanism	Infrequently available and infrequently used	Infrequently available and infrequently used	Yes and whistleblower mechanism
Protective Equipment	Rarely adequate	Rarely adequate	More than adequate
Mobile reception	Depends on location, often limited	Depends on location, often limited	Phone provided at employer's expense
MEANS OF COERCION IDENTIFIED	Threat of removal of accommodation (accommodation scarcity), vulnerability of children and family, wage theft and deductions, threat of sexual and physical harassment, open to harassment by organised crime and deception as to contract terms. No means of redress. Banking conflict of interest.	Via migrant status, passport retention (theft), wage theft and deductions, arbitrary penalties, threat of physical abuse, debt and fees to recruitment agents, isolation on planation, deception as to contract terms. No means of redress. Banking conflict of interest.	None. In fact only given incentives!!

SUMMARY OF DESCRIBED WORKING CONDITIONS

Every plantation is run much as an individual profit centre. It is the responsibility of the relevant manager and their mandors to meet their targets. With limited implementation of organisation-wide governance and internal controls over worker treatment, costs relating to workers and their conditions are an important variable cost component that can be squeezed to make profitability. Both domestic and foreign labour, documented and undocumented, are therefore subject to a wide range of labour abusive conditions within a plantation.

Workers interviewed across plantations owned by the same palm oil corporate groups were unable to provide any details of any consistent good governance practices and principles by plantation supervisors and their mandors. In fact, sadly, there are inconsistent practices and treatment between individual workers in the same teams. The management of labour often seems arbitrary and subjective and at worst discriminatory and prejudicial. At all times, there is very limited identifiable oversight in the workers' description of their treatment.

- + Local workers have a contract which seems one sided and places the local worker into a position of vulnerability. For example, terms may be varied without workers' consent and without cause. If they lose their employee status, ie they are demoted to contractors, then they immediately lose their right to accommodation. This stops workers from complaining and results in the creation of intergenerational arrangements to work on a plantation to retain housing. Local workers experience considerable wage deduction and it is their children who might be engaged with labour on the plantation.
- + The foreign workers interviewed had various experiences. Deductions from wages may arise for accommodation, water, electricity, insurance, pensions, medical care and some are simply unknown. All foreign workers interviewed have experienced deductions from their wages that they say were not agreed.
- + All foreign workers interviewed had their passports retained. Many believe that this was an acceptable practice. Some foreign workers were given copies of their passport and/or an ID card.
- + Fines or penalties arose and were incurred for lateness and failure to work properly, they are not consistently applied and seem arbitrary. Regardless, the workers say they had not agreed a fining system.
- + Threatened and actual violence against women is regularised in the work environment. Women workers stated they are harassed and at times, if they dissent, are relocated to isolated parts of the plantation or nearby forest and then abused by mandors.
- + Debts owed by workers to recruiters must be paid from wages
- + Workers interviewed were not paid the minimum monthly wage – about US\$290
- + Without passports, the workers cannot leave and if they have no copies, which is common, then are often arrested when they go to the local town to get their wages. Workers interviewed have been required to pay a “fee” by way of a bribe to their supervisors to obtain their passports.
- + Individuals are “required” to use the same bank as the employer which in context of the long history of labour abuse and wage theft should be considered a potential conflict of interest and a potential money laundering offence.

Work conditions against the International Labour Organisation's Forced Labour Indicators

FOREIGN WORKERS

It is important that the treatment and conditions of foreign workers on plantations are assessed against the International Labour Organisation's Forced Labor Indicators³⁷. However, for the purposes of this document and its arguments, the indicators were assessed in relation to the workers interviewed across a number of plantations run by various plantation businesses. The aim is to show that all indicators are satisfied but more crucially the degree to which each is present changes between the plantations of the same company and across companies. There is no consistency. The reason is simply that plantation managers and mandors conduct themselves with a high degree of autonomy, with little evidence of monitoring or regulation except an occasional audit (which is completed with often more than one month's notice in advance!).

³⁷ https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_203832.pdf

ILO Indicators of Forced Labour	Positive	Comments
Abuse of vulnerability	Yes	
Deception	Yes	Deceived by recruitment agent in relation to nature of work and level of pay
Restriction of movement	Yes	Passports retained, ID cards and copies of passport inconsistently available
Isolation	Not complete and total isolation but very isolated	With the exception of occasional trips to local village or town all time is spent on plantation. Some must pay mandor for transport – potentially corruption/extortion
Physical and sexual violence	Yes	Threats have been made against workers, see below.
Intimidation and threats	Yes	As claimed by the workers dangerous items have been thrown by the supervisor into accommodation
Retention of identity documents	Yes – passports retained and other forms of ID not issued (form of retention)	All retained BUT moreover no provision, such as a lock box, for workers to store their own passports safely and still have access. Audit report findings do discuss/explain SDP's intent with regard to passport retention
Withholding of wages	Workers should be paid minimum wage under Malaysia law	As set out in the contract below, there is an expectancy of minimum wage and also an expectancy of wage set out in the agreed contract. Neither are being satisfied
Debt bondage	Yes to recruitment agent or other third party	Debt incurred to pay for recruitment and therefore must work to pay off debt – this is the same as the previous kangani system (see below)
Abusive working and living conditions	Yes	Threats are made with arbitrary penalties and fines. Clear threat is to be sent to a remote part of the plantation, refused work and reprimanded verbally
Excessive overtime	Yes	Overtime is often unpaid

LOCAL WORKERS

It was not our original intention to focus on the experiences of local workers but as more was learned about their working conditions and treatment it became clear that there were important issues that should be explored. It is worth examining these experiences against the ILO forced labor indicators. Obviously local workers could not be coerced through retention of identity documents as they are Malaysian citizens.

The local workers describe a very different relationship with the plantation and the business. Unlike foreign workers, local workers are not on fixed-term contracts but regularly have an intergenerational relationship with the plantation with many children born on the plantation who then seek to work on the same plantation.

A primary motivation to work on a palm oil plantation is that housing is provided for employees. Many of the workers claim that they would be unable to afford housing elsewhere and this is well known by the plantation managers and mandors. The local workers explain that they experience considerable wage deductions and many local workers often turn to loan sharks in

local villages and towns and we understand it is not uncommon for the criminals to enter the plantations to offer loans or, as is more common, seek repayments. As the local workers are allowed to raise families in their housing, and for a fee keep uncaged chickens, the plantation is their home for both work and life. However, as housing is linked to service then it may be taken away immediately at any time without much reference to cause.

The terms of the housing contract do appear very onerous. Unfortunately, to prevent any retaliation, it is not possible to reproduce a copy of the various terms herein but, to summarise, if no service is provided by the workers then there is no right to the house, no renovations can be made inside or out, no additional electrics can be installed, there are requirements to upkeep surrounding landscaping trees and terms can be altered by the plantation business at any time. The threat of immediate loss of family accommodation seems an obvious mechanism for potential coercion and creating vulnerability.

The housing contract does not seem to give any assurances of continuity, it is essentially at the discretion of the relevant manager thus creating persistent vulnerability and an obvious unmitigated mechanism for coercion and abuse.

ILO Indicators of Forced Labour	Positive	Comments
Abuse of vulnerability	Yes	Abuse of accommodation and wage
Deception	Yes	Deceived as to pay as workers describe not receiving minimum wage and sometimes only 60%
Restriction of movement	Yes	Substantial vulnerability as to income and housing. They are tied together and may be removed at any time as workers and civil society members describe
Isolation	No	
Physical and sexual violence	Yes	Threats have been made against local workers
Intimidation and threats	Yes	Workers say there is continual threatened sexual harassment
Retention of identity documents	No	
Withholding of wages	Yes	Workers should be paid minimum wage under Malaysian law but workers report they never receive minimum wage. On top of this, there are also deductions that they cannot identify
Debt bondage	Yes	Because their wage is often much lower than minimum wage workers borrow from loan sharks. In fact loan sharks do enter the plantation and workers explained that loan sharks have abducted children to force and extort repayment which causes workers to enter into new arrangements with other loan sharks
Abusive working and living conditions	Yes	For local workers housing is provided by Sime Darby Plantations and may be removed at any time. This causes vulnerability and there is no clear grievance mechanism to prevent abuse Threats are made with arbitrary penalties and fines. A clear threat is to be sent to a remote part of the plantation and women threatened with rape, refused work and reprimanded verbally
Excessive overtime	No	

POOR GOVERNANCE AND INTERNAL CONTROLS LEAD TO COERCIVE PRACTICES AND ABUSE

It unnecessary for individuals who have made a risky, often harmful, journey to be recruited by a palm oil plantation business to be further abused by exploiting their vulnerability.

Foreign migrants who have been promised work on the plantations find themselves locked into labour arrangements under forced labour conditions, exploiting their inability to return home. Their vulnerabilities are exploited and the harm exacerbated. The mega and large businesses are capable

of implementing the necessary corporate governance, risk management and internal controls that can provide support and protection for these individuals as they are onboarded into a plantation's workforce.

No worker or activist we interviewed was able to describe any control mechanisms over the plantation managers and their mandors, they were unable to identify any grievance mechanism's and were unable to distinguish whether plantation managers were regularly trained and monitored. Workers intimated that they were generally fearful of the managers and mandors.

**CORPORATE
GOVERNANCE,
ENTERPRISE
RISK
MANAGEMENT
AND INTERNAL
CONTROLS**

WHY CORPORATE GOVERNANCE, ENTERPRISE RISK MANAGEMENT AND INTERNAL CONTROLS?

The subject of corporate governance, enterprise risk management and internal controls is massive and was once largely the purview of lawyers and accountants and the worry of boards of directors. As the global economy boomed in the 80s, and both public and private became at increasingly greater risk, the issue of how ambitious companies, and therefore investors' money, were managed became of great importance. In the beginning, as the great Jack Welch proclaim earlier in his career, ensuring investor returns was pretty much the sole goal of a company and its board. Governance and management was aimed at profitability, and little else.

However, as mentioned earlier in this document, even one of the world's great CEOs eventually saw a larger vision towards the end of his life. Corporate governance grew to include risk management and internal controls, and company law and securities regulation³⁸ developed to become more sophisticated and nuanced, moving beyond profitability. Secondly, as society's priorities have developed, by necessity or otherwise, other elements have been included such as corporate commitment and action in relation to diversity, inclusion, environmental concerns and social impact. For investors, these changes have coalesced into ESG strategies (or ESG themes depending on who one is speaking to) which purport to assess and rate accurately a company's commitment to and action on environmental, social and governance concerns. However, there is a catch - the responsibility and success for committing and acting in relation to E & S always falls to G. Pretty much everything a company does, global or local, comes down to how it is governed.

As repeated throughout this document, abuse and harm of workers on plantations has been repeatedly highlighted and reported for the last two decades. Moreover, the agricultural industry on the Malaysian peninsular has a long history of labour abuse issues. Substantial change in any corporation only comes when there is significant change in the governance by the board and senior executives which is then implemented through the organisational structure and culture. In relation to the management and treatment of employees and contractors on palm oil plantations, plantation managers, supervisors and mandors should work under a more onerous and robust governance framework that monitors their conduct and the impact on the workers on an ongoing basis.

“

WHAT IS CORPORATE GOVERNANCE?

Corporate governance is the system of rules, practices, and processes by which a firm is directed and controlled. Corporate governance essentially involves balancing the interests of a company's many stakeholders, such as shareholders, senior management executives, customers, suppliers, financiers, the government, and the community. Since corporate governance also provides the framework for attaining a company's objectives, it encompasses practically every sphere of management, from action plans and internal controls to performance measurement and corporate disclosure³⁹.

“

WHAT IS ENTERPRISE RISK MANAGEMENT (ERM)?

Enterprise risk management (ERM) is a plan-based business strategy that aims to identify, assess, and prepare for any dangers, hazards, and other potentials for disaster—both physical and figurative—that may interfere with an organization's operations and objectives.

The discipline not only calls for corporations to identify all the risks they face and to decide which risks to manage actively, but it also involves making that plan of action available to all stakeholders, shareholders and potential investors, as part of their annual reports. Industries as varied as aviation, construction, public health, international development, energy, finance, and insurance all utilize ERM.

More recently, companies have managed such risks through the capital markets with derivative instruments that help them manage the ups and downs of moment-to-moment movements in currencies, interest rates, commodity prices, and equities. From a mathematical point of view, all of these risks or “exposures” have been reasonably easy to measure, with resulting profits and losses going straight to the bottom line⁴⁰.

³⁸ <https://www.securitiesregulationmonitor.com/default.aspx>

³⁹ <https://www.investopedia.com/terms/c/corporategovernance.asp>

⁴⁰ <https://www.investopedia.com/terms/e/enterprise-risk-management.asp>

⁴¹ <https://www.investopedia.com/terms/i/internalcontrols.asp>

⁴² <https://www.ebrd.com/what-we-do/sectors/legal-reform/corporate-governance-videos.html>

⁴³ <https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/>



WHAT ARE INTERNAL CONTROLS?

Internal controls are the mechanisms, rules, and procedures implemented by a company to ensure the integrity of financial and accounting information, promote accountability, and prevent fraud. Besides complying with laws and regulations and preventing employees from stealing assets or committing fraud, internal controls can help improve operational efficiency by improving the accuracy and timeliness of financial reporting⁴¹.

To help understand how these three concepts and the underlying activities intersect, I refer to the European Bank for Reconstruction and Development's introductory materials on corporate governance⁴² and highly regarded Business Roundtable of the Harvard Law School Forum on Corporate Governance which outlined the Principle of Corporate Governance at the following Guiding Principles of Corporate Governance,

"Business Roundtable supports the following core guiding principles⁴³:

1. The board approves corporate strategies that are intended to build sustainable long-term value; selects a chief executive officer (CEO); oversees the CEO and senior management in operating the company's business, including allocating capital for long-term growth and assessing and managing risks; and sets the "tone at the top" for ethical conduct.
2. Management develops and implements corporate strategy and operates the company's business under the board's oversight, with the goal of producing sustainable long-term value creation.
3. Management, under the oversight of the board and its audit committee, produces financial statements that fairly present the company's financial condition and results of operations and makes the timely disclosures investors need to assess the financial and business soundness and risks of the company.
4. The audit committee of the board retains and manages the relationship with the outside auditor; oversees the company's annual financial statement audit and internal controls over financial reporting, and oversees the company's risk management and compliance programs.
5. The nominating/corporate governance committee of the board plays a leadership role in shaping the corporate governance of the company, strives to build an engaged and diverse board whose composition is appropriate in light of the company's needs and strategy, and actively conducts succession planning for the board.
6. The compensation committee of the board develops an executive compensation philosophy, adopts and oversees the implementation of compensation policies that fit within its philosophy, designs compensation packages for the CEO and senior management to incentivize the creation of long-term value, and develops meaningful goals for performance-based compensation that support the company's long-term value creation strategy.
7. The board and management should engage with long-term shareholders on issues and concerns that are of widespread interest to them and that affect the company's long-term value creation. Shareholders that engage with the board and management in a manner that may affect corporate decision making or strategies are encouraged to disclose appropriate identifying information and to assume some accountability for the long-term interests of the company and its shareholders as a whole. As part of this responsibility, shareholders should recognize that the board must continually weigh both short-term and long-term uses of capital when determining how to allocate it in a way that is most beneficial to shareholders and to building long-term value.
8. In making decisions, the board may consider the interests of all of the company's constituencies, including stakeholders such as employees, customers, suppliers and the community in which the company does business, when doing so contributes in a direct and meaningful way to building long-term value creation.



INTRODUCTION TO CORPORATE GOVERNANCE, ENTERPRISE RISK MANAGEMENT AND INTERNAL CONTROLS

For those unfamiliar with basic elements of corporate governance, risk management and internal controls, above is some introductory information. I have referred to existing texts and materials. Investopedia offers some reliable definitions for those at an introductory level.

From the extremely brief introductory information above, it should be obvious that the objectives of these activities are to control the business and ensure, at the bare minimum, resources, financial and otherwise, are not wasted and a priority is that risks and potential liabilities are identified, mitigated or completely avoided.

At present, risks and potential liabilities from corruption, bribery, fraud, conflicts of interest, inaccurate financial reporting and poor controls are the primary concerns of the governance framework. It is time that the risks of human trafficking, forced labour and child labour were also incorporated into obligations under corporate governance and therefore fixed into the risk management and internal controls activities. These would then be implemented as required procedures and practices at an operational level.

Risk management and internal controls are implemented by dividing the organisational structure into three lines of defence on which obligations are placed to manage and control risk. The first line of defence (FLOD) are those on the frontlines. In the palm oil industry, the first line of defence should include plantation managers, supervisors and mandors - as we have discussed they interact with the recruitment agents, they conduct the onboarding and contracting and they manage people who are in various states of vulnerability. Unfortunately, and rather conveniently, human trafficking, forced labour and child labour remain outside the corporate governance framework and, being outside, they exist solely as ethical and sustainability initiatives, strategies and aims and so the plantation managers, supervisors and mandors are generally free from the obligations of responsibility, accountability and both they and the company free from liability.

There are many examples showing how commitments to social issues like protection of worker vulnerability and human rights have not translated into obligations to operate with a zero tolerance policy or implement rigorous corporate governance. A good example of the difference is demonstrated by the wording of the Chairman's Governance Overview in FGV's (Felda) Annual Integrated Report 2019⁴⁴.



COMMITMENT TO ANTI-BRIBERY AND ANTI-CORRUPTION

I am pleased to report that our Anti-Bribery Policy Statement – which applies to all employees and sets out a zero-tolerance approach to bribery – is firmly in place.

The recognition followed a comprehensive gap analysis conducted early in 2019. Three key focus areas were examined – fraud, abuse of power and corruption. The results of the gap analysis led to training programmes and workshops that have reached out to all employees.

The ISO 37001:2016 standard meets the requirements set out in Section 17A of the Malaysian Anti-Corruption Commission Act 2009 and the Guidelines on Adequate Procedures which will take effect from 1 June 2020 onwards. This standard is a guide to assist organizations in establishing, implementing, maintaining and enhancing anti-corruption programmes.

SUSTAINABILITY

The Board embodies and promotes a corporate culture based on sound ethical values and behaviours from the top down, and this guides the Group's objectives and strategy.

Where possible, we look to take these values into our relations with suppliers and customers, as well as embed them in our compliance and internal controls, employee management, engagement and reward systems and responsibility to the environment and local community.

DATUK WIRA AZHAR ABDUL HAMID
Chairman

⁴⁴ <https://www.fgvholdings.com/investor-relations/annual-reports-presentations/>

⁴⁵ <https://www.fgvholdings.com/investor-relations/annual-reports-presentations/>

⁴⁶ <https://www.theguardian.com/world/2018/oct/25/1mdb-scandal-explained-a-tale-of-malaysias-missing-billions>

Chairman Datuk Wira Azhar Abdul Hamid's language on anti-bribery and anti-corruption, above, is unequivocal (highlighted in yellow)⁴⁵. The statement makes clear there is zero tolerance and that a gap analysis was conducted which resulted in training for all employees. The language makes it clear that FGV has received an ISO 3001:2016 certificate, which suggests that it meets the requirements of the Malaysian Anti-Corruption Commission Act. Considering the issues that arose from the 1MDB scandal⁴⁶, these statements of commitment and action are important for investors and other stakeholders. However, with regard to forced labour, human trafficking and child labour, these issues are an integral part of FGV's sustainability aims as set out at the beginning of the Annual Integrated Report 2019.

On pages 18 and 19 of the report, the different approaches to their action on anti-bribery and anti-corruption and their action on human rights and labour relations becomes much clearer. First, anti-bribery and anti-corruption are set out as a part of Governance, Ethics and Integrity which has a number of specific statements and policies which were the focus of "large-scale implementation across the Group encompassing operations throughout Malaysia". Whereas, human rights and labour relations are part of the Group Sustainability Policy. Ultimately, the language in the Chairman's Governance Overview under the paragraph titled "Sustainability" explains FGV's position as regards human rights and labour relations.

ASSESSMENT OF DISCLOSURES AND ACTION

The mega and large corporations in the palm oil industry have gone to great efforts and make substantial investments every year to draft and publish a range of disclosure and documents containing charters, reports, statements and policies⁴⁷ concerning human rights/trafficking and forced labour, environmental concerns and broader governance. In fact, a collaboration between the ASEAN CSR Network, the Institute of Human Rights and Peace Studies, Mahidol and Article 30, conducted research on human rights related corporate disclosure across ASEAN⁴⁸ and rated Sime Darby Plantations Berhad (SDP) as number one followed by Sime Darby Berhads against a framework of scoring they developed based on the UN Guide Principles on Business and Human Rights⁴⁹. SDP's position is probably as it should be. SDP utilise the services of a

New York based organisation, Shift⁵⁰, whose board of trustees is chaired by Professor John Ruggie, a creator of the UN Guide Principles on Business and Human Rights. Their human rights related disclosure should be good and it is, as the research report concludes⁵¹. What is missing from their assessment is the integration of human rights, specifically forced labour, child labour and human trafficking, into the obligations of corporate governance, risk management and internal controls making the business accountable and liable.

The important question is to determine whether or not the intent and ideas set out in the plethora of human rights and sustainability related disclosures have been developed into robust and effective corporate governance, risk management and internal controls to protect workers and prevent abuse, and implemented fully *to reach all employees*, to borrow a phrase from FGV's Chairman's Governance Overview, to ensure the improvement of conditions and treatment. A robust control environment, created by effective corporate governance, risk management and internal controls from top to bottom in an organisation, should reduce risk and should ensure workers' experience consistent conditions and treatment, there should not be a wide variance in experiences. Conditions and treatment should be in accordance with relevant legislation, regulations, internal governance, policies, procedures and practices. The governance framework should clearly set out the procedures and practices which are implemented from top to bottom through the organisational structure. The responsibility to undertake the implementation is not on the shoulders of NGOs, labour consultants/auditors and other civil society advisors, this would be greenwashing, a problem in the palm oil industry already highlighted by the Environmental Investigation Agency⁵².

The implementation is at the feet of the companies themselves and therefore the board of directors, senior executives, and senior management, down through the three lines of defence to the FLOD, the plantation managers, supervisors and the mandors. The structure of the corporate governance, risk management and internal controls should seek to ensure the actions and conduct of the company, its subsidiaries, employees and third party relationships are lawful and in accordance with its disclosures and representations.

Dr Andika Wahab of the Institute of Malaysian & International Studies, The National University of Malaysia, has examined the

⁴⁷ <http://www.simedarbyplantation.com/sites/default/files/2018%20SDP%20Modern%20Slavery%20and%20Human%20Trafficking%20Statement.pdf>

⁴⁸ http://www.asean-csr-network.org/c/images/190506-upload/Human_Rights_Disclosure_in_ASEAN-Executive_Summary.pdf

⁴⁹ https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

⁵⁰ <https://www.shiftproject.org/un-guiding-principles/>

⁵¹ http://www.asean-csr-network.org/c/images/190506-upload/Human_Rights_Disclosure_in_ASEAN-Executive_Summary.pdf

⁵² <https://eia-international.org/wp-content/uploads/EIA-Who-Watches-the-Watchmen-FINAL.pdf>

human rights disclosure among sustainably certified palm oil companies in Malaysia - his work sought to address the nature of the gap between disclosure and action. His study argues that although human rights is becoming a common feature in their public disclosure, their statements often lack substance and elaboration. In most cases, he concludes, companies do not disclose information regarding the conduct of human rights due diligence, detailed action plans and their progress, or the elaboration of partnerships with their suppliers and other expert organisations. Furthermore, he finds that, "For a few companies that report an elaborated human rights information, such information often the positive impacts of the companies have made. Companies do not disclose human rights risks they face, grievance they receive and efforts undertaken to mitigate human rights harms. This raises concerns regarding their motives of disclosure and corporate accountability in addressing actual and potential corporate-related human rights violations. With respect to specific human rights themes, the vast majority of the sample companies disclose elaborated information regarding safety and health, but less on the right of persons with disabilities."⁵³

All the mega palm oil companies have invested in robust disclosure, as described in the above. But Dr Wahab's conclusion seems to apply across the industry, they do not provide specific and clear details of ongoing issues experienced by foreign and local workers, they "do not disclose human rights risks they face, grievance they receive and efforts undertaken to mitigate human rights harms."

Responses by both foreign and local workers interviewed demonstrate that they are not aware they should be the chief beneficiaries of a strong and robust corporate governance, risk management and internal controls that provides them with protection and prevention from abuse such as conditions and treatment constituting coercion leading to forced labour. The workers did not seem aware of any of the disclosures published and the mechanisms and commitments described therein.

LIMITED DISCLOSURE OF CONTROLS OVER CONDUCT OF MANAGEMENT OF PLANTATION WORKERS

Reading the various annual reports of Wilmar International, Sime Darby Plantations and FGV, it is very difficult to be convinced that the protection of workers and prevention of worker abuse, of the nature described by workers themselves and by members of

civil society, is being effectively and sufficiently addressed in their corporate governance, enterprise risk management and internal controls. IOI Group do integrate their corporate governance, risk management and internal controls and worker protection, however the extent of implementation has not been openly and publicly confirmed by a third party.

Without a full inclusion and implementation in the corporate governance and enterprise risk management framework throughout the organisational structure, there can be no assurance that the protection of vulnerable workers and prevention of their abuse has the full weight and attention of the board of directors, senior management and functional heads, or the full weight of existing governance and infrastructure. From the available disclosure it can be argued, and well believed, that what happens on plantations seems to stay on plantations and worker abuse happening on one plantation could well happen on another or many.

Worker abuse is framed not as a human resources management issue, not a corporate governance, risk management and internal control issue, nor one of compliance with laws to avoid criminal actions and conduct on plantations. In fact, forced labour and child labour are not regularly mentioned

Our governance of risk adopts the Three Lines of Defence model:

- 1 First Line of Defence - comprising the business units and support functions, the first line of defence has primary responsibility for risk management at the operational level and are given sufficient flexibility to manage risks in a manner that is consistent with Group-wide standards and policies;
- 2 Second Line of Defence - The GRM and GC form the second line of defence. The primary role of GRM is to assist RMC in providing the framework and guidance to which the business units can operate, identify, and report on Group-wide risks. GC on the other hand, assists the Management in coordinating Group-wide compliance risk management activities (i.e. programmes or activities to identify, mitigate and educate employees about the risk of non-compliance); and
- 3 Third Line of Defence - The GCA is the third line of defence, who, as part of their internal audit activities, assist the GAC in ensuring that the Group's risk management process is appropriate and functioning as designed.

These three lines of defence in their respective roles are designed to reinforce each other in the implementation and strengthening of the Group's Risk Management Framework.

⁵³ <https://www.tandfonline.com/doi/abs/10.1080/13642987.2020.1716741?journalCode=fjhr20>

⁵⁴ <http://www.simedarbyplantation.com/sites/default/files/download/SDP-Annual-Report-2018.pdf>, pages 133

across the issued disclosure. Addressing forced labour and child labour specifically and setting out methods of prevention and protection are seemingly outside of the statements of governance framework, risk management and internal controls even though these acts may constitute unlawfulness and criminality under local and foreign jurisdictions.

PLANTATION MANAGERS, SUPERVISORS AND MANDORS ARE RESPONSIBLE FOR RISK MANAGEMENT

As mentioned several times above, corporate governance, risk management and internal controls are implemented via the standard “Three Lines of Defence model” of risk management, for example as set out in Sime Darby’s risk management statements⁵⁴. The excerpted paragraphs are included below. The use of FLOD, or first line of defence, in risk management is a very familiar and very widely used standard practice⁵⁵. In any business there are those functional personnel, such as line managers, supervisors, forepersons (e.g. mandors), as described in the excerpted paragraphs above, who are responsible at the operational level. To protect workers from coercion, abuse

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IOI GROUP

OUR SUSTAINABILITY APPROACH (PAGE 21)

To effectively manage all of our sustainability and operational risks, the Group coordinates risks and audit oversight through the Enterprise Risk Management (“ERM”) framework which is maintained by the board-level Audit and Risk Management Committee (“ARMC”). For the full report and information on our effective audit, risk management and internal control processes, refer to pages 91 to 102 in the IOI Annual Report 2019.

The sustainability risks that concern our operations include human rights, local community grievances, occupational health and safety, fire management, deforestation, climate change, biodiversity, and peatland protection. These risks are managed at the business unit level and are guided by approved standard operating procedures (“SOPs”).

PAGE 60

ETHICAL RECRUITMENT INCLUDING NO RECRUITMENT FEE

IOI plantations in Malaysia recruit workers from various countries including Indonesia, the Philippines, India, Nepal, and Bangladesh. Our comprehensive policy was developed in collaboration with relevant NGOs and ensures ethical recruitment practices are followed. This includes guidelines for pre-employment, employment, and post-employment.

IOI has a “No Recruitment Fee” policy in recruiting its foreign workers, and covers all legal costs without charges to the workers. Where possible, we ensure that workers are recruited directly and without engaging third-party agencies, mainly to avoid exploitation. If agencies are used, they are required to sign a letter of commitment adhering to IOI’s policies and we maintain a list of preferred partners, based on their reputation. All workers’ contracts are provided to them in their native language.

New employees’ travel costs from their country of origin to Malaysia are borne by IOI, and verification interviews upon arrival are held to make sure that their human rights have not been violated at any stage of the recruitment process. Workers are free to decide how and where they want their passports to be kept, including an option of a centralised passport locker with 24 hour access.

POLICIES MADE TRANSPARENT AND ACCESSIBLE

In the future, training about labour and human rights will be more focused on individual field workers, with training sessions taking place at least twice a year. IOI has initiated a Systems, Application, Products in Data Processing – Enterprise Resource Planning (“SAP-ERP”) platform. This means that information about labour rights (e.g. payment rates and leave entitlement) is increasingly held at a centralised location at IOI, with better standardisation and transparency.

⁵⁵ <https://na.theiia.org/standards-guidance/Public%20Documents/PP%20The%20Three%20Lines%20of%20Defense%20in%20Effective%20Risk%20Management%20and%20Control.pdf>

⁵⁶ <https://www.bsigroup.com/globalassets/localfiles/en-my/mspo/psr-2019/mspo-report-sime-bukit-kerayong-mill-and-estate-asa1.pdf>

⁵⁷ <https://www.farmlandgrab.org/post/view/21722-liberia-sime-darby-s-slave-camp-is-another-face-of-corporate-evil>

⁵⁸ see supporting documents

⁵⁹ <http://www.simedarbyplantation.com/sites/default/files/2018%20SDP%20Modern%20Slavery%20and%20Human%20Trafficking%20Statement.pdf>

and conditions of forced labour, the plantation managers and mandors are the first line of defence and yet the interviewed workers describe abuse by these very people.

As already explored in this document, the abuse of foreign and domestic workers on plantations on the Malaysian peninsular has a long history rooted first in the sugar and coffee plantations of the 19th century which became industrialized for the rubber production industry and which has continued since the mid-20th century on palm oil plantations. The behaviour and management practices of supervisors and mandors on plantations has yet to change to the extent that workers, investors and civil society can be assured that foreign and local workers will not be abused. Systemic behavioural change, altering plantation management practices followed for the past century, will be extremely difficult to achieve over the tens of thousands of smallholders but it is very unlikely to occur without leadership from those who can afford to develop and implement sufficient governance, management and controls to implement such changes.

CONCLUSION

Poor governance and control of the managers and mandors of plantation workers pose considerable risks to the workers but also to the company. Effective and robust corporate governance and internal controls should have been implemented to create company-wide best procedures and practices to ensure that plantation managers, supervisors/foreman (mandors) act in compliance with the law and in the interests of the business, its shareholders and, of course, for its workers. We believe that the presence of workers who have described treatment and conditions that can be deemed forced labor by satisfying the ILO forced labour indicators is unacceptable and undesirable for any corporation in any industry sector and increasingly unlikely to be acceptable to investors, financiers, purchasers and the general public.

Furthermore, descriptions of conditions and treatment provided by workers interviewed that may be deemed forced labour across plantations cast significant doubts as to the degree of effectiveness and sufficiency of past and existing corporate governance, risk management and internal controls. Moreover, the descriptions of worker conditions severely question whether published statements concerning protection

and prevention of workers, sustainability initiatives, corporate human rights charters and social impact objectives and aims have been and are being achieved and whether plantation managers, supervisors and mandors do act consistently in compliance with the law and in the interests of the business, stakeholders and ultimately workers.

More specifically, we believe it can be reasoned and strongly argued that the greater the variance in the conditions and treatment experienced by workers within and across plantations then the weaker and more insufficient the implementation of corporate governance, risk management and internal controls over employees managing and supervising plantation workers. At the very least, plantation managers and mandors should comply with any and all obligations and liabilities arising under laws and regulations from relevant jurisdictions (local and foreign), with industry association and certification requirements and with a plantation's own relevant policies, procedures and practices arising from their corporate governance, risk management and internal controls. It should be expected that all plantation managers and mandors know and understand these obligations. Reviewing the responses from the foreign and local workers interviewed, experiences from civil society members and other research, it can be strongly argued that if structural insufficiencies and weaknesses in corporate governance, risk management and internal controls cannot prevent and protect even one worker from experiencing labour conditions and treatment deemed forced labour then it cannot be assumed to prevent and protect other workers from experiencing similarly or worse conditions and treatment.

The Malaysian palm oil industry and its participants⁶² have been the focus of investigative civil society for many years⁶³ & ⁶⁴ focusing on operations in both Malaysia and Indonesia⁶⁵ & ⁶⁶. In response, the industry issued forth a spectacular array of impressive disclosure and public sustainability corporate policy initiatives. But the development and implementation of robust and comprehensive corporate governance, risk management and internal controls that would benefit foreign and local workers and protect and prevent them from experiencing and working in conditions and treatment of forced labour and abuse has not occurred and what has been developed has shown itself still to be insufficient and ineffective.

⁶⁰ <https://www.confectionerynews.com/Article/2018/11/07/New-worker-helpline-launched-to-tackle-human-and-labor-rights-issues-in-palm-oil-supply-chain>

⁶¹ <http://www.simedarbyplantation.com/sites/default/files/download/SDP-Annual-Report-2018.pdf>

⁶² http://humanityunited.org/pdfs/Modern_Slavery_in_the_Palm_Oil_Industry.pdf

⁶³ <https://www.reuters.com/article/us-malaysia-palmoil/malaysian-palm-giant-sime-darby-says-it-will-work-with-environmental-groups-idUSKBN2011RQ>

⁶⁴ <http://archivo-es.greenpeace.org/espana/Global/espana/report/other/quemando-borneo-3.pdf>

⁶⁵ <https://jakartaglobe.id/news/rspo-must-respond-complaints-sime-darby-rights-group/>

⁶⁶ https://www.asienhaus.de/archiv/user_upload/Palm_Oil_Workers_-_Exploitation__Resistance_and_Transnational_Solidarity.pdf

APPENDIX – SURVEY DETAILS

TOPICS

- + Gender
- + Country of origin (birth and domicile)
- + Asked family/friends for help
- + Asked NGO/CSO for help
- + Asked union for help
- + Undocumented worker
- + Size of family
- + Marital status
- + Children
- + Extended family dependents
- + Financial resources of family
- + Remittances to family members
- + Level of education
- + Current place of accommodation
- + Distance to nearest town
- + Regularity of visits to nearest town
- + Who owns current accommodation
- + Pressure to remain near accommodation
- + Victim work in a team?
- + Phone?
- + Sexual harassment
- + Dangerous/hazardous working conditions
- + Not paid
- + Lack of provision of medical care
- + Indecent assault
- + Overtime - paid or not?
- + Excessive hours
- + Deception
- + False information about law, attitude of authorities
- + Non-renewal of work permit
- + Abuse of illegal status
- + Lack of contract
- + Wage manipulation
- + Contract substitution
- + Non-adherence to repatriation obligations
- + Lack of occupational, safety training
- + Lack of provision of safety gear
- + Denial to unionize
- + Union busting behavior
- + No or insufficient sick leave
- + Denied access to legal services
- + Lack of transparent and accessible grievance mechanism
- + Forced to act against peers
- + Confinement or surveillance
- + Abuse of cultural/religious beliefs
- + Forced to lie to authorities, family, etc.
- + Intentional Infliction of emotional distress
- + Deceived about the nature of the job, location or employer
- + Deceived about conditions of work
- + Deceived about content or legality of work contract
- + Deceived about housing and living conditions
- + Deceived about legal documentation or obtaining legal migration status
- + Deceived about wages/earnings
- + Deceived about family reunification
- + Extortion
- + Non-compliance with instructions from supervisor
- + Received punishment for non-compliance
- + Deduction from wage for non-compliance
- + Loss of work opportunities for non-compliance
- + Relocation of work activities for non-compliance
- + Physical punishment for non-compliance
- + Child labour
- + Union involvement
- + Disallowed from communications with union?
- + Allowed to bring partner and children?
- + Payment/wage deduction for partner and children?
- + Partner and children needed for work completion?
- + Is wage insufficient?
- + Payment in cash?

- + Daily/weekly/monthly payment?
- + Payment to bank account?
- + Deductions per contract?
- + Payment as stated in contract?
- + Payment as promised at recruitment?
- + Payment in timely manner?
- + Consistent payment of agreed amounts?
- + Deductions for time off?
- + Corruption
- + Bribes
- + Court action
- + Unlawful arrest/ detention by authorities
- + Payments between corporate actors and perpetrators
- + Payments to recruitment agents
- + Loan sharking
- + Names of financial institutions
- + Names of individual recruitment agents
- + Names of individual transporters
- + Names of any involved law enforcement officers
- + New contract offered (so called revised version V2) to existing workers
- + Verbal description of the contract to illiterate workers
- + Existing workers will be able to accept and sign V2
- + Experienced any periodical assessment
- + Recognition of right to terminate (this is obviously difficult if passport retained)
- + If name of recruitment agent is known then is it registered?
- + Grievance mechanism available
- + Access to affordable medical treatment
- + Informed about insurance benefits
- + Return of all passports
- + Freedom of movement and no imposition of unnecessary conditions
- + Reduction of utilities burden on foreign workers



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