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# LIBERTY SHARED: CORPORATE ACCOUNTABILITY AND LIABILITY IN THE MALAYSIAN PALM OIL INDUSTRY

**LIBERTY SHARED**

CREATING AN ENVIRONMENT  
SAFE FROM TRAFFICKING

2019

# PREFACE

## Archana Kofecha

Asia Region Director and Head of Legal  
Liberty Shared

## Duncan Jepson

Managing Director  
Liberty Shared

## Plam Oil and Society

It could be said that most consumers know little about palm oil or its use, even though it is contained in a very wide variety of products ever present in most households across the world.<sup>1</sup> Many people are perhaps only aware of palm oil and the palm oil industry because of the ongoing public discourse and civil society attention on the social<sup>2</sup> issues, (e.g. the recent complaint against Felda<sup>3</sup>, one of the largest palm oil production companies, for awful labour practices and worker conditions) and the long standing environmental issues,<sup>4</sup> such as deforestation.

To a degree, the palm oil industry does openly accept that the social and environmental issues exist and it recognises that broader society increasingly wants these addressed because over the years it has responded with various initiatives. The most important demonstration of the industry's efforts to address the social and environmental issues is the establishment of the Roundtable on Sustainable Palm Oil<sup>5</sup> (RSPO) and the willingness of companies to join the RSPO. The RSPO is not a regulator and has no legal powers, however it does have mechanisms for certification, complaints, dispute settlement and investigation of its members.

At the end of November 2018, the RSPO demonstrated, as it has done on many occasions, that it is prepared to use its resources when the complaints panel brought

actions against FGV Holdings Berhad (Felda).<sup>6</sup> But huge and fundamental problems persist and the RSPO's efforts have not raised the standard of practices, even in the large companies, to the levels that convince concerned consumers, civil society, buyers<sup>7</sup> and investors<sup>8</sup> that the problems have been resolved.

This lack of resolution is largely driven by the failure of the industry and those concerned by the industry's impact to agree on the nature and extent of the problems. Those committed to examining the industry are motivated by details provided by many victims and observers which describe the nature of the social and environmental issues as often rooted in criminal and unlawful underlying activities such as bribery, organised crime, physical abuse and financial crimes. On the other hand, the industry continues to treat problems as ethical issues and social responsibility, but after several decades of promises and initiatives, the problems remain the same, only at a greater magnitude. Efforts by the industry to change its operating environment to eliminate organised criminality recruiting labour, debt arrangements imposed on workers on plantations, injuries caused by pesticides and continuing incidence of child labour, are unconvincing as they still focus largely on restitution rather than prevention. Disclosure is weak as there is little disclosure about relationships with recruitment agents, payments and the arrangements.

1 WWF, *Which Everyday Products Contain Palm Oil?*, available at <https://www.worldwildlife.org/pages/which-everyday-products-contain-palm-oil> (accessed 23 Jan. 2019).

2 Amnesty International, *Palm Oil: Global brands profiting from child and forced labour*, 30 Nov. 2016, available at <https://www.amnesty.org/en/latest/news/2016/11/palm-oil-global-brands-profiting-from-child-and-forced-labour/> (accessed 23 Jan. 2019).

3 Rainforest Action Network, *Palm Oil Giant FELDA Sanctioned Over Forced Labor, Human Trafficking*, 29 Nov. 2018, available at <https://www.ran.org/press-releases/palm-oil-giant-felda-sanctioned-over-forced-labor-human-trafficking/> (accessed 23 Jan. 2019).

4 EIA, *Time to get tough on environmental crime: legality in palm oil is essential*, 17 Sep. 2018, available at <https://eia-international.org/time-get-tough-environmental-crime-legality-palm-oil-essential/> (accessed 23 Jan. 2019).

5 See RSPO, available at <https://rspo.org/> (accessed 23 Jan. 2019).

6 Quartz, *A palm oil giant has been sanctioned over forced labor and trafficking workers*, 30 Nov. 2018, available at <https://qz.com/1479562/palm-oil-giant-felda-sanctioned-over-worker-trafficking-allegations/> (accessed 23 Jan. 2019).

7 Unilever, *Transforming the palm oil industry*, available at <https://www.unilever.com/sustainable-living/reducing-environmental-impact/sustainable-sourcing/transforming-the-palm-oil-industry/> (accessed 23 Jan. 2019).

8 Sustainalytics, *Palm Oil's Evolving ESG Risk Profile: Can Issuers Cope?*, 29 Mar. 2017, available at <https://www.sustainalytics.com/esg-blog/palm-oil-companies-esg-risk/> (accessed 23 Jan. 2019).

## Crime, unlawfulness, palm oil and Malaysia

That the operating environment of an industry should be so entwined with criminal and unlawful activity is of little surprise, and it is not unique to the palm oil industry. As discussed above there is work to combat this, it is just currently insufficient. The complaint against Felda and subsequent letter to Felda from the RSPO at the end of last year draws attention to problems that are repeatedly communicated to civil society by victims and migrants providing their labour to the industry.

“(i) FGV had by written agreements outsourced its foreign workers to FGV’s contractors in violation of Malaysian laws and this may be considered as acts done in furtherance of trafficking in persons. This is a violation of RSPO P & C 2.1 and 6.12 (details of which are further elaborated in the table below) that must be addressed by FGV as a matter of priority.

(ii) FGV’s recruitment and employment processes need further improvements as indicators of forced labour are present and cumulatively, points to a breach of RSPO P & C 6.12 including issues relating to contract substitution, freedom to contract and resign, passport retention and workers’ freedom of movement and workers’ working and living conditions (details of which are further elaborated in the table below).”

It continues.

“Reference should also be made to the ILO Indicators of Forced Labour, which are as follows:

- Abuse of vulnerability;
- Deception;
- Restriction of movement;
- Isolation;
- Violence;
- Intimidation and threats;
- Retention of identity documents;
- Withholding of wages;
- Debt bondage;
- Abusive working and living conditions; and
- Excessive overtime.”

The list above does not focus on the harmful activities that create and sustain the ongoing supply of labour, of which the injury to the victim is a consequence. This system supplying labour, or at least makes labour available, often

begins in a local village or town in another country with the deceit of an individual and then relies on organised criminal and unlawful arrangements to move people and money across borders until groups of workers are received and then located on a plantation. At present, palm oil businesses and governments have not implemented the effective governance, due diligence, monitoring to prevent the use of this unlawful and criminal system of supply labour or transform it.

Unless there is greater investment in business internal controls, governance and risk management concerning the outsourcing of labour and disclosure of the practices and arrangements so verification and external monitoring can be conducted then the businesses will continually have to contend with these issues. Global society, which includes buyers, product makers and investors, are not going to be convinced that there is control over these issues and the risk of abuse and active involvement in criminal and unlawful arrangements until there has been investment in lawful labour supply systems.

### Why ethics and corporate responsibility are inadequate?

The current and continuing reliance of many workers on a system of labour supply that is founded on transnational criminal and unlawful arrangements is the clearest argument against the capacity of ethical business initiatives and corporate social responsibility to solve these issues. Several decades have passed and the unlawful and criminal arrangements and structures are perhaps much more institutionalised<sup>9</sup> and structural than before. Furthermore, it is likely businesses have adjusted and priced in the ethical and social responsibility ‘risk’ and cost to their value propositions and have successfully arbitrated the risk between ethical and criminal.

The very visible continuation of the use of forced labour across the industry, as the Felda matter demonstrates, particularly the use of undocumented migrant workers, and the involvement with unlawful and criminal recruiters to provide is certainly proof enough that ethical business initiatives and corporate social responsibility efforts are not sufficiently persuasive nor effective. Ethical responsibility needs to sit in a framework of clear criminal, civil and regulatory liability so that arguments of business ethics are a refinement to an underlying legal position, they cannot be the primary default position for corporate governance

<sup>9</sup> UNODC, Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment (April 2013), available at <https://www.unodc.org/toc/en/reports/TOCTA-EA-Pacific.html> (accessed 23 Jan. 2019).

and management. It did not work in the banking and finance industry and there is little reason to believe it will work in non-financial industries.

As Supt. P.R Gunarajan A/L Ramayal of the Malaysian Police indicates in the July 2013 paper “Organised Crime: Governments Initiatives, Laws and Investigation of Human Trafficking In Person and Smuggling of Migrants in Malaysia”<sup>10</sup>, the problem is at a fundamental level involving various elements of criminality and unlawfulness such as smuggling, trafficking, corruption and networks of organised crime. It is a criminal issue, not simply an ethical one. The harm and injury caused from this criminal and unlawful system of labour supply, which touches upon increasing areas of the criminal, civil and regulatory frameworks, give rise to direct risk and liability for the plantations and producer businesses. Similarly so, for those stakeholders providing supporting services to these industry participants such as banks and auditors. Indirectly, laws and regulations with local and extra-territorial effect, give rise to risk and liability to those benefiting and profiting from the products such as buyers and investors. There must be greater liability and greater effort to hold liable and accountable those who deliberately continue to seek to profit from exploitative labour practices and fail to develop and implement robust risk management, governance and management for prevention and protection.

### **Accountability of corporations and their stakeholders**

To the question of accountability and liability, one is left asking – if not the corporations and their stakeholders then whom?

No doubt, to sustain and improve the rule of law, if it is so desirable, it is a government’s responsibility to apply more resources to rooting out corruption, as is arresting and convicting those found guilty of relevant offences. And it is a government’s function to propose legislation concerning anti-trafficking, modern slavery and the underlying issues. It is clear who benefits from the abused labour and who owns and perpetuates the business model and so those who are accountable. In the long term, it is better for the workers, investors, service providers and the economics of the industry if these parties are also held accountable and liable, allowing businesses with good practices to thrive and be rewarded appropriately.

Compliance and adherence with all laws and regulations is inherent in the capitalist model and so where it is failing then risk increases and business valuations must be adjusted. Society is increasing past the point of considering profiting from abuse of labour simply an ethical issue but one that should be punished and penalised. New legislation, consumer action, investor attitudes and civil society activity all demonstrate this changing perspective. At first blush, the controllers of a company and the company itself owning the businesses using labour in this unlawful and criminal manner are accountable, the question is the degree of liability.

<sup>10</sup> Supt.P.R Gunarajan A/L Ramayal, Organised Crime: Governments Initiatives, Laws and Investigation of Human Trafficking In Person and Smuggling of Migrants in Malaysia, available at <https://wyf.org.my/wp-content/uploads/2015/08/j-Paper-Presentation-Law-Enforcement-on-Human-Trafficking.pdf> (accessed 23 Jan. 2019).



## About this document

This document sets out the current underlying framework of law and governance that impose greater accountability and liability on businesses participating in the palm oil industry, those indirectly benefiting and profiting and those providing supporting services as the industry and its participants continue to rely, partly or wholly, on a criminal and unlawful system of labour supply.

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# RECOMMENDATIONS

## 1 For policymakers:

### **A more coordinated approach to legal and regulatory policy.**

Policymakers and regulators are hamstrung by the limits of their scope – in the case of lawmakers, there is a limit to jurisdiction and the scope of extra-territorial laws (the French Corporate Duty of Vigilance Law applies only to French companies; the UK and Australian Modern Slavery Acts applies to companies with some aspect of their business taking place in the UK or Australia, respectively). In the case of regulators, the remit is often even more restricted – ESG reporting requirements on the Bursa Malaysia by definition apply only to those companies listed there and cannot be an effective standard to compel, amongst others, private companies, to meet specific standards. The creation of a binding treaty enforcing a global standard is not necessarily a pipe-dream, but is likewise not imminent, and the terms of any such treaty cannot be accurately predicted. That said, there is scope for a more joined-up approach. To the extent that regulators and lawmakers can apply similar standards across a broader landscape will assist companies to understand their obligations, as well as victims to understand their rights. The palm oil industry relies on connections through the global markets and cross-border business and the legislation and policy needs to be similarly coordinated and cooperative.

### **Accountability not just for standards of disclosure and transparency, but standards of diligence to prevent human rights abuses.**

There is a material, substantive difference between holding companies accountable for failure to provide adequate disclosure, either under laws such as the California Transparency in Supply Chains Act, the UK Modern Slavery Act or ESG reporting requirements on a listing exchange, and holding companies directly accountable for labour abuse in their supply chains. Policymakers need to take brave steps to raise the accountability stakes for companies by applying not just standards of disclosure and transparency, but standards of diligence to improve policies and practices that prevent human rights abuses. In the absence of effective accountability mechanisms designed to punish behaviour and not just failures to report, it will remain difficult to effect meaningful change in the palm oil industry and beyond.

## 2 For companies:

### **Companies to meet the highest prevailing standards of compliance, rather than bare compliance with minimal requirements.**

Companies are increasingly subject to a range of new laws and regulations to which they were not previously subject. Companies are responding in kind by increasing the size of their compliance functions and the number of personnel dedicated to meeting more onerous reporting and disclosure requirements. In many cases, adherence to higher levels of diligence, however, remain voluntary. In recognition of developments in this legal space, and as a start of a race to the top, companies should seek to ensure they meet the highest threshold standards as these develop. This means ensuring human rights due diligence as a matter of course, ongoing audit work, and remedial action within supply chains and at the parent company level once failures are identified. Companies should not fear applying the highest standards of conduct, diligence, reporting and remediation. To do so would prepare themselves for further evolutions in the legal and regulatory landscape, reduce potential liability, and, in the eyes of interested stakeholders and consumers, would distinguish their level of accountability and responsibility.

### **Compliance with increased reporting, transparency and human rights due diligence standards should become a key concern at the level of the board.**

In some instances, this is already the case – slavery and human trafficking statements under the Modern Slavery Acts in the UK and Australia require board approval. But less directly, the threat of litigation, investor perception and reduced revenue from reputational damage may all reflect on the duties of directors to act in the best interests of the company in question. Directors' duties are not a monolith worldwide, but it is a general expectation that directors act in the furtherance of the company's goals and with shareholder value in mind. These drivers should prompt boards to prioritise human rights issues and failure to match improved standards, and failure to address root causes of reputational damage from involvement in labour abuse attributable to the company's business or its supply chain should be and must be a matter of increasing importance to directors in the conduct of their business. It may be the case that the boards with the greatest engagement are those that are associated with companies that have experienced significant reputational issues related to labour in their supply chains. In that case, boards of impacted companies may need to interact with other boards or publicise their experiences so that



other companies can learn from them and become more proactively engaged in risk identification and management/mitigation.

**Companies to improve ethical recruitment of migrant workers.**

Although labour brokers and recruitment agencies are directly responsible for employing well-documented fraudulent and unethical practices, companies that hire or contract with these agencies will also be implicated. To avoid facilitating forced labour unwittingly through their own recruitment process, companies should clearly define the scope of the recruitment process/responsibilities/costs, preferably adopt a fee-free model and shoulder the responsibility for paying for the recruitment costs of its migrant workers.

**Empowering the voice of workers to improve understanding of risks and private sector accountability.** In many large companies, active oversight within their businesses and supply chains may be difficult to achieve. This further marginalises many workers working on plantations in very remote locations and who are not using any smart phone technology. There is a need to develop the right means to harness the worker voice to complement other supply chain transparency measures in the sector. Different channels of open communication can ensure disadvantaged and disconnected groups of workers have access to mechanisms to express their voice.

### 3

#### **For NGOs and legal aid service providers:**

**Ensure appropriate victim remediation and compensation.**

Effective remedy for victims of forced labour remains the hardest obstacle to overcome, in spite of the developing framework of law and regulation designed to address corporate accountability for labour abuse in the palm oil industry and beyond. Policymakers are reluctant to unilaterally raise the bar for corporate accountability, and companies, in the absence of a binding legal obligation, will be reluctant at best to provide compensation to victims. The recognition of victims' rights implied by doing such will likely render a remedy impossible in those circumstances. That said, Malaysia has a well-developed set of laws to address forced labour and human trafficking, and a legal mechanism for the compensation of victims of the same. It is imperative that cases are brought before the courts to allow victims to seek compensation in line with existing laws in Malaysia.

**Build corporate-NGO partnership.** Through this collaboration, NGOs can act as independent watchdogs to improve communication and community engagement around recorded abuses in a safe and transparent manner. NGOs can provide insights and recommendations for companies to improve their policies and practices as well as help implement solutions that are funded by governments, foundations, or coalitions of companies in a fair manner.

**Educate workers as to their rights in Malaysia.** As a corollary to the above, enforcement of the law in Malaysia requires that victims are aware of their rights in respect of forced labour and human trafficking. In many instances, victims are not aware of their rights, or that they are entitled to compensation following a successful conviction. The resource inadequacy of victims in seeking due process in the courts often contributes to the limited instance of victim compensation. The situation is exacerbated in the instance of migrant workers, who have language and geographic barriers to seeking compensation in courts outside their country of origin. That said, raising awareness on workers' rights throughout the palm oil industry would better equip migrant workers who are most at risk of exploitative labour practices to better understand their labour rights and rights as victims of forced labour and human trafficking including rights to compensation.





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# I. THE PALM OIL INDSUTRY IN MALAYSIA AND WORLDWIDE

## The Industry

Palm oil production is a key pillar to the economy of Malaysia, which in turn is one of the largest palm oil producing and exporting countries in the world.<sup>11</sup> In 2018, the agriculture sector stood at 8.2 per cent or RM96.0 billion to the Gross Domestic Product (GDP) and oil palm was a major contributor to the GDP of agriculture sector at 46.6 per cent.<sup>12</sup>

In 2018, Malaysia accounted for 39% of world palm oil production and 44% of world exports, making it the second largest palm oil producer in the world after Indonesia.<sup>13</sup> According to the Malaysian Palm Oil Board, in 2017, Malaysia exported approximately 16.6 million tonnes of palm oil worth around RM50 billion (over USD12 billion). Taking other derivatives and side-products into account, Malaysia's export of palm oil products in 2017 reached 24 million tonnes, with a value of RM74.8 billion (almost USD18 billion) with the biggest share of exports heading to India, followed by China and the Netherlands respectively.<sup>14</sup>

## Palm Oil Investments

The financial industry becomes inextricably linked to the sheer scale of the palm oil industry. Financial institutions worldwide provide investment banking, commercial banking and asset management services to upstream palm oil producers which mostly consist of the planting and harvesting of oil palm and downstream companies which make further use of palm oil in their trading, manufacturing or electricity generating businesses. From 2000 to 2010, more than USD50 billion was invested in the Malaysian and Indonesian palm oil sectors, with banks providing an estimated 24% of the total financing required. Institutional investors and private shareholders also provide the capital necessary for commercial-scale palm oil agriculture.

A number of funds have direct investments in palm oil activities in their portfolios. Since a number of large companies involved in the production and supply chain of palm oil are listed on stock exchanges in Asia, tracker

funds<sup>15</sup> connected to indices also have interests in the industry. Palm oil is also traded as one of the major food and crop commodities in the global financial markets. In the public sector, the World Bank has spent more than USD1 billion in the industry, with a majority of its investment in Southeast Asia.<sup>16</sup>

## Palm Oil in Global Supply Chains

Although palm oil production, processing and refining predominantly take place in Indonesia and Malaysia (amongst other tropical palm oil producing countries), its ubiquity as a raw material in a wide range of products places it firmly within a global supply chain, the complexity of which, together with the geographical and cultural barriers between consumers and producers, makes it a challenge for end-users to monitor the origin and ethical sustainability of the products they buy.<sup>17</sup>

## Industry-wide Areas of Concern

As a key driver to the economy of producing countries, in some instances, sustainability of the production process has arisen as a concern for a variety of stakeholders – and for a range of reasons. Oil palm plantation is a major driving factor in deforestation in producing countries<sup>18</sup>, where tropical biodiversity has been destroyed to make way for oil palm plantations.<sup>19</sup> In Southeast Asia, 45% of sampled oil palm plantations came from areas that were forests in 1989.<sup>20</sup>

In addition, the industry has been linked to ongoing violation of labour rights, including forced and child labour. The U.S. Department of Labour has specifically identified palm oil produced in Malaysia as one of the goods produced using child labour and forced labour, lending the industry an unwanted reputation for labour abuse. Furthermore, civil society in Malaysia regularly observes a range of criminal activities around the palm oil industry mostly connected with the supply and control of labour drawn from the undocumented migrant labour population. In Bangladesh and Indonesia, civil society observe fraudulent recruitment practices to supply this population.

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- 11 Indonesia and Malaysia, which represent together only 11% of Asian oilseeds production, account for 71% of all Asian vegetable oil production (See Jean-François Mittaine, Oilseeds and vegetable oils in asia: a world of diversity, 21 Oct. 2016, available at [https://www.ocl-journal.org/articles/ocll/full\\_html/2016/06/ocll160040s/ocll160040s.html](https://www.ocl-journal.org/articles/ocll/full_html/2016/06/ocll160040s/ocll160040s.html)).
  - 12 Department of Statistics Malaysia, Statistics updated on 31 Dec. 2018, available at [https://www.dosm.gov.my/v1/index.php?r=column/ctwoByCat&parent\\_id=45&menu\\_id=Z0VTZGU1UHBT1VJMF1paXRRR0xpdz09](https://www.dosm.gov.my/v1/index.php?r=column/ctwoByCat&parent_id=45&menu_id=Z0VTZGU1UHBT1VJMF1paXRRR0xpdz09) (accessed 23 Jan. 2019).
  - 13 See Malaysia Palm Oil Council, available at [http://www.mpopc.org.my/Malaysian\\_Palm\\_Oil\\_Industry.aspx](http://www.mpopc.org.my/Malaysian_Palm_Oil_Industry.aspx) (accessed 23 Jan. 2019).
  - 14 Malaysia Palm Oil Board, Export of palm oil by destination: 2018 (Tonnes), available at <http://bepi.mpob.gov.my/index.php/en/statistics/export/192-export-2018/867-export-of-palm-oil-to-major-destinations-2018.html> (accessed 23 Jan. 2019).
  - 15 A tracker fund is an index fund that tracks a broad market index or a segment. For example, FTSE Bursa Malaysia Asian Palm Oil Plantation Index (MYR) aims to capture the performance of companies that earn a substantial proportion of their revenue from palm oil activities.
  - 16 The World Bank Group, Key Sustainability Issues in the Palm Oil Sector, available at [http://siteresources.worldbank.org/INTINDONESIA/Resources/226271-1170911056314/Discussion.Paper\\_palmoil.pdf](http://siteresources.worldbank.org/INTINDONESIA/Resources/226271-1170911056314/Discussion.Paper_palmoil.pdf) (accessed 23 Jan. 2019).
  - 17 See illustrative example of a complex palm oil supply chain at [http://sustainablesmartbusiness.com/content/wp-content/uploads/2016/01/347694\\_palm-oil-supply-chain.1-01.jpg](http://sustainablesmartbusiness.com/content/wp-content/uploads/2016/01/347694_palm-oil-supply-chain.1-01.jpg) (accessed 23 Jan. 2019).
  - 18 Climate Advisers, The Economic Impact at the National Level of the Illegal Conversion of forests for Export-Driven Industrial Agriculture (April 2018), available at <https://www.climateadvisers.com/wp-content/uploads/2018/04/Climate-Advisers-Costs-of-Deforestation-for-Industrial-Agriculture-11-2017-clean.pdf> (accessed 23 Jan. 2019).
  - 19 Environmental Investigation Agency, Palm oil plantation crime drives illegal logging in Indonesia, 16 Dec. 2014, available at <https://eia-international.org/palm-oil-plantation-crime-drives-illegal-logging-in-indonesia/> (accessed 23 Jan. 2019).
  - 20 Vijay V, Pimm SL, Jenkins CN, Smith SJ, The Impacts of Oil Palm on Recent Deforestation and Biodiversity Loss (2016), available at <https://doi.org/10.1371/journal.pone.0159668> (accessed 23 Jan. 2019).



There has been a concerted effort worldwide by stakeholders in the palm oil industry to address the industry's problems. More than 4,000 stakeholders involved in the palm oil supply chain have formed a non-profit organization, the Roundtable on Sustainable Palm Oil (RSPO), which provides certification for palm oil produced in conformity with a set of sustainability criteria. So far 13.64 million tonnes of palm oil, or 19% of palm oil produced worldwide, has gained the stamp of approval from the RSPO. Other widely adopted international certification standards concerning palm oil production include International Sustainability and Carbon Certification, Roundtable on Sustainable Biomaterials, and Rainforest Alliance, each of which seek to minimise the detrimental impacts of palm oil production on the environment and human rights. There are also multi-stakeholder initiatives e.g. The Palm Oil Innovation Group (POIG) that strive to achieve the adoption of responsible palm oil production practices by key players in the supply chain that go even further than the industry-wide certification like the RSPO. After drawing criticism that its standards were too weak, the RSPO recently approved a new standard that focuses on strengthening protection of human and labour rights.<sup>21</sup>

At a domestic level, national governments are beginning to take action to combat the issues arising from palm oil production on their doorsteps. The Malaysian government has launched its own Malaysian Sustainable Palm Oil standard (MSPO) to further regulate the production process. In addition, Green Commodities,<sup>22</sup> a project operated by the United Nation's Development Programme, aims to go beyond multinational supply chains and approach the issues at the local level by working with local authorities and partners.

## Legal Framework

National and international efforts at accreditation provide one response to the broadening concern around the effects of palm oil production. The legal and regulatory framework in Malaysia naturally goes further in the obligations it places on producers and investors in the industry.

### Local legal framework in Malaysia

The key legislation governing the palm oil industry in Malaysia is the Malaysian Palm Oil Board Act 1998 (the "Palm Oil Act"). Under this Act, the Malaysian Palm Oil Board ("MPOB") is established as the main regulatory body with responsibility for overseeing the palm oil industry. In addition, the Malaysian Palm Oil Board (Licensing) Regulations 2005 require that licenses from the MPOB are obtained for the planting, selling, purchasing, exporting and importing of palm oil products. The regulatory

framework applying to the palm oil industry also includes a number of other general laws, for example in relation to land and environmental matters.

In addition to the day-to-day regulation of the industry, there is an extensive set of laws applicable to workers in Malaysia, including within the palm oil industry.<sup>23</sup> These include the Employment Act 1955, Industrial Relations Act 1967, Minimum Wages Order 2016, Worker's Minimum Standards of Housing and Amenities Regulation 1990, Occupational Health and Safety Act 1994, Anti-Trafficking in Persons and Smuggling of Migrants Act 2007 (the **Anti-Trafficking Act** and the Children and Young Persons (Employment) Act 1966. These laws provide the typical set of guarantees and protections for workers in a mature economy.

*Basic protections include:*

- Minimum statutory standards of terms and conditions under which workers are to be employed
- Minimum age for child or young person engaged in hazardous work
- Minimum wage
- Minimum standards of housing and nurseries for workers and their dependents
- Health, hospital, medical, and social amenities as well as housing amenities
- Safety, health, and welfare of persons at work
- Dispute resolution between employers and workmen and their trade unions
- Freedom from slavery and forced labour

Most interestingly, Malaysia boasts a government-sponsored mechanism for compensation of victims of human trafficking. Under the Anti-Trafficking Act, the Malaysian courts are entitled to make orders for the payment of compensation to a victim of trafficking by a person convicted of trafficking the victim. The Malaysian government may legislate in the future to introduce heavier penalties for offenders, but the existence of a victim compensation mechanism is an important legislative device. Compensation for victims goes a step forward, and is often legally problematic for companies given the admission of legal liability it implies, and remains a panacea. It is however not the norm for palm oil related trafficking or forced labour cases to be heard in court. The mechanisms for assistance with dispute resolution, administrative complaint mechanisms, and criminal and court hearing proceedings are established in legislation but not always accessible in practice.<sup>24</sup> Many migrant workers, especially undocumented workers, even if they are victims of forced labour, are still reluctant to pursue remedies in the court or seek redress at the Labour Department and service providers often rely on informal mediation to resolve cases in Malaysia due to slow and ineffective

21 RSPO, RSPO Members agree on new palm oil standard to halt deforestation and improve human rights protection, 15 Nov. 2018, available at <https://www.rspo.org/news-and-events/news/rspo-members-agree-on-new-palm-oil-standard-to-halt-deforestation-and-improve-human-rights-protection> (accessed 23 Jan. 2019).

22 See Green Commodities, available at <http://www.greencommodities.org/content/gcp/en/home.html> (accessed 23 Jan. 2019).

23 See a full list of related laws and regulations, *Malaysia's Palm Oil Industry*, available at [http://freedom.collaborative.prod.s3.amazonaws.com/Malaysia\\_Analysis\\_120218\\_FINAL.pdf](http://freedom.collaborative.prod.s3.amazonaws.com/Malaysia_Analysis_120218_FINAL.pdf) (accessed 8 Feb. 2019).

24 ILO (2017), Access to Justice of Migrant Workers, available at [https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms\\_565877.pdf](https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/documents/publication/wcms_565877.pdf) (accessed 8 Feb. 2019).

administrative mechanisms.<sup>25</sup> Some of the cases are settled through complaints mechanism provided for by the RSPO; however, it appears that only a handful of cases have been filed in Malaysia, none involving labour rights abuses.<sup>26</sup> Information about the terms of settlement is not available in the public domain.

### Regulation of Investment in Palm Oil Industry

The Palm Oil Act does not contain specific provisions which govern investment in the palm oil industry, for example, by international financial institutions or funds. In the absence of a specific legislative regime for investment in the Malaysian palm oil industry, the general principles in the Securities Commission of Malaysia's "Malaysian Code for Institutional Investors" ("**Institutional Investor Code**") carry the most significant weight.

The Institutional Investor Code (which is not legally binding) applies to "institutional investors", being asset owners and managers with equity holdings in corporations listed on Bursa Malaysia. The Institutional Investor Code:

- is intended to give institutional investors guidance on the effective exercise of stewardship responsibilities to ensure delivery of sustainable long-term value to their ultimate beneficiaries or clients; and
- provides that institutional investors should incorporate corporate governance and sustainability considerations, including environmental, social and governance ("**ESG**") factors in their investment decision-making processes.

Examples of ESG factors that institutional investors should evaluate are specified to include corporate governance and business ethics, employee benefits and corporate culture, products, customers and supply chain and environmental and social impact.

On a global scale, the United Nations Principles for Responsible Investment ("**UNPRI**") seek to inform the international network of signatory investors on incorporating ESG considerations into investment decision-making and ownership practices, in a systematic way. In 2011, the UNPRI established the "Investor Working Group on Sustainable Palm Oil", which seeks to engage with companies operating across the palm oil value chain and better understand how they are managing the ESG risks associated with the palm oil industry. The need to identify labour abuse issues in the industry at an investor level is on the rise and investors have shown to make some progress as seen in the case of more than 90 institutional investors representing over USD6.7 trillion in assets under management writing to the RSPO calling on it to strengthen its green certification standards for palm oil production.<sup>27</sup>

## Business Governance Issues

Despite advances in technology, palm oil by its nature remains an extremely labour-intensive industry, one that is highly reliant on cheap sources of labour. Particularly in rapidly developing countries like Malaysia with a well-educated population and rising income levels, marginalised groups at risk of exploitative recruitment and employment practices such as migrant workers will invariably form the backbone of the industry. Notwithstanding purportedly robust legal protections and stringent certification requirements (referred to above), the lack of collective bargaining power held by the mainly migrant workforce makes it difficult to attract effective grassroots political support for reform, or for the enforcement of standards within palm oil-producing countries such as Malaysia, in the absence of external or industry-led initiatives.

Efforts to implement and enforce greater controls against abuse are constrained by factors such as:

- the remote rural location of palm oil plantations, frustrating efforts at direct oversight and interventions such as labour inspections. Agencies/volunteer groups assigned to enforcing parts of labour migration policies often abuse their authority, thus further marginalising migrant workers;
- worker permits that are tied to one employer making it impossible for migrant workers to switch employment and if migrant workers escape an abusive employer, they become irregular and can no longer secure a legal job with protections, making them even more vulnerable to further abuses;
- while large corporations involved in the industry have the resources and sophistication to implement remedial policies (or on which foreign regulations such as the UK Modern Slavery Act may apply to), the current audit schemes do not allow for proper assessment of labour conditions and identification of relevant issues on a continuous basis. Even if such remedial policies are available on large plantations, the same does not always apply to smallholders which are difficult to track and trace, but which are responsible for a significant proportion of total production;
- labour abuse may not always begin in the country of production. Recruitment often involves complex supply chains that begin in the workers' home countries, involving unscrupulous recruitment agents imposing excessive fees on workers repayable out of future earnings – creating debt bondage. Corporations often engage a recruitment agency or third-party contractor to hire migrant workers, thus the employer-employee relationship often lies with

<sup>25</sup> *Id.*

<sup>26</sup> Liberty Shared (2018). Malaysian's Palm Oil Industry, available at [http://freedom.collaborative.prod.s3.amazonaws.com/Malaysia\\_Analysis\\_120218\\_FINAL.pdf](http://freedom.collaborative.prod.s3.amazonaws.com/Malaysia_Analysis_120218_FINAL.pdf).

<sup>27</sup> Michael Holder, *Investors worth \$6.7 trillion advocate for better palm oil standards*, 20 Aug. 2018, available at <https://www.greenbiz.com/article/investors-worth-67-trillion-advocate-better-palm-oil-standards> (accessed 23 Jan. 2019).



the contractor and the workers; and

- official complicity and corruption of law enforcement officers remains a problem and impedes effective and swift investigation of offences under the Anti-Trafficking Act.<sup>28</sup>

These factors create the basis for exploitation. Instances of abuse that have been documented include:<sup>29</sup>

- opaque and exploitative recruitment systems in which migrant workers are traded between producers in order to circumvent migrant worker caps;
- insufficient provision of personal protective equipment or training;
- insufficient education about the safe usage of toxic chemicals and the effects of exposure;
- imposition of unrealistic quotas or incentive systems which encourage workers to co-employ family members (including children) in order to meet targets;
- earnings below national minimum wage;
- significant deductions from salaries;
- exploitative, forced labour indicators such as retention of workers' passports and other documentation; and
- involvement of organised and regularised criminal activities.

It is apparent that efforts at reform cannot be limited to top-down initiatives, nor can they be enacted in domestic legal isolation given the cross-border nature of the labour supply chain. Instead, individual companies must begin to adopt active oversight within their businesses and supply chains in a holistic fashion. As a resourcing matter, this may prove to be out of reach to all but the largest companies at present. It is also a fact that the worker voice is largely absent from the data sets currently available. Many workers particularly those in very remote locations are not using any smart phone technology and remain hard to reach. There is a pressing need to develop the right means to harness the worker voice as a very important supplement to the data currently available to companies (and publicly) through audits and other investigations.

<sup>28</sup> US Department of State, *Trafficking in Persons Report 2018*, available at <https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282701.htm> (accessed 8 Feb. 2019); See Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, A/HRC/29/38/Add.1 (1 Jun. 2015), available at <https://www.refworld.org/pdfid/5577eadc4.pdf>.

<sup>29</sup> Amnesty International (2016). *The Great Palm Oil Scandal: Labour abuses behind big brand names*, available at <https://www.amnesty.org/en/documents/asa21/5184/2016/en/> (accessed 23 Jan. 2019).









# II. THE DEVELOPMENT OF APPLICABLE LAW AND REGULATION

The development of new legal instruments, with extra-territorial effect, was not designed specifically to address labour abuses in the Malaysian palm oil industry; however, in each case, there is potential applicability of these laws both outside of their jurisdiction of origin and to the palm oil industry in Malaysia and elsewhere. By comparison with only ten years ago, there is much for companies to consider by way of regulatory requirement and potential liability. For those seeking to hold companies to account for their labour activities this provides some considerable ammunition. That said, the imposition of a range of uncoordinated laws, with inconsistent requirements, imposes an increasing burden on companies struggling to match the requirements. The creation of transparency through due diligence, supply chain mapping and disclosures creates more opportunities to hold actors in the palm oil industry accountable for practices that violate human rights, and governance and/or whose actions are detrimental to the environment. They do however open up the possibility of holding companies accountable for such abuse where it arises.

## Transparency Requirements versus Due Diligence

The past decade has witnessed a spate of new laws, regulations and reporting standards which place the onus on companies to ensure good practices in the treatment of their workers and to combat forced labour and modern slavery, including in the US, the UK, France, the European Union and Australia. Further jurisdictions are in the process of legislating in favour of similar laws, or considering the feasibility of introducing the same. At risk of suggesting that these laws and regulations can be considered a monolith, the primary focus concerns mandatory requirements as to transparency and due diligence on companies as well as further regulating the public procurement process. The following laws and regulations are already in place:

### a. United States (federal)

The Tariff Act in 1930, designed to reduce foreign competition with domestic production, contains other restrictions on the importation into the US of foreign goods produced by means of forced labour and mechanisms for private parties to report potential trafficking violations to US Customs and Border Protection (“CBP”). In turn, CBP has the power to seize and require forfeiture of such property. Depending on the nature of their misconduct, violators may also be subject to criminal and civil penalties. However, enforcement may be minimal given the difficulty in documenting the connection between labour practices and palm oil which can come from different sources, some of which are not certified or the origins of which are unknown.

In addition, the US Trade Facilitation and Trade Enforcement Act requires import companies to conduct supply chain due diligence to demonstrate their products were not mined, produced or manufactured with forced labour. There is also the Federal Acquisition Regulation (“FAR”) which requires federal contractors

or subcontractors engaged in contracts or subcontracts abroad involving services or supplies exceeding USD500,000 to create and implement compliance plans targeting trafficking activities. These entities must also certify, prior to accepting an award, that they implemented a compliance plan and, after conducting due diligence, either determined that, to the best of the contractor’s knowledge and belief, neither it nor any of its agents, subcontractors, or their agents are engaged in any trafficking activities, or the contractor took appropriate remedial and referral actions if any abuses were found. The FAR also requires US government contracting personnel to certify that it will not supply any end product from countries (subject to certain exceptions) that appear on the List of Goods Produced by Forced or Indentured Child Labour (which includes palm oil produced in Malaysia); or to certify that it has made a good faith effort to determine whether forced or indentured labour was used.

In 2018, the US has also implemented the Global Magnitsky Act which authorises the president to impose sanctions on certain foreign individuals and entities if they are involved in violations of internationally recognised human rights or are government officials or senior associates of government officials responsible for or complicit in acts of corruption.

### b. United States (California)

The California Transparency in Supply Chains Act of 2010 requires retail sellers or manufacturers doing business in the state of California with annual worldwide gross receipts in excess of USD100 million to publicly disclose their actions (if any) which they are taking to address modern slavery in their operations and supply chains. While there is no financial penalty for non-compliance with the California Transparency in Supply Chains Act, injunctive relief can be sought against the relevant entity to make the necessary disclosures.

### c. United Kingdom

The Modern Slavery Act of 2015 (the “UK Modern Slavery Act”) applies to companies (and other commercial entities/organisations) who do business in the UK, and have a global annual turnover of £36 million or more. It is similar to its US counter-part, the California Transparency in Supply Chains Act, in that it also requires companies to prepare a slavery and human trafficking statement for each financial year of the organisation setting out the steps (if any) they are taking to ensure that slavery and human trafficking are not taking place in any of its supply chains or businesses. The statement must be approved by the board and signed by a director. Again, there are no financial penalties but injunctive relief can be sought to force the organisation to publish a slavery and human trafficking statement and failure to comply with such injunction can lead to an unlimited fine. In October 2018, the UK Home Office provided a high-level overview of the minimum legal requirements applicable to statements and recommended statement content



of the parent entities to clearly include names of the entities covered by the statement.<sup>30</sup> Further, in 2017, the UK's Criminal Finances Act also entered into force which enhances the ability of law enforcement offices to freeze and/or seize assets alleged to be connected to gross human rights abuses (including forced labour).

#### d. France

The “Corporate Duty of Vigilance Law” passed in the French Parliament in 2017. This law imposes a duty of vigilance on parent companies incorporated or registered in France for two consecutive fiscal years with either: (a) more than 5,000 employees working for the company and its direct or indirect French-registered subsidiaries, or (b) more than 10,000 employees working for the company and in its direct or indirect subsidiaries globally to adequately identify risks and prevent serious violations of human rights and fundamental freedoms, risks and serious harms to health and safety and the environment within their supply chains. The law also requires companies to have in place and publish annually due diligence plan. More than any other existing law in this space, it is thought that this law may allow for the circumvention of the corporate veil,<sup>31</sup> and goes further than other existing legislation by imposing diligence and remediation requirements on companies acting in breach of acceptable labour standards in their operations wherever based, including directly or indirectly controlled entities and subcontractors and suppliers with whom companies maintain an ‘established business relationship’. Any concerned parties can file a complaint with the relevant jurisdiction asking judicial authorities to order a company to establish, publish and implement a vigilance plan. Moreover, a victim can also engage the company’s liability through civil action and ask for compensation when a company’s violation of its legal obligations has resulted in damages.

#### e. European Union

The EU Non-Financial Reporting Directive 2014/95/EU (the “**Directive**”) requires large public-interest companies with more than 500 employees to report in their annual reports on the impact of their business activities on non-financial matters including human rights. However, the Directive (which requires implementation within the individual Member States and such Member States may decide whether to impose any penalties under the Directive) does not require companies to pursue additional measures to address the reported impacts. There are additional laws and regulations across the different European countries.

The European Parliament resolution of 4 April 2017 on palm oil and deforestation of rainforests (2016/2222(INI)) calls on the European Commission

to introduce a single certification scheme for palm oil entering the EU market and calls on the EU to introduce minimum sustainability criteria for palm oil and products containing palm oil that enter the EU market, one of which being not contributing to the economic, social and environmental problems and conflicts, including child labour, forced labour, land grabbing or the eviction of indigenous or local communities and fully respecting fundamental human and social rights, and is in full compliance with adequate social and labour standards designed to guarantee the safety and wellbeing of workers. Such a certification scheme will no doubt create better traceability and accountability relating to those buying and importing palm oil and related products. It also provides the European Commission with leverage to influence change within businesses dealing in this commodity.

#### f. Australia

The Australia Modern Slavery Act applies to entities which do business in Australia with a consolidated revenue of A\$100 million or greater including the Australian government and corporate Commonwealth entities. The Australia Modern Slavery Act requires businesses to submit annual “modern slavery” statements that complies with certain mandatory reporting criteria, which includes information about: structure, operations and supply chains; risks of modern slavery practices in the operations and supply chains of the reporting entity, and any entities that the reporting entity owns or controls; actions taken to assess and address those risks, including due diligence and remediation processes, and how the reporting entity assesses the effectiveness of such actions. The scope of the modern slavery reporting is extended to public procurement activities. There are currently no penalties for companies that fail to report. The potential introduction of civil penalties for non-compliance will be revisited as part of the compulsory three-year review of the law.

At a state level, the Modern Slavery Act 2018 No 30 (the “**NSW Act**”) applies to businesses that have at least one employee in New South Wales and supply goods and services for profit or gain. Unlike the Australia Modern Slavery Act, the NSW Act will not apply to any New South Wales government agency. Under the NSW Act, each organisation must prepare a Modern Slavery Statement similar to the Australia Modern Slavery Act. A key difference is that large penalties, including fines of up to A\$1.1 million, will apply under the NSW Act for organisations that fail to prepare a statement or provide false or misleading information.

30 Ropes & Gray, *UK Home Office Ramps Up Modern Slavery Statement Expectations – Recent Developments and Compliance Recommendations for Multinationals*, 12 Nov. 2018, available at [https://www.ropesgray.com/en/newsroom/alerts/2018/11/UK-Home-Office-Ramps-Up-Modern-Slavery-Statement-Expectations?utm\\_source=alert&utm\\_medium=email&utm\\_campaign=UK-Home-Office-Ramps-Up-Modern-Slavery-Statement-Expectations](https://www.ropesgray.com/en/newsroom/alerts/2018/11/UK-Home-Office-Ramps-Up-Modern-Slavery-Statement-Expectations?utm_source=alert&utm_medium=email&utm_campaign=UK-Home-Office-Ramps-Up-Modern-Slavery-Statement-Expectations) (accessed 23 Jan. 2019).

31 S Brabant and E Savourey, *Law on the Corporate Duty of Vigilance: A Contextualised Approach*, 14 Dec. 2017, available at <https://www.business-humanrights.org/sites/default/files/Law%20on%20the%20Corporate%20Duty%20of%20Vigilance%20-%20A%20Contextualised%20Approach%20-%20Int'l%20Rev.Compl.%20%26%20Bus.%20Ethics.pdf> (accessed 23 Jan. 2019).

There are several other laws and regulations which are still at the proposal/legislative stage: -

#### a. The Netherlands

The proposed Dutch Child Labour Due Diligence Law is expected to require companies selling goods and services to Dutch end-users to take certain detailed due diligence steps to determine whether there is a reasonable suspicion that the goods or services provided in the course of the company's business may have been produced with the use of child labour. For the quality of this assessment, due diligence is expected to be aligned with international guidelines, including the ILO-IOE Child Labour Guidance Tool for Business and the UN Guiding Principles on Business and Human Rights. If so, the company must develop and carry out an action plan to combat this. The company must issue a due diligence statement on the investigation and (if necessary) the plan of action. This law is not about reporting requirements but about compulsory due diligence, hence companies only have to submit the statement once, which is different from the UK Modern Slavery Act and the French Corporate Duty of Vigilance law, both of which require an annual statement. Any person (natural or legal) can file a complaint with the regulator on the basis of concrete evidence that the company's products or services were produced with child labour. It is currently contemplated that the failure to do so may, in the first instance, lead to minor fines and, in cases of repeated offences, heavy fines or even imprisonment of the responsible directors. The highest penalty for failure to follow the law can involve imprisonment and fines of €750,000 or 10% of the company's annual turnover.

#### b. Switzerland

In what may be perhaps the most ambitious law under consideration, Switzerland is taking steps to impose a human rights due diligence bill as part of its citizens' Responsible Business Initiative. The bill will impose civil liability for parent companies where damage to life & limb or property has happened, and only when being a result of violating international standards, ratified by Switzerland. Companies will not be held liable if they can demonstrate they have undertaken due diligence to comply with the law.<sup>32</sup>

#### c. Canada

A private member's bill was recently introduced entitled "C-423 – An Act respecting the fight against certain forms of modern slavery through the imposition of certain measures and amending the Customs Tariff"<sup>33</sup> (the "Bill C-423"). The Bill C-423 targets corporate actors that meet the requirements that (i) manufacture, produce, grow, extract, process, or sell goods in Canada or abroad or (ii) import into Canada goods manufactured, produced, grown, extracted, or

processed outside Canada, and the entities they each control. The Bill C-423 would require the entities to submit a public report on the steps taken to prevent and reduce the risk of forced and child labour, the structure of its supply chain, any relevant policies, activities that carry risks of forced and child labour, remedial measures and any corporate training provided by the entity. Penalties for non-compliance include fines up to CAD250,000 on summary conviction and the Bill C-423 includes director and officer liability. Persons or entities that knowingly make a false or misleading statement will also be guilty of a summary conviction offence and liable to fines up to CAD250,000. The proposed regime is essentially a disclosure regime; however, it also includes an amendment to the Customs Tariff to allow the minister to prohibit the importation of goods produced wholly or in part through forced or child labour.

## ESG and Mandatory Reporting

Application of hard law inevitably creates the most comprehensive response from companies faced with new requirements and liabilities. On the less onerous end of the scale are the range of enhanced reporting requirements for listed and in some cases, unlisted companies, in Malaysia and elsewhere.

The Malaysian securities exchange (Bursa Malaysia) is also a part of the 'Sustainable Stock Exchange Initiative' that aims to build the capacity of stock exchanges and securities market regulators to promote responsible investment in sustainable development and advance corporate performance on environmental, social and governance issues – especially to integrate the UN Sustainable Development Goals. Bursa Malaysia imposes certain environmental, social and governance reporting requirements on issuers whose securities are listed on its exchange.<sup>34</sup> The listing requirements oblige listed companies to include a sustainability statement meeting certain requirements in their annual report or on their website. The sustainability statement is required to include:

- a. the governance structure that the Listed Company has put in place to manage economic, environmental and social risks; and
- b. how "material" sustainability matters are identified and managed (including in respect of policies, actions and review of indicators to evaluate performance).

Bursa Malaysia has also produced a "Sustainability Reporting Guide" to be considered in the preparation of sustainability statements, including a section on the "social impacts of the supply chain". In the event a listed company fails to comply with these disclosure requirements, Bursa

<sup>32</sup> See the Parliamentary counter-proposal, available at [https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision\\_RBI\\_counter-proposal\\_EN-1.pdf](https://corporatejustice.ch/wp-content/uploads/2018/07/Comparision_RBI_counter-proposal_EN-1.pdf) (accessed 23 Jan. 2019).

<sup>33</sup> See the draft Bill C-423, available at <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-423/first-reading> (accessed 23 Jan. 2019).

<sup>34</sup> See Sustainability Reporting Guide, available at <http://www.bursamalaysia.com/market/regulation/rules/listing-requirements/main-market/listing-requirements> and [http://www.bursamalaysia.com/misc/system/assets/15789/BURSA%20MALAYSIA%20SUSTAINABILITY%20REPORTING%20GUIDE%20\(final\).pdf](http://www.bursamalaysia.com/misc/system/assets/15789/BURSA%20MALAYSIA%20SUSTAINABILITY%20REPORTING%20GUIDE%20(final).pdf) (accessed 23 Jan. 2019).

Malaysia is empowered to issue fines to either directors or listed companies, and ultimately to suspend or withdraw a listing. These reporting requirements bear similarities to other ESG reporting standards elsewhere on other major bourses, including London, Hong Kong and Singapore and suggest an increasing divergence of approach in this regard. Although the integration of social issues – including labour standards – into investment decision-making is becoming more relevant to investors, ESG mandatory disclosure requirements tend to focus primarily on health/safety, basic labour issues from human capital to workplace diversity and stakeholder engagement and leaves out some of the important social indicators such as labour protection for migrant workers in the supply chain.

## Transnational Litigation

Corporate structures may have previously shielded parent companies from the consequences of the actions of their subsidiaries. Increasingly attempts are being made to hold parent companies liable for their tolerance of human rights abuses carried out by their subsidiaries. Such attempts may find increasing success, as business and human rights laws become more common, and may challenge the legal autonomy of corporates within supply chains, as well as the boundaries of the traditional law of tort and other causes of action. There is a pressing need to regulate not only in Malaysia but elsewhere where subsidiaries operate given the recent government-led policies to limit further expansion of palm oil in the country and make it sustainable<sup>35</sup> which has resulted in some companies expanding operations into West Africa nations and buying existing palm oil producers in Africa.<sup>36</sup>

As business and human rights law is still in its infancy, there remain significant hurdles for litigants to overcome in order to convince the courts to lift the corporate veil. Courts in the UK have produced substantial jurisprudence on this point based on an application of the tort law concept of duty of care to parent companies controlling subsidiaries allegedly engaged in harming victims domestically or overseas.

- In *AAA & Others v Unilever PLC and Unilever Tea Kenya Limited* [2018] EWCA Civ 1532, the Court of Appeal declined to allow a claim against the UK-registered parent company Unilever PLC and its Kenyan subsidiary, for a failure by its Kenyan subsidiary, Unilever Tea Kenya Limited, to adopt adequate safeguards to protect the appellants from the ethnic violence that erupted in Kenya following the 2007 presidential elections. The claim was brought by employees and former employees of the Kenyan subsidiary and residents living on a tea plantation run by the subsidiary. The Court reiterated a long line of authority to the effect that the corporate structure tends to militate against the

requisite proximity between parent company and claimant.

The Court did, however, concede that “a parent company, having greater scope to intervene in the affairs of its subsidiary than another third party might have, has taken action of a kind which is capable of meeting the relevant test for imposition of a duty of care in respect of the parent” ([37]), leaving open the door in the UK for a parent to be held liable in the future for the actions of its foreign subsidiaries.

- In *Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines Plc* [2017] EWCA Civ 1528, a wider duty of care was determined to arise where a parent company can be liable alongside their non-UK subsidiaries for adverse human rights impacts occurring abroad if it controls the operations of the subsidiary or takes direct responsibility for a policy relevant to the claim.<sup>37</sup> The court held that a duty of care may be owed to the employees of a foreign subsidiary, in certain situation and that “such a duty may be owed in analogous situations...to those affected by the operations of the subsidiary”. A duty of care is more likely to arise where the parent company has “superior knowledge” about the operations of the subsidiary which can be inferred on the basis that the parent company publishes a sustainability report which emphasises how the Board of the parent company has oversight over its subsidiaries; enters into a management and shareholders agreement under which it is obligated to provide various services to the subsidiary; provides financial support to the subsidiary; or exercises control over the subsidiary. Thus, the submission of a group statement can be used to impute knowledge of certain activities of the subsidiary by its parent.

It is, therefore, a duty that parent companies owe directly to victims on the basis of the control they exercise over their subsidiaries.

In the US, courts have long decided cases on parental liability for extraterritorial human rights based on the Alien Tort Statute, which allows US courts to assert jurisdiction on civil actions in tort filed by aliens and alleging a violation of the ‘law of nations’, which has been interpreted as international or human rights law. The Court of Appeals for the Ninth Circuit in *John Doe, et al v. Nestle, S.A., et al* recently held that victims can sue the manufacturer under the Alien Tort Statute for the use of forced labour at their overseas suppliers in Ivory Coast cocoa farms by funding slave owners. It remains to be seen how the court would arrive at the final ruling if the case does eventually proceed to trial. Regardless, this decision indicates that there

35 World Economic Forum, *Palm Oil: With Malaysia cracking down on production, what’s the alternative?*, 10 Sep. 2018, available at <https://www.weforum.org/agenda/2018/09/palm-oil-with-malaysia-cracking-down-on-production-what-s-the-alternative/> (accessed 23 Jan. 2019).

36 Steve Zwick, *Oil Palm, The Prodigal Plant, Is Coming Home To Africa. What Does That Mean For Forests?*, 20 Nov. 2018, available at <http://www.ecosystemmarketplace.com/articles/oil-palm-the-prodigal-plant-is-coming-home-to-africa-what-does-that-mean-for-forests/> (accessed 23 Jan. 2019).

37 Hogan Lovells, *Parent company liability in England for human rights impacts abroad: Lungowe v Vedanta*, 13 Mar. 2018, available at <https://www.hoganlovells.com/en/publications/parent-company-liability-in-england-for-human-rights-impacts-abroad-lungowe-v-vedanta> (accessed 23 Jan. 2019).



remain possibilities to hold companies accountable for human rights abuses committed abroad.

This parental liability for extraterritorial human rights abuses is supported by the recently released draft of the UN legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (the “**Zero Draft**”). Article 10(6) contemplates civil liability of parent companies for harm caused by their subsidiaries to the extent that the parent company “exercises control over the operations, or [...] exhibits a sufficiently close relation with its subsidiary or entity in its supply chain and where there is strong and direct connection between its conduct and the wrong suffered by the victim...”<sup>38</sup>

The rise in legislation mandating supply chain disclosures over the past recent years has led to an increasing number of lawsuits brought by consumers, victims of exploitation and advocates around the world to demand greater transparency in the business operations on issues relating to human rights. For the time being, in the absence of legislation to overcome the proximity issues that arise in tortious matters such as the French Corporate Duty of Vigilance Law or the proposed Swiss law, rather than attempting to hold a company liable for a particular act or omission that resulted in human rights abuse in its supply chain, litigants have begun filing claims relating to, amongst other things, misleading and deceptive conduct and unjust enrichment in circumstances where corporates have failed to disclose human rights abuses such as the use of slave or child labour within supply chains.

A series of putative class actions alleging the use of child and slave labour in the supply chains of retailers and manufacturers that have premised upon misrepresentation or misleading advertising ground have yet to succeed. The federal court in *Danell Tomasella v. Nestlé USA, Inc.*, the most recent case of the bunch, held that although child and slave labour is “widespread, reprehensible, and tragic,” it was not deceptive for Nestlé to omit from product labels that those practices (allegedly) exist in its supply chain.

The introduction of hard national laws in relation to supply chain responsibility will only improve the ability of claimants to hold multinationals accountable in relation to human rights abuses within supply chains. Further, the increasing level of novel litigation in this area suggests that corporate structures will largely be inadequate in the future as a means of protection against liability for human rights abuses within supply chains, and that corporate parents will need to increasingly monitor the operations of their subsidiaries and impose adequate protections against human rights abuses to minimise their liability in relation to their supply chains.

## Investor pressure

### The UN Guiding Principles Reporting Framework

A coalition of 87 investors with USD5.3 trillion assets under management is supporting the UN Guiding Principles Reporting Framework (the “**UNGP Reporting Framework**”).<sup>39</sup> The UNGP Reporting Framework is based on the UNGP and therefore focuses on how companies meet the ‘corporate responsibility to respect human rights’. Companies that report using this framework must identify salient human rights risks (defined as those human rights at risk of the most severe negative impacts, in connection with a company’s business activities), then disclose information on the effective management of each salient risk identified.

### Reporting under the Investor Code in Malaysia

The *Malaysian Code for Institutional Investors* (the “**Investor Code**”) falls under a recommendation within the Corporate Governance Blueprint 2011 and is intended to give institutional investors guidance on effective exercise of stewardship responsibilities to ensure delivery of sustainable long-term value to their ultimate beneficiaries or clients.

As an application mechanism of the Investor Code, signatories are expected to report annually on their application of the principles of the Investor Code on their website, annual report or in other accessible forms. Specific reporting requirements are scattered through the Investor Code, including:

- a. **Principle 1:** institutional investors should disclose the policies on their stewardship responsibilities;
- b. **Principle 3:** institutional investors should engage with investee companies as appropriate with guidance 3.2 requiring institutional investors to disclose a summary of their engagement activities or engagement highlights at least on an annual basis in the annual report or company website.
- c. **Principle 5:** institutional investors should incorporate governance and sustainability considerations into the investment decision-making process and employee benefits and business ethics are among the ESG (environmental, social and governance) factors an institutional investor should evaluate.

A signatory to the Investor Code should disclose to the public how it chooses its investee company, when and how it will step in and initiate further communication with the investee company, and how it evaluates the sustainability, including employee benefits, of the investee company.

<sup>38</sup> See the Zero Draft, available at [https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf?utm\\_source=Business+%26+Human+Rights+Resource+Centre+Updates&utm\\_campaign=f2c39447b0-EMAIL\\_CAMPAIGN\\_2018\\_09\\_14\\_11\\_34\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_c0049647eb-f2c39447b0-182029873&mc\\_cid=f2c39447b0&mc\\_eid=ec94f94a3e](https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf?utm_source=Business+%26+Human+Rights+Resource+Centre+Updates&utm_campaign=f2c39447b0-EMAIL_CAMPAIGN_2018_09_14_11_34_COPY_01&utm_medium=email&utm_term=0_c0049647eb-f2c39447b0-182029873&mc_cid=f2c39447b0&mc_eid=ec94f94a3e) (accessed on 23 Jan. 2019).

<sup>39</sup> See the UNGP Reporting Framework, available at <https://www.ungpreporting.org/> (accessed on 23 Jan. 2019).

## UN Principles for Responsible Investment

Another voluntary and aspirational set of investment principles which was developed by an international group of institutional investors is the UNPRI. The UNPRI works with its international network of signatories to put the six Principles for Responsible Investment into practice. Its goals are to understand the investment implications of environmental, social and governance issues and to support signatories in integrating these issues into investment and ownership decisions.

The six principles are:

- a. incorporate environmental, social and corporate governance (ESG) issues into investment analysis and decision-making processes.
- b. be active owners and incorporate ESG issues into our ownership policies and practices.
- c. seek appropriate disclosure on ESG issues by the entities in which we invest.
- d. promote acceptance and implementation of the principles within the investment industry.
- e. work together to enhance our effectiveness in implementing the principles.
- f. each report on our activities and progress towards implementing the principles.<sup>40</sup>

Furthermore, a group of 25 investors coordinated by the PRI Secretariat, formed an Investor Working Group (IWG) on sustainable palm oil, which aims to raise awareness of these issues among investors, provide a unified investor voice in support of sustainable palm oil and the RSPO, and engage with companies in support of more sustainable practices.<sup>41</sup>

In addition to the UNGP Reporting Framework, the Investor Code and the UNPRI, other investors are using specific benchmarks, such as Corporate Human Rights Benchmark<sup>42</sup> which provides a public ranking of major companies from three industries – agricultural products, apparel, and extractives – on the basis of their size and revenues on human rights performance.

Another benchmark, Know The Chain,<sup>43</sup> also similarly provides resources that enable companies to operate more transparently and responsibly and for investors to understand forced labour risks within their global supply chains in order to make informed investor decisions.

## ESG issues as components of fiduciary analysis

An increasing number of investors are integrating ESG issues into investment policy statements, portfolio analysis and the process of investment decision-making. The alignment of investment process with fiduciary responsibilities is confirmed by the US Department of Labour (DOL) which acknowledges that prudent investment decisions involve investment policies that incorporate ESG factors as economic considerations.<sup>44</sup>

Privately-sponsored US qualified retirement plans, governed by the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA), now focus their investment considerations on ESG factors which are treated as material considerations in determining the prospects of a company and its ability to create long-term value.<sup>45</sup> The concept of responsible investment that focuses beyond the rate of return when making investment decisions is becoming more common and irresponsible, risky investment is deemed unacceptable by almost any investing standard as seen in the case of the Alabama State Pension Fund's investment in the now bankrupt company, Signal International, amid a multi-million dollar settlement of human trafficking claims.<sup>46</sup>

40 UNPRI, Principles for Responsible Investment, available at <https://www.unpri.org/download?ac=1534> (accessed on 23 Jan. 2019).

41 See <https://collaborate.unpri.org/group/pri-coordinated-investor-working-group-on-sustainable-palm-oil-681> and also: <https://www.rspo.org/file/acopl-generation-investment-management/F-Lending-Policy.pdf> (accessed on 23 Jan. 2019).

42 See Corporate Human Rights Benchmark, available at <https://www.corporatebenchmark.org/> (accessed on 23 Jan. 2019).

43 See Know The Chain, available at <https://knowthechain.org/> (accessed on 23 Jan. 2019).

44 UNPRI, Addressing ESG factors under ERISA, available at <https://www.unpri.org/download?ac=1425> (accessed on 23 Jan. 2019).

45 *Id.*

46 Daniel J. Smith, *RSA is a poor steward of our retirement resources*, 29 Jul. 2015, available at [https://www.al.com/opinion/index.ssf/2015/07/rsa\\_is\\_a\\_poor\\_steward\\_of\\_our\\_r.html](https://www.al.com/opinion/index.ssf/2015/07/rsa_is_a_poor_steward_of_our_r.html). (accessed on 23 Jan. 2019).

## Financial Institutions and the Profits of Exploitation

Banks and financial institutions invariably become conduits for criminal activity through the transfer of funds drawn from illicit activities through the banking system. Where slavery, human trafficking and forced labour are predicate offences to money laundering, banks and financial institutions associated with this criminal activity may find themselves liable under money laundering offences. For palm oil producers this may be the case either under Malaysian legislation or foreign laws.

### Malaysian anti-money laundering legislation

Malaysia's central bank (the Bank Negara Malaysia (BNM)) acts as the central banking institution in Malaysia and is also charged with regulating the country's financial institutions and banking bodies and issues guidance on compliance with legislation. BNM is a 'regulatory or supervisory authority', empowered by legislation, to monitor money laundering and terrorism financing activities.

Malaysia's governing legislation in this space is the *Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001* (the "AML Act"). The AML Act criminalises money laundering, terrorist financing and also criminalises the structuring of transactions in order to evade reporting requirements. The AML Act also includes provisions for the seizure and forfeiture of proceeds of crime. It has a broad definition of "financial institution" and it applies to both parent and subsidiary entities, incorporating property both in and outside of Malaysia.

Due diligence, including Know Your Client (KYC) procedures, should be standard procedure and banks and financial institutions should ensure the senders and receivers of funds are identifiable and verifiable. The AML Act specifically requires that a reporting institution not open an anonymous account or conduct business with an account that involves a fictitious, false or incorrect name. Due diligence is required on all account, business relationships, transactions and activity.

The penalty for money laundering is up to 15 years imprisonment and the higher of "a fine of not less than five times the sum or value of the proceeds" or RM5 million (approximately USD1.2 million). A variety of other offences are captured in the AML Act, carrying terms of imprisonment and/or financial penalties.

### Irresponsible banking

Financial institutions and banks have traditionally lagged behind companies when it comes to supporting sustainable palm oil. As abusive practices on palm oil plantations have been uncovered and documented by various parties over

the years, financial institutions are increasingly under strict scrutiny by civil society and media.

In 2014, Friends of the Earth filed an OECD complaint against Rabobank for financing a palm oil company accused of managing an illegal palm oil plantation and of having caused deforestation, thereby not only violating the sustainability policy of Rabobank but also the OECD Guidelines for Multinational Enterprises.<sup>47</sup> The complaint specifically pinned upon the bank's failure to carry out risk-based due diligence to identify, prevent and mitigate an adverse impact where they had not contributed to that impact, when the impact was nevertheless directly linked to their operations, products or services by a business relationship and its failure to carry out human rights due diligence.

Pressure on banks to invest responsibly has led to some banks de-risking or exiting the palm oil business. HSBC announced a stricter lending policy based on a "no deforestation, no peat, no exploitation" commitment and revised its "Agricultural Commodities Policy: Palm Oil"<sup>48</sup> to make it clear that the bank will not knowingly provide financial services which directly support palm oil companies that engage in land clearance by burning, the destruction of "high conservation value" areas like rainforest, harmful child labour, forced labour, or other activities violating the rights of local communities. Following HSBC's move, BNP Paribas also announced a new set of guidelines around palm oil investment that sets responsible palm oil production as a pre-condition for financing.<sup>49</sup> It remains to be seen how these policies are strictly implemented on its palm oil banking clients particularly for the majority of banks that finance palm oil but are not RSPO members. Nevertheless, these public statements provide an opportunity for leverage against those businesses that fall foul of the practices outlined above.

### Jurisdictional reach – how other country's legislation can affect actions in Malaysia

The increasing level of international cooperation amongst regulators, and the wide reaching legislative powers for those regulators, has meant entities operating in the palm oil industry in Malaysia can be certain their activities will be watched by overseas authorities. This applies to both the company and the financial institutions involved in the various transactions. For example, where the entity has subsidiaries operating in Malaysia but parent companies in foreign countries, including the US and the UK, they may find their activities captured under foreign laws with extra-jurisdictional effect. The key examples are the Foreign Corrupt Practices Act 1977 in the US and the Bribery Act 2010 in the UK, each of which have a trans-national component to their reach. In the US, for example, laws refer to "international" money which can arguably put the actions in Malaysia under the remit of US prosecutors if activity includes US dollars or passes through a US entity.

47 See Friends of the Earth vs. Rabobank, available at [https://www.oecdwatch.org/cases/Case\\_330](https://www.oecdwatch.org/cases/Case_330) (accessed 23 Jan. 2019).

48 HSBC, *HSBC Statement on Revised Agricultural Commodities Policy: Palm Oil*, 20 Feb. 2017, available at <http://www.hsbc.com/news-and-insight/media-resources/media-releases/2017/hsbc-statement-on-revised-agricultural-commodities-policy> (accessed 23 Jan. 2019).

49 BNP Paribas, *BNP Paribas' Sector Policy – Palm Oil*, available at [https://group.bnpparibas/uploads/file/csr\\_sector\\_policy\\_palm\\_oil.pdf](https://group.bnpparibas/uploads/file/csr_sector_policy_palm_oil.pdf) (accessed 23 Jan. 2019).







**III.**

**CORPORATE  
RESPONSES**

Companies should be increasingly clear on the broadening scope of routes available to hold them to account for abusive and exploitative labour practices. New legislation and new regulatory requirements will require companies to respond in kind, with improvements and increases in scale in compliance and reporting functions. Companies can, and are increasingly expected to pursue new and more onerous procedures including audit, certification and diligence. Furthermore, directors' liability is causing board members to reassess their responsibilities in light of legislative developments in this space in mature jurisdictions.

The following are some of the key trends in corporate responses to meet human rights obligations:

### **'Risk Management' vs. Human Rights Due Diligence**

Professional services firms offer companies the prospect of conducting third-party audits of suppliers as a product, and there is an increasing number of companies taking a bolder attitude to the provision of supply chain information. This includes publishing information on specific instances of modern slavery in their supply chains, as well as quantitative data on the results of supply chain audits. Audits, and the diligence work undertaken to finalise them, are more effective when made public through new disclosure and transparency requirements as they place the onus on companies to not only dive deeper into their supply chain but also publicise the results, good or adverse, of the audit process. Disclosure can be reconciled and confirmed by civil society offering a chance for businesses with good practise to be lauded and those with bad practices to be encouraged to change. Without the disclosure and the involvement of civil society good actors will go unrewarded for their effort and remain tainted with the same scepticism held for the industry.

As an example, Unilever was recently commended as the first company in the industry to fully disclose the suppliers and mills that process the palm oil used in the company's wide range of personal care and processed food products.<sup>50</sup> This is a welcome development from a market leader, but does not necessarily represent a broad trend across corporate life and particularly across small and medium size companies. It is likely that in the absence of compulsion, companies will continue to keep the results of audits internal, and act, or not, on their results without publicity.

Companies should be careful not to place too much reliance on audits, as there is strong evidence that they often fail to pick up serious labour rights abuses. One study found that a factory's number of audits over a period of 7 years did not improve factory working conditions significantly and that the local neighbourhood in which a factory is located has a greater effect on changes in

factory audit scores.<sup>51</sup> The diligence work undertaken to compile an audit can be highly stage-managed, with limited unhindered input from the workforce. Auditors often struggle to verify information relevant to working conditions in these scenarios. Hence, auditing does not always offer the type of documentation a company needs to fulfil its legal obligation under the various legal frameworks discussed in previous section. Companies may instead seek to use participatory monitoring that uses input from key stakeholders so that the realities of risk are better made known to the parent company.<sup>52</sup>

One point to note in respect of audits is the limited extent to which audit processes result in remediation for victims of abusive practices. Effective audits underpinned by probing human rights due diligence can be effective in revealing exploitative practice (partially so, as referred to above) but taking affirmative action does not always translate into remediation for victims so much as stamping out the offending practice. This is in spite of the fact that Malaysia does possess a government-sponsored mechanism for compensation of victims of human trafficking, under which victims are entitled to receive compensation, payable by those convicted under the relevant laws.

### **Good practices for identifying and managing risk: commitment, due diligence, disclosure and remediation**

Company responses can be placed on a sliding scale of effectiveness, ranging from, at one end, a stated commitment to improving labour practice, through disclosure (in the absence of diligence, as required by the modern slavery legislation in both the UK and Australia), through mandatory diligence and, ultimately, remediation. The UNGP's three pillars provide the first global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity, and is the internationally accepted framework for enhancing standards regarding business and human rights. The second pillar of the UNGP provides a blueprint for how human rights due diligence should be conducted and the third pillar relates to access to remedy. The need to provide victims of abuse in the palm oil industry with access to remediation is the toughest challenge – in the absence of legal requirements, companies in the industry are not compelled to remediate victims of labour abuse, and are simply not likely to undertake to do so save where reputational and commercial issues incentivise them to do so.

Companies do however need to be committed to the responsibilities set out in the UNGPs and avoid causing or contributing to practices which are adverse to human rights. Each company needs to ensure that it, and its subsidiaries and other companies within its organisation is committed to protecting human rights throughout their

50 Eco-Business, *Unilever lays bare palm oil supply chain in rare industry move*, 19 Feb. 2018, available at <https://www.eco-business.com/news/unilever-lays-bare-palm-oil-supply-chain-in-rare-industry-move/> (accessed 23 Jan. 2019).

51 Sanders, S.R., Cope, M.R. and Pulsipher, E.R. *Do Factory Audits Improve International Labor Standards? An Examination of Voluntary Corporate Labor Regulations in Global Production Networks*. Soc. Sci. 2018, 7, 84.

52 SHARE, *The rise of supply chain transparency legislation: What is at stake for Canadian investors?* (February 2017), available at [https://share.ca/documents/investor\\_briefs/Social/2017/Supply\\_Chain\\_Transparency\\_Legislation.pdf](https://share.ca/documents/investor_briefs/Social/2017/Supply_Chain_Transparency_Legislation.pdf) (accessed 23 Jan. 2019).

activities and business relationships, and this should really mean at parent company level, at subsidiary level and throughout the extended supply chain.

### Commitment

According to the UNGPs, commitment includes governance and policies (board level accountability and policy commitment) and embedding respect for human rights in culture and management systems and human rights due diligence. Commitment must be demonstrated by the implementation of adequate controls in an organisation to ensure adherence to its corporate policies with respect to human rights. This will require firstly corporate policies on human rights are in place and communicated throughout the organisation. Staff will need to be trained to identify areas of risk. Management will need to show that they are committed to these policies and will stand behind these policies. Workers should have alternative channels for reporting any irregularities if they do not feel comfortable reporting through their usual channels. There will need to be regular monitoring of compliance and appropriate sanctions or remediation action where there are breaches.

In addition, the UNGPs ask companies to address risks of involvement in practices adverse to human rights through their broader business relationships. The UNGPs provide that companies should: “Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.” This would necessarily involve supply chain mapping and mitigation of any adverse human rights impact that arise as a result of these relationships and the activities they involve.

### Due Diligence and monitoring

Due diligence is an integral part of transparency and disclosure requirements – as a simple matter, disclosure and transparency are of limited merit without due diligence procedures to uncover disclosable matters of concern. Companies need to conduct due diligence to identify, mitigate and account for potential human rights issues in their operations, supply chain and other business relationships. The human rights due diligence process should include a human rights impact assessment which entails an ongoing risk management process in order to identify, prevent, mitigate and account for how the company addresses its adverse human rights impacts. It requires companies to assess their entire operations, business relationships and supply chain and identify general areas where the risk of adverse impact to human rights is most significant.

Key aspects of human rights due diligence with respect to the supply chain will include (i) traceability; (ii) identification of potential areas of risk in the organisation and the supply chain, and (iii) identification of labour

abuses in the organisation and the supply chain. Under the UNGPs, human rights due diligence processes should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

Regardless of the results of due diligence, companies should adopt a process for monitoring compliance with its standards, applicable internal policies and any industry codes and accepted practices.<sup>53</sup> The monitoring process should include:

- Regularly refreshing the due diligence questionnaire
- Regular reporting from suppliers of certain data or metrics to demonstrate compliance
- Auditing of suppliers within the supply chain to verify compliance.

Despite having all these tools and guidance on human rights due diligence practices, what is unclear is the appetite for Malaysian palm oil producers or end-of-chain companies to fully diligence the operations in their palm oil production, and this could be a major obstacle to compliance. Laws such as the French Corporate Duty of Vigilance Law go some way to requiring compliance with diligence norms, but the French law will not cover each palm oil producer, and does not provide a tonic for all ills in the industry. In order to avail themselves of the tortious claim available under French law victims would need to demonstrate that the exploitation was carried out by a palm oil company in the supply chain of the French company. Given the nature of the commodity it is not always easy to determine the final destination of different consignments of palm oil in different forms and their connection to a French company subject to the Duty of Vigilance.

### Remediation

One of the key shortcomings of the existing legal and regulatory framework, and non-binding guidelines like the UNGPs, is the inability of courts and regulators to require companies to remediate the distant migrant workers that are subjected to exploitative labour practices on palm oil plantations. Effective remedy is one of the three pillars of the UNGPs but for the most part, direct remedy to victims of labour abuse remains elusive. There are a number of obstacles to seeking remediation, not least finding an appropriate forum and jurisdiction for seeking damages, but a partial legal framework lacking effective sanction, penalties and rights to compensation and arbitration is the key obstacle. While the United Nations continues to promote a binding global treaty on business and human rights, effective remedy remains the exception rather than the rule.

This does not prevent companies themselves from taking action within their supply chain to counter labour abuse, however. If breaches are discovered through the due diligence process, a remediation plan should be agreed or some form of suspension or sanction of the company or

<sup>53</sup> The UNGP has developed a reporting framework in order for companies to produce human rights performance reports. It provides guidance on human rights due diligence, monitoring and reporting on performance and progress. See <https://www.ungpreporting.org/>.

supplier should be required. Disclosure and transparency requirements assist in this regard – the requirement to disclose publicly breaches further down supply chains by parent companies places the onus on companies to address issues with suppliers – highlighting how the risk of reputational damage is focusing parent companies on compliance.

### Director's liability – an opportunity to identify and remediate

Whereas in the past large companies (particularly parent companies) and their directors may have been able to largely escape liability when human trafficking or modern slavery occurs only in the labour force of their suppliers and not at the parent company level, it is no longer the case that companies can “afford to remain ignorant of human trafficking violations in corporate supply chains”.<sup>54</sup>

#### United States

The reauthorisation of the Trafficking Victims Protection Act in 2008 has established a domestic legal regime to create liability for human trafficking abroad and to hold multinational corporations and its directors accountable for benefiting financially from human rights violations despite not directly committing such violations. As a result of the reauthorisation, a corporation can now be held directly liable for any accrual of financial benefit from business associations where the corporation knew or was in reckless disregard of the fact that the other party employed trafficked labour. The legislation has therefore required directors to implement systems to oversee and monitor corporate supply chains to eliminate and prevent trafficking violations, with any failure to comply inviting the risk of derivative suits for breach of directors' fiduciary duties and to bring personal liability upon the directors of a company.

#### Australia/United Kingdom

Another key recent development in this area relates to the passing of specific modern slavery legislation in jurisdictions such as Australia and the UK. The scope of new legislation in these jurisdictions intends to capture a broad range of companies (including foreign companies) doing business (providing goods and services) in that jurisdiction and reach a certain annual threshold turnover. Though the substantive obligations under such legislation remain light-touch, these measures nonetheless increase awareness of the public and accountability of the officers of the reporting company. Under these regimes, companies are required to issue corporate statements which set out steps taken by the corporation to address issues concerning modern slavery in their business, for example in measures taken to ensure slavery and human trafficking are not taking place in any of its supply chains. Directors of

reporting entities are required to approve such modern slavery statements.

Though these regimes do not prescribe strict penalties for non-compliance, the publication of an inadequate modern slavery statement or modern slavery statement, which indicates inadequate preventative due diligence, can still give rise to corporate and director liability. In the context of the UK regime, this can be evidenced in two main respects. Firstly, the existence of modern slavery in a supply chain can have serious implications for business continuity from a supply chain perspective but also from a demand perspective due to reputational damage. This can in turn impact a company's financial condition and give rise to investor class actions or claims for loss and breach of directors' duties. Secondly, modern slavery statements may be used in regulatory investigations or prosecutions in respect of offences under parallel legal regimes, such as the Criminal Code Act or the Bribery Act 2010.

#### Sweden

A corporate director in Sweden can be held accountable for their involvement in international crimes abroad. In the case of Lundin Petroleum, two corporate directors were recently prosecuted and could be charged with aiding and abetting gross crimes against international law in accordance with Chapter 22, Section 6 of the Swedish Penal Code. The list of prohibited acts in Chapter 22 Section 6 (1-7) is non-exhaustive, and the provision also explicitly covers any serious violation of a treaty or agreement with a foreign power,<sup>55</sup> potentially including the crime of human trafficking and forced labour. A case of civil liability against the suspects or a third person can also be brought in conjunction with the prosecution of the offence.

When assessing individual liability within corporations, Swedish courts turn to general principles on perpetration and complicity, as codified in the Penal Code, which provides that punishment shall be imposed not only on the person who committed the act but also on anyone who furthered it by advice or deed.<sup>56</sup> Thus, director's liability for omission or failure to conduct sufficient due diligence may be alluded to in the assessment of corporate criminal liability in Sweden.

#### Fiduciary Duties

Finally, there is also jurisprudence across jurisdictions such as the European Court of Human Rights and the UK which suggest that human trafficking or modern slavery abuses and offenses may give rise to liability under existing, well-established, legal principles. One such an instance is in the realm of directors' fiduciary duties. Where corporate directors fail to minimise the risk of suit and potential reputational harm stemming from trafficking violations

<sup>54</sup> Liberty Shared, *Modern Slavery Governance: Basics for Boards*, available at <https://static1.squarespace.com/static/53038dd2e4b0f8636b5fa8c3/t/5b687d6e70a6ad18271b4482/1533574513261/Modern+Slavery+Governance+Guide+FINAL.pdf> (accessed 23 Jan. 2019).

<sup>55</sup> European Journal of International Law, *The Road Less Traveled: How Corporate Directors Could be Held Individually Liable in Sweden for Corporate Atrocity Crimes Abroad*, 13 Nov. 2018, available at <https://www.ejiltalk.org/the-road-less-traveled-how-corporate-directors-could-be-held-individually-liable-in-sweden-for-corporate-atrocity-crimes-abroad/> (accessed 23 Jan. 2019).

<sup>56</sup> Chapter 23, Section 4 of the Swedish Penal Code.



by not having strong information systems in place, shareholders may file derivative suits for breach of the directors' fiduciary duties.<sup>57</sup> For example, there has been commentary in the UK that an argument could be made for potential liability under the UK Modern Slavery Act to give rise to a breach of fiduciary duty, either in common law or under the Companies Act. It is trite law that a director has general duties to act in the best interests of a company and to act with reasonable care, skill and due diligence in conducting the affairs in a company. It is at least arguable that a failure to address diligence shortcomings, or to properly discharge a directors' duties in relation to the UK Modern Slavery Act, would result in a breach of such liabilities and thereby incurring liability on a director.

In the US, in *Louisiana Mun. Police Employees' Ret. Sys. v. Hershey Co.*, a public pension fund filed suit against Hershey to inspect the company's books and records, contending that Hershey uses cocoa produced as a result of unlawful child and forced labour in the West African countries of Ghana and the Ivory Coast.<sup>58</sup> Although the lawsuit resulted in a dismissal, this case demonstrates the possibility of bringing a shareholder derivative suit directed at a company that may have facilitated human trafficking and forced labour.

Another strand of notable jurisprudence relates to the landmark decision in the Lafarge case by the European Court of Human Rights, where LafargeHolcim was indicted by investigative judges on charges of complicity in crimes against humanity, financing of a terrorist enterprise, and endangerment of people's lives. It was argued successfully that Lafarge acted as an accomplice and failed to ensure the security of its employees. Interestingly, in parallel, eight former executives of the company have also been charged with financing a terrorist group and/or endangering the lives of others as a result of Lafarge's activities, extending the breach of the European Convention of Human Rights to the officers responsible for the organisation.

As a result of the development of targeted modern slavery legislation, corporations and their directors are now required, or at least highly incentivised, to undertake various measures to improve the company's systems which oversee and monitor their supply chains and procurement actions. And indeed, if there are any concerns that the risk of non-compliance with these regimes do not create sufficient incentives for directors, recent developments in caselaw and commentary suggest that a risk of litigation with shareholders or personal criminal and civil liability for a breach of fiduciary duty ought to bring even greater incentives for directors to eliminate human trafficking and modern slavery from their companies. Whether benefiting economically from human trafficking or modern slavery, or the failure to monitor supply chains and to eliminate trafficking or punish offending suppliers, these are no longer acceptable business practices for corporates and directors alike.

## Conclusion

Palm oil is an integral industry to the Malaysian economy. Tracing the production origins of the product, plus production-related factors (remoteness of production, the complexity of recruitment supply chains, debt bondage etc.) lend to the industry the conditions likely to create the potential for exploitation, and often in the absence of probing or even adequate scrutiny.

The palm oil industry has an unwanted reputation for exploitation, but do market observers, industry stakeholders and others have the means to subject offenders to account – either at the parent company or the subsidiary level? The answer to this question does need to be balanced by the reality of the current legislative and regulatory framework. Clearly, the levers available for raising accountability for corporate abuse of workers are more sophisticated than at any point previously. This is from a low base, however. There is no disguising that those laws of extra-territorial effect focus primarily on transparency and disclosure requirements, often without significant requirements for audit, diligence and in particular, accountability for labour abuse by companies at the top of or within supply chains. There is a complementary trend towards increased investor engagement through application of industry standards (both in Malaysia and internationally) and ESG reporting requirements in Malaysia that reflect overseas standards. A welcome trend towards greater accountability is, therefore, discernible, albeit there are still limited means to ensure effective accountability for offenders and compensation for victims.

<sup>57</sup> Vanderbilt Law Review, Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations, available at <https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2016/03/Human-Trafficking-in-Multinational-Supply-Chains-A-Corporate-Directors-Fiduciary-Duty-to-Monitor-and-Eliminate-Human-Trafficking-Violations.pdf> (accessed 23 Jan. 2019).

<sup>58</sup> *Louisiana Mun. Police Employees' Ret. Sys. v. Hershey Co.*, No. CV 7996-ML, 2013 WL 6120439, at \*3–4 (Del. Ch. Nov. 8, 2013).

