

Palm Oil Risk Assessment Malaysia - Sabah

Version 1.2 | November 2017



COUNTRY RISK
ASSESSMENTS



This risk assessment has been developed by NEPCon under the project “Responsible Sourcing of Soy, Palm Oil and Cattle” with support from DANIDA, Ministry of Foreign Affairs of Denmark.



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DANIDA, Ministry of Foreign Affairs of Denmark has supported the development of this material, however DANIDA is not responsible for any views or claims presented in this material.

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A. Introduction

The world demand for palm oil is rapidly growing and is driving deforestation and other negative Corporate Social Responsibility (CSR) related impacts e.g., biodiversity loss, greenhouse gas emissions, corrupt and illegal behaviour, and violation of civil rights including workers' rights, traditional and indigenous peoples' rights.

Each of the CSR categories are considered minimum legal, environmental and social responsible criteria that should met for palm oil plantation establishment and management. The criteria are in line with key CSR International Guidelines Content Areas as identified, analysed and published by the Danish Business Authority: A comparison of 4 international guidelines for CSR OECD Guidelines for Multinational Enterprises, ISO 26000 Guidance on Social Responsibility, UN Global Compact and UN Guiding Principles on Business and Human Rights, January 2015. This risk assessment used the methodology detailed in the Corporate Social Responsibility (CSR) Palm Oil Risk Assessment Framework Guidelines (November 2015).



Figure 1. Countries for which NEPCon have developed a risk assessment for palm oil

B. Overview of sourcing risks for palm oil from Malaysia - Sabah

Palm oil Risk Score: 20 / 100 in 2017

This report contains an evaluation of the CSR risks in Sabah Malaysia for five categories and 21 sub-categories of law. We found:

- Specified risk in 16 sub-categories.
- Low risk for 4 sub-categories.
- Not-applicable for 1 sub-category.

Palm oil source types and risks

There are three palm oil source types found in Sabah, Malaysia. Knowing the “source type” that palm oil originates from is useful because different source types can be subject to different applicable legislation and have attributes that affect the risks. We have analysed the risks for all source types and found the risks do not differ between the source types.

Government land development schemes	Palm oil from large state estates where smallholders are leased small plots (4.0 – 5.7 hectares (ha)) then awarded them after a 10-15 repayment period. The mono-crop plots are managed for subsistence and/or commercial purposes.
Large-scale private plantation	<p>Palm oil from large-scale private mono-crop commercial plantations from 40 ha to more than 100,000 ha on alienated land under:</p> <ul style="list-style-type: none">• a country land title (CL) under a 99-year lease• a freehold land title. <p>These plantations are often integrated with a production mill and processing facilities.</p>
Small-scale private plantation	<p>Palm oil from small-scale private commercial/subsistence plantations (less than 40 ha) on alienated land under:</p> <ul style="list-style-type: none">• a country land title (CL) under a 99-year lease• a freehold land title• native title (NT) alienated for perpetuity.

The CSR risks identified in this report concern business issues, social issues, environmental issues and conversion.

Regarding **business issues**, there is a risk of:

- fraud in the issuance of native licenses (sub-category 1.1). Land conflict in Sabah is common due to native communities being often unaware of their rights and unfamiliar with the legal process of claiming land.

- licenses being awarded through corrupted processed (1.2). This is reinforced by the widespread of fraudulence in the issuance of native titles in Sabah.
- tax evasion due to systemised corruption by high-level officials, spreading all the way to the federal level, characterised by kick-backs, nepotism, cronyism and money laundering through off-shore accounts (1.3-1.5).

Regarding **social issues**, there is a risk that:

- producers engage in illegal labour practices mainly linked to the employment and working conditions of migrant workers (2.1). Malaysia's legal framework is currently insufficient to protect foreign workers, because the law imposes several processing fees and levies on the employer and consequently allows these fees to be deducted from the workers' wages, thus incentivising forced labour and debt bondage. Other common treatment of foreign workers includes passport retention, contract violations, restricted movement, wage fraud, poor housing conditions and lack of H&S training. These risks are especially pertinent in Sabah as the state currently faces a significant shortage of labour in the oil palm industry.
- Malaysian's legal employment laws do not cover what the ILO considers universal fundamental principles and rights at work as Malaysia currently has only ratified 5/8 ILO fundamental conventions (2.3). There also have been several reports of forced labour, workers under the minimum age, child labour and discrimination including of foreign and migrant labourers.
- Malaysia's Occupational Health and Safety (OSH) requirements are breached by palm oil producers (2.2). There is evidence that shows several instances of alleged breaches of OSH requirements which is exposing workers to injuries falling fruit bunches, tool usage, heavy lifting and health hazards connected oil palm pest bites, over exposure of the sun and herbicides etc.
- the legal and customary rights of indigenous or traditional peoples are violated (2.4 and 3.3: 3.3.5 – 3.3.6). There are numerous court cases and allegations that commercial plantations had encroached on, or were introduced into, land claimed as indigenous customary land rights/title, without the community's knowledge or without complying the principles of free, prior and informed. Apart from loss of land, many community witnesses have complained that the opening of plantations has resulted in destruction of graveyards and crops, and pollution of rivers and loss of livelihoods and traditional ways of life.

Regarding **environmental issues**, there is a risk that:

- palm oil plantations cause environmental problems such as deforestation, biodiversity loss, water pollution, soil erosion, carbon emissions resulting from land use change and forest fires, and pesticide use (3.1 and 3.3.4). There is also a risk that the Environmental Impact Assessment requirements are not complied with due a poor vetting and monitoring process due to lack of personnel and/or sufficient expertise by the relevant authorities. Additionally, an environmental audit to monitor the implementation of the EIA control measures is not required. There is a loophole whereby an EIA can be avoided by dividing a project up into smaller lots that do not require such assessments. There is also a risk of low level of compliance with required

practices aimed at minimising runoff and soil erosion caused by conversion of natural forests into palm oil plantations.

- protected sites and species and High Conservation Values (HCVs) (3.2 and 3.3: 3.3.1 – 3.3.3). Risk of palm oil plantations encroaching into the boundaries of protected areas and forest reserves. There is also a risk of a lack of adequate identification and conservation measures for protected, rare, threatened and endangered species within and adjacent palm oil plantations

Regarding **conversion**, there is a risk that natural forests are being cleared for the establishment of palm oil plantations.

This matrix summarises the findings of the CSR risk assessment set out in this report:

Legal Category	Sub-category		Risk conclusion
Business Issues	1.1. Land tenure		Specified
	1.2. Plantation registration & management rights		Specified
	1.3. Payment of royalties & required fees		Specified
	1.4. Value Added taxes & other sales taxes		Low
	1.5. Income and profit taxes		Specified
	1.6. Disclosure of Information		N/A
Social issues	2.1. Legal employment		Specified
	2.2. Health and safety		Specified
	2.3. ILO Fundamental Conventions are upheld.		Specified
	2.4. IP and TP rights are upheld.		Specified
Environmental issues	3.1. Environment		Specified
	3.2. Protected sites and species		Specified
	3.3. HCV	3.3.1. Species diversity.	Specified
		3.3.2. Landscape-level ecosystems & mosaics.	Low
		3.3.3. Ecosystems and habitats	Specified
		3.3.4. Critical ecosystem services.	Specified
		3.3.5. Community needs	Specified
		3.3.6. Cultural values.	Specified
Conversion	4.1. New plantations since November 2005 have not replaced natural forest or ecosystems.		Specified
	4.2. Fire avoidance is being practiced		Low
GMOs	5.1. No GMO's		Low

C. Overview of the palm oil sector in Malaysia - Sabah

Malaysia is one of the world's largest producers of palm oil. Surpassed only by Indonesia, Malaysia currently possesses the second largest area of plantations worldwide, covering 5.64 million hectares (ha) of land (Gunarso, Hartoyo, Agus, & Killeen, 2013, p. 45); 2.66 million hectares (47%) of this is found in Peninsular Malaysia, while 1.54 million hectares (27%), and 1.44 million hectares (26%) is found in Sabah and Sarawak, respectively (MPOB, 2016, p. 1). In 2015, production of Crude Palm Oil (CPO) was 19.96 million tonnes. Total export of palm oil products in the same year was 25.37 million tonnes, which generated 60,169 billion Malaysian Ringgit (RM) – approx. 14,322 billion USD - in export revenue (MPOB, 2016, p. 6).

Oil palm was first planted commercially in Malaysia in 1917. Cultivation accelerated during the 1960s under the government's agricultural diversification programme, as well as land settlement schemes for landless farmers and smallholders (MPOC, 2012). Most of the British controlled palm oil companies were nationalized in the 1970s and 1980s, and in the 1990s the strategy shifted towards transnational expansion. This transnational expansion is reflected in the current export scheme, where MPOB (2016) reports that the markets in India, the European Union, China, Pakistan, USA, Philippines and Vietnam together imported 11.16 million tonnes (64.0%) of palm oil from Malaysia (MPOB, 2016, p. 1).

From 2014 to 2015, production of Malaysian palm oil increased slightly by 1.5% to 19.96 million tonnes, while the area planted with oil palm increased by 4.6%, to 5.64 million ha. In the same period, Crude Palm Oil (CPO) production increased marginally, and exports increased 1.2%, from 25.07 to 25.37 million tonnes. The majority of this increase was in Sarawak with an increase of 7.6% in CPO production and a 13.9% increase in planted area. Peninsular Malaysia experienced a growth of 3.6% in CPO production, but Sabah faced a decline of 5.5%. (MPOB, 2016, p. 1).

There are a number of different oil palm farm types in Malaysia. In broad terms, these fall within one of three categories: private, smallholder and joint venture/state agency. Private plantations occupy 3.1 million ha (61.6%) of the oil palm planted area in Malaysia. For the sake of simplicity and overview, private plantations can be broken down to the following subcategories:

- Government-linked public listed firms (GLCs, e.g. Sime Darby, FGV, TH Plantations)
- Large publicly-owned firms, e.g. Hap Seng, IOI, KLK
- Medium-sized firms with 3-8 mills, and a production area less than 100,000 ha
- Small companies with 1-2 mills and a production area less than 10,000 ha

Smallholders are legally defined by the Malaysian government as aggregate land of less than 40.46 ha. The RSPO definition states that smallholders usually mix commodity and subsistence crops, while the family comprise the bulk of the workforce and revenue the principal source of income (RSPO, n.d.). Smallholders fall into one of two categories:

- Independent smallholders that operate without external assistance (and who sell crops directly to mills or traders).
- Supported smallholders – land owners supported by a company or a government State Agency (e.g. FELDA, FELCRA, RISDA etc.). The land owner provides land in exchange for management assistance and guarantee that the relevant partner will buy the produce.

Palm oil production is regulated at both the state and federal levels. Importantly, land tenure/rights is a state matter, while at the national level, licensing takes place under purview of the Malaysian Palm Oil Board (MPOB) and the Department of Environment (DOE). Taxes, levies and cesses are paid to the MPOB and the Ministry of Finance.

Major forest types in Malaysia are lowland dipterocarp forest (LDF), hill dipterocarp forest (HDF), upper hill dipterocarp forest, oak-laurel forest, montane ericaceous forest, peat swamp forest and mangrove forest. There are also smaller areas of freshwater swamp forest, heath forest, forest on limestone and forest on quartz ridges. While most of the country was covered with LDF in the past, today the majority has been cleared for other land uses, including oil palm. The few remaining pockets are under intense development pressure and are shrinking rapidly (WWF-Malaysia, 2016).

Forest conversion statistics show that between 1990 and 2010, approximately 28% of all plantations in Peninsular Malaysia, or 318,000 ha, have been established following forest conversion (Gunarso, Hartoyo, Agus, & Killeen, 2014). The percentage of oil palm plantation area on peat soils stayed relatively constant throughout those 20 years: 8.1% in 1990 and 7.9% in 2010 (Gunarso, Hartoyo, Agus, & Killeen, 2014). The direct conversion of forest to oil palm was more common in Sabah and Sarawak, but the conversion of other types of land use, such as rubber was more important in Peninsular Malaysia (Gunarso, Hartoyo, Agus, & Killeen, 2014).

Major environmental threats from oil palm plantations are deforestation, biodiversity loss, water pollution, soil erosion, carbon emissions resulting from land use change and forest fires, and pesticide use (Chin, 2011). There are also human-wildlife conflicts fuelled by forest conversion for oil palm (Persey, Imanuddin, & Sadikin, 2011).

The biggest underlying threats are corruption and weak enforcement of the law. Comprehensive legislation exists to regulate business, labour, human rights, indigenous rights, and the environment, however, the effectiveness of enforcement is hampered by insufficient numbers of enforcement officers, incohesiveness of monitoring government agencies, and corruption. Indigenous rights is an area of high concern as the palm oil sector continue to encroach on indigenous land in a political environment that marginalizes indigenous communities from the benefits of development.

RSPO is a voluntary certification scheme that offers a comprehensive set of safeguards in the palm oil sector, but critics have said that the certification bodies and RSPO itself need to undergo credible reform for the safeguards to become effective. Until then, critics have said that buyers must exercise due diligence to determine the source of their palm oil – or risk the many products on supermarket shelves being tainted with human trafficking, human rights abuses and species extinction (Environmental Investigation Agency UK Ltd and Grassroots, 2015).

Information Sources:

- Chin, M. (2011). *Biofuels in Malaysia: An Analysis of the Legal and Institutional Framework*. Bogor, Indonesia: CIFOR.
- Environmental Investigation Agency UK Ltd and Grassroots, 2015. *Who Watches the Watchmen? Auditors and the breakdown of oversight in the RSPO*. Environmental Investigation Agency. <https://eia-international.org/wp-content/uploads/EIA-Who-Watches-the-Watchmen-FINAL.pdf>

- Gunarso, P; Hartoyo, ME; Agus, F & Killeen, TJ. (2013). Oil Palm and Land Use Change in Indonesia, Malaysia and Papua New Guinea. Reports from the Technical Panels of the 2nd Greenhouse Gas Working Group of the Roundtable on Sustainable Palm Oil (RSPO). <http://www.tropenbos.org/publications/oil+palms+and+land+use+change+in+indonesia,+malaysia+and+papua+new+guinea>
- MPOB. (2016). Overview of the Malaysian Oil Palm Industry 2015. Malaysian Palm Oil Board. Retrieved from: http://bepi.mpob.gov.my/images/overview/Overview_of_Industry_2015.pdf
- Persey, S., Imanuddin, & Sadikin, L. (2011). A Practical Handbook for Conserving High Conservation Value Species and Habitats within oil palm landscapes. Zoological Society of London. Retrieved from <http://www.sustainablepalmoil.org/wp-content/uploads/sites/2/2015/11/A-Practical-Handbook-for-Conserving-High-Conservation-Value-species-and-Habitats-within-Oil-Palm-Landscapes-Indonesia-focus.pdf>
- WWF. (2016). The Malaysian Rainforest. Retrieved from: http://www.wwf.org.my/about_wwf/what_we_do/forests_main/the_malaysian_rainforest/

D. CSR Risk Assessment

BUSINESS ISSUES

1.1. Land Tenure

Legislation covering land tenure rights that includes the use of legal methods to obtain tenure rights. Risk may be encountered where land rights have not been issued according to prevailing regulations and where corruption has been involved in the process of issuing land tenure rights. The intent of this indicator is to ensure that any land tenure rights have been issued according to the legislation.

1.1.1. Applicable laws and regulations

- Malaysia Federal Constitution - [link](#)
- Sabah Land Ordinance (Cap. 68) - [link](#)
- Sabah Land Acquisition Ordinance (Cap. 69) - [link](#)
- Sabah Biodiversity Enactment 2000 - [link](#)
- Sabah Environment Protection Enactment 2002 - [link](#)
- The Forest Enactment (1968) - [link](#)
- Sabah Forestry Development Authority Enactment (1981) - [link](#)
- Sabah Land Development Board Enactment 1981 - [link](#)

1.1.2. Legal authority

- Federal Government: Referent to the National Land Code 1965, the Federal government can intervene in land matters to promote uniformity of law and policy and thus plays an important coordinating role across law, administration and policy (<http://aseanvaluer.org/>)
 - Department of Environment Malaysia (DOE): Responsible for the implementation and regulation of environmental legislation
 - Key activities: environmental assessment, monitoring, review and enforcement of environmental regulations and orders as prescribed under the Environmental Quality Act (http://www.rspo.org/files/resource_centre/OP_Chain_Part%20A_new.pdf)
 - The Ministry of Plantation Industries and Commodities (MPIC): <http://www.kppk.gov.my/mpic/index.php/en/>
 - The main functions of MPIC are policy and strategy development in the plantation and commodity sector, as well as supervision of relevant government department and agencies in regards to finance and implementation – e.g. MPOB
 - Malaysian Palm Oil Board (MPOB): <http://www.mpob.gov.my/en/about-us/about>: Government agency charged with overseeing, regulating and developing the Malaysian Palm Oil sector.

- State Government: All land belongs to the State; land that has not been alienated, declared as reserved land or mining land is considered State land (http://www.fao.org/gender-landrights-database/country-profiles/countries-list/land-tenure-and-related-institutions/en/?country_iso3=MYS). Because land is a State matter, each State has its own responsible entity. In Sabah, such entities are:
 - Ministry of Agriculture and Food Industry – Charged with the responsibility to advise the state government on matters pertaining to agriculture industry and development (<http://ww2.sabah.gov.my/mafi/ENG/InfoFunction.html>). It is further in charge of legislation, monitoring, coordination, ensuring and implementation of policies and strategies. The Ministry of Agriculture and Food Industry is comprised of the following department:
 - Department of Agriculture
 - Department of Fisheries
 - Department of Veterinary Services and Animal Industry
 - Department of Drainage and Irrigation
 - Rural Development Corporation
 - Fisheries and Fisherman Development Corporation
 - Sabah Rubber Industry Board
 - Sabah Lands and Survey Department – In charge of alienation of State land under the Land Acquisition Ordinance (<http://www.jtu.sabah.gov.my/homepage/index.cfm?section=about&action=function>)
 - Sabah Land Development Board – In charge of promoting and carrying out projects for land development and settlement, for making funds available therefor and for purposes connected thereto (<http://www.lawnet.sabah.gov.my/lawnet/SabahLaws/StateLaws/SabahLandDevelopmentBoardEnactment1981.pdf>).

1.1.3. Legally required documents or records

- Proof of ownership is provided by two documents: Issue Document of Title and Register Document of Title.
 - If the buyer of land is a foreign person or company, the transfer needs to be sanctioned by the State Authority
- In addition, establishment and management of a palm oil plantation in Sabah requires the following licenses:
 - If the proposed agricultural plantation is of more than 500 ha derived from secondary- or primary forests (or from modification of present land use) it requires project proponents to submit an Environmental Impact Assessment (EIA) and obtain approval from DOE (http://www.rspo.org/files/resource_centre/OP_Chain_Part%20A_new.pdf).
- MPOB License (MPOB L1):

- All persons wanting to be involved in the palm oil business needs to be licensed the MPOB according to the MPOB Regulations of 2005.
- This includes the production, sale, purchase, movement, storage, commence construction of oil palm mill, milling, commence construction of bulking facilities, survey, test, export and import of oil palm products (<http://161.142.157.2/pnp/bi/pelesenan.html>)
- Palm Oil Mills: Referent to the Environmental Quality Act 1974, all treatment and disposal facilities (e.g. crude palm oil mill) must obtain prior written permission from the Director-General of Environmental Quality (RSPO, 2014)

1.1.4. Sources of information

Non-Government sources

- Chan, J. (2016, March 1). To prevent fraud, Sabah MACC wants to reissue native certificates. Retrieved from [www.themalaymailonline.com](http://www.themalaymailonline.com/malaysia/article/to-prevent-fraud-sabah-macc-wants-to-reissue-native-certificates): <http://www.themalaymailonline.com/malaysia/article/to-prevent-fraud-sabah-macc-wants-to-reissue-native-certificates>
- Department of Environment. (2010). Environmental Requirements: A Guide for Investors. Kuala Lumpur: Government of Malaysia.
- Toh, S. M., & Grace, K. T. (2006). Case study from Malaysia: Sabah forest ownership. In FAO, Understanding forest tenure in South and Southeast Asia (pp. 253-281). Rome: FAO.

1.1.5. Risk determination

Overview of Legal Requirements

In Sabah, as in the rest of Malaysia, land tenure is governed by the State Government. Consequently, any claims to land have to be registered and approved by the State. All unowned land, or land not continually cultivated, will be assumed by the State (Toh & Grace, 2006). Land in Sabah falls into one of three categories:

- State Property Rights – also known as state land.
- Private Property Rights – Alienated land for development (including palm oil). Owned by the private sector in form of companies or individuals. Also, includes indigenous and communal titles.
- Communal Property Right – Differs from communal titles in that rights cannot be transferred to other parties. A communal property right is an indigenous reserve and comes with a set of restrictions on land use. Although communal property rights are enshrined by law, only a very small area is currently gazetted under them (Toh & Grace, 2006, p. 257).

To obtain land ownership in Sabah, the most common way is via a land application to the State government through the Land and Survey Department. However, sections 9(1), 76 and 78 of the Sabah Land Ordinance (SLO) opens for alternative routes for native ownership in Sabah. In addition, the SLO provides some protection of indigenous customary rights, as it introduces a strict set of conditions that must be followed to claim customary land (Toh & Grace, 2006, p. 254).

Description of risk

In Sabah, the greatest risk in land tenure appears to be fraud in the issuance of native licenses. In the spring of 2016, the Malaysian Anti-Corruption Commission (MACC) estimated that thousands of fake native licenses have been bought by non-natives through criminal syndicates (Chan, 2016). Several prominent cases of land fraud in Sabah have surfaced in 2016, where it was revealed that foreigners had purchased large areas native customary land; one non-native held more than 300 native titles (Chan, 2016). The extent of the fake licenses is so large that the MACC have called for a complete recall of all native certificates and revaluation of the system of issuance, including the introduction of a new and improved certificate (Chan, 2016).

In addition to the issue of false licenses, land conflict in Sabah is common. Native communities are often unaware of their rights under the SLO and are unfamiliar with the legal process of claiming land, often leading to conflict with the State, which is quick to gazette resource-rich land to other purposes (Toh & Grace, 2006). Land disputes in Sabah exists when indigenous communities fail to register and claim their traditional lands and the State gazettes this land for other purposes, such as designating it as a forest reserve or alienating it for development purposes (Toh & Grace, 2006).

Risk conclusion

This indicator has been evaluated as Elevated risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

1.1.6. Risk designation and specification

Elevated risk

1.1.7. Control measures and verifiers

Country specific

Verifiers:

Review updated information and news on land tenure issues via:

- NGO investigations and reports (Forest Peoples Programme <http://www.forestpeoples.org>, , Rainforest Action Network www.ran.org, <http://www.schusterinstituteinvestigations.org>, greenpeace.org, Friends of the Earth foe.org, The Human Rights Commission of Malaysia (SUHAKAM) (<http://www.suhakam.org.my/>), Pusat Komus (komus.org), Cultural Survival (culturalsurvival.org))
- Media reports (Mongabay.com, greenomics.org, red-monitor.org, eyesontheforest.org, sarawakreport.org, malaysiakini.com, www.theborneopost.com)
- Review the Zoological Society of London (ZSL)'s Sustainable Palm Oil Transparency Toolkit (SPOTT) tool to assess the palm oil producer's commitments to environmental and social best practice which is based on publicly available information on disclosure of their operations.

For land tenure issues check palm oil producers' 'Landbank' scores:

<http://www.sustainablepalmoil.org/companies/>

This data can support SPOTT users in conducting further research to verify whether or not company commitments are being implemented on the ground.

Under Map of Concessions found here: <http://www.sustainablepalmoil.org/about/> use the map search bar to find specific company concessions or locations. Click the concession sites marked by pins to zoom in for more information, then go to the company pages of featured concessions to view their assessments and for legality particularly pay attention to the layer called 'government allocated areas' to ensure the palm oil producer is operating in a legal area. For more on how to use the SPOTT map see the ZSL FAQs page.

Country specific Control Measures:

- Evidence of palm oil farms obtaining proof of ownership documents: Issue Document of Title and Register Document of Title
- Evidence of MPOB License
- Palm Oil Plantations >500 or palm oil plantations clearing more than >50 hectares of land hectares: evidence an approved Environmental Impact Assessment (EIA) from the Department of Environment Malaysia (DOE)

Generic

- Land registry shall confirm ownership and validity of property deed.
- Tax authorities shall confirm valid tax registration.
- The business register shall confirm valid business licenses to operate within the jurisdiction.
- In areas with land ownership conflicts, consultation with neighbours, local communities and others shall confirm that land tenure rights are clear.
- Stakeholder consultation shall confirm that registration of farm has been granted following legally prescribed processes
- Stakeholder consultation shall confirm that legal status of the operation or rights for conducting the established activities are not subject to court orders or other legally established decisions to cease operations.
- The management contract or other agreements with the owner shall indicate clear management rights.
- Valid business registration documents shall exist.
- The issuance of legal rights and registration shall be subject to public disclosure prior to commencement of any activities within farm.

1.2. Plantation registration and management rights

Legislation covering land management rights including customary rights and any legal requirements for management planning. It also covers legal business registration and tax registration, including relevant legal required licenses. Risk may be encountered where land rights have not been issued according to prevailing regulations and where corruption has been involved in the process of issuing land tenure and management rights. The intent of this indicator is to ensure that any land management rights have been issued according to the legislation. Low quality of the management plan resulting in illegal activities may be a risk factor for this indicator as well.

1.2.1. Applicable laws and regulations

- Malaysia Federal Constitution - [link](#)

- Malaysian Palm Oil Board (Licensing) Regulations 2005 - [link](#)
- Environmental Quality Act 1974 - [link](#)
- Sabah Environment Protection Enactment 2002 - [link](#)
- The Forest Enactment (1968) - [link](#)
- Companies Act 1965 (Act 125) - [link](#)
- Registration of Businesses Act 1956 (Act 197) - [link](#)
- Trust Companies Act 1949 (Act 100) - [link](#)
- Kootu Funds (Prohibition) Act 1971 (Act 28) - [link](#)
- Limited Liability Partnerships Act 2012 (Act 743) - [link](#)
- Subsidiary legislation:
 - Companies Regulations 1966 - [link](#)
 - Registration of Businesses Rules 1957 - [link](#)
- Conservation of Environment Enactment 1996 - [link](#)
- Conservation of Environment (Prescribed Activities) Order 1999 - [link](#)

1.2.2. Legal authority

- Federal Government: Referent to the National Land Code 1965, the Federal government can intervene in land matters to promote uniformity of law and policy and thus plays an important coordinating role across law, administration and policy (<http://aseanvaluer.org/>)
 - Department of Environment Malaysia (DOE): Responsible for the implementation and regulation of environmental legislation
 - Key activities: environmental assessment, monitoring, review and enforcement of environmental regulations and orders as prescribed under the Environmental Quality Act (http://www.rspo.org/files/resource_centre/OP_Chain_Part%20A_new.pdf)
 - The Ministry of Plantation Industries and Commodities (MPIC): <http://www.kppk.gov.my/mpic/index.php/en/>
 - The main functions of MPIC are policy and strategy development in the plantation and commodity sector, as well as supervision of relevant government department and agencies in regards to finance and implementation – e.g. MPOB
 - Malaysian Palm Oil Board (MPOB): <http://www.mpob.gov.my/en/about-us/about>: Government agency charged with overseeing, regulating and developing the Malaysian Palm Oil sector.
- State Government: All land belongs to the State; land that has not been alienated, declared as reserved land or mining land is considered State land (http://www.fao.org/gender-landrights-database/country-profiles/countries-list/land-tenure-and-related-institutions/en/?country_iso3=MYS). Because land is a State matter, each State has its own responsible entity. In Sabah, such entities are:

- Ministry of Tourism, Culture and Environment: "Develop and provide a policy and guidelines for sustainable tourism development for Sabah in line with national policies" (<http://kepkas.sabah.gov.my/about-us/>)
 - Director of the Environmental Conservation Department (ECD): In charge of issuing Environmental Impact Assessments in Sabah (<http://ww2.sabah.gov.my/jpas/programs/>)
- Ministry of Agriculture and Food Industry – Charged with the responsibility to advise the state government on matters pertaining to agriculture industry and development (<http://ww2.sabah.gov.my/mafi/ENG/InfoFunction.html>). It is further in charge of legislation, monitoring, coordination, ensuring and implementation of policies and strategies. The Ministry of Agriculture and Food Industry is comprised of the following department:
 - Department of Agriculture
 - Department of Fisheries
 - Department of Veterinary Services and Animal Industry
 - Department of Drainage and Irrigation
 - Rural Development Corporation
 - Fisheries and Fisherman Development Corporation
 - Sabah Rubber Industry Board
- Sabah Lands and Survey Department – In charge of alienation of State land under the Land Acquisition Ordinance (<http://www.jtu.sabah.gov.my/homepage/index.cfm?section=about&action=function>)
- Sabah Land Development Board – In charge of promoting and carrying out projects for land development and settlement, for making funds available therefor and for purposes connected thereto (<http://www.lawnet.sabah.gov.my/lawnet/SabahLaws/StateLaws/SabahLandDevelopmentBoardEnactment1981.pdf>).
- The Companies Commission of Malaysia (Suruhanjaya Syarikat Malaysia or SSM): <http://www.ssm.com.my/en/about-ssm>
 - Statutory body charged with regulation of companies and businesses in Malaysia. Serves as an agency to incorporate and regulate businesses as well as provide information to the public. Ensures compliance with business- and corporate legislation.
 - SSM is responsible for the administration and enforcement of the following legislation
 - Companies Act 1965 (Act 125);
 - Registration of Businesses Act 1956 (Act 197);
 - Trust Companies Act 1949 (Act 100);

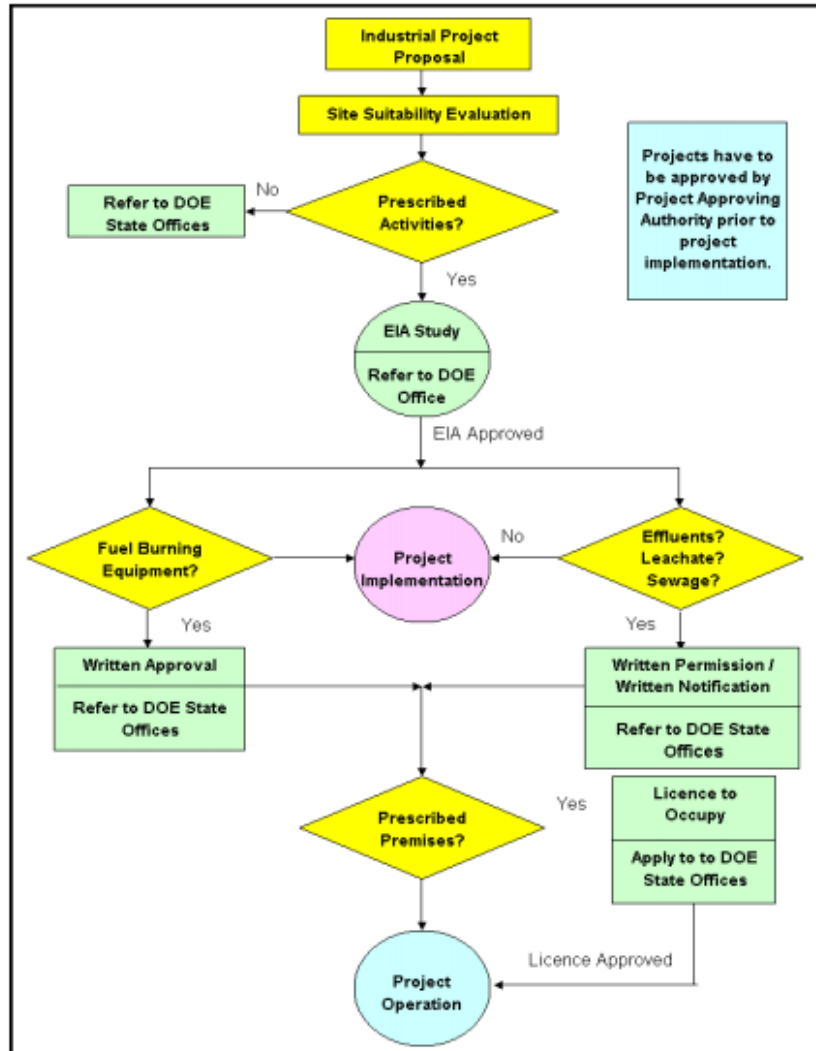
- Kootu Funds (Prohibition) Act 1971 (Act 28);
- Limited Liability Partnerships Act 2012 (Act 743);
- any subsidiary legislation made under the Acts specified above such as:
 - Companies Regulations 1966; and
 - Registration of Businesses Rules 1957

1.2.3. Legally required documents or records¹

- Proof of ownership is provided by two documents: Issue Document of Title and Register Document of Title
 - If the buyer of land is a foreign person or company, the transfer needs to be sanctioned by the State Authority
- A business license is required and is provided by the relevant State authority
- Complete a Business Registration Form (Form A) to the SSM
- In addition, establishment and management of a palm oil plantation in Sabah requires the following licenses:
 - If the proposed agricultural plantation is of more than 500 ha derived from secondary- or primary forests (or from modification of present land use) it requires project proponents to submit an Environmental Impact Assessment (EIA) and obtain approval from DOE (http://www.rspo.org/files/resource_centre/OP_Chain_Part%20A_new.pdf).
- MPOB License (MPOB L1):
 - All persons wanting to be involved in the palm oil business needs to be licensed the MPOB according to the MPOB Regulations of 2005.
 - This includes the production, sale, purchase, movement, storage, commence construction of oil palm mill, milling, commence construction of bulking facilities, survey, test, export and import of oil palm products (<http://161.142.157.2/pnp/bi/pelesenan.html>)
- Palm Oil Mills: Referent to the Environmental Quality Act 1974, all treatment and disposal facilities (e.g. crude palm oil mill) must obtain prior written permission from the Director-General of Environmental Quality (RSPO, 2014). A separate license from the Department of Environment (DOE) is required to occupy and operate crude palm oil mills (RSPO, 2014)

¹ (Department of Environment, 2010, p. 20)

Figure 1
APPLICATION PROCEDURE FOR ENVIRONMENTAL REQUIREMENTS IN MALAYSIA



STEP 1

- **Site Suitability Evaluation** (for non-Prescribed Activities).
- **EIA Approval** (for Prescribed Activities).

STEP 2

Activities subject to air and water pollution control:

- **Written Permission** (Air).
- **Written Notification** (Sewage, Industrial Effluent, Leachate).
- **Written Approval** (Prescribed Premises: Crude Palm Oil Mills, Raw Natural Rubber Mills, Scheduled Wastes Facilities)

STEP 3

Licence to occupy:

- Crude Palm Oil Mills.
- Raw Natural Rubber Factories.
- Scheduled Waste Treatment and Disposal Activities
- Prescribed Conveyance

1.2.4. Sources of information

Government sources

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Non-Government sources

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www.sarawakreport.org: <http://www.sarawakreport.org/2012/04/malaysian-foreign-minister-named-in-macc-investigation-into-sabah-timber-corruption-national-expose/>

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1.2.5. Risk determination

Overview of Legal Requirements

Having obtained land in Sabah, a series of licenses from various authorities are needed in the palm oil industry. Firstly, any company must register with the Companies Commission of Malaysia (SSM) using a Business Registration Form (Form A). Furthermore, a set of the licenses from the Department of Environment (DOE) is needed to establish an oil palm plantation or mill. If the plantation exceeds 500 hectares, an Environmental Impact Assessment (EIA) must be completed. In Sabah, the EIA is conducted by the Director of the Environmental Conservation Department (ECD). After the EIA, the palm oil plantation will be subject to DOE regulations and monitoring referent to the Environmental Quality Act 1974 (Teoh, 2002). All parties engaged in the palm oil sector must further obtain a MPOB L1 license subject to the MPOB Licensing Regulations 2005. The MPOB L1 license covers specific areas audited by the MPOB such as: production, sale, purchase, movement, storage, construction, milling, survey, test, export and imports. Thus, if an organization has been approved for production, storage and movement but wants to start selling and exporting Crude Palm Oil (CPO) or palm oil products, then a reassessment of the MPOB L1 is required.

Description of risk

In general, the oil palm sector in Malaysia has the legal framework in place to become a highly organized, regulated, taxed and monitored sector. However, as stated by Transparency International Malaysia, there is always an element of risk when private companies get involved in agriculture, because the only objective is the generation of revenue (Transparency International Malaysia, 2011). In their 2011 Forest Government Integrity Report of Peninsular Malaysia, Transparency International pointed to several weaknesses in the legislation and possible areas influenced by corruption. In relation to corruption and licensing in the forestry sector, the main concern was the legislation's inability to address issues of preferential treatment exercised by state governments towards private companies.

Sabah has long been suspected of corruption in relation to the issuance of licenses. In 2012, the Sarawak Report unveiled how the MACC was in possession of evidence linking then Foreign Minister Anifar Aman to millions of ringgits achieved through corruptly issued logging licenses by his brother, then Sabah Chief Minister, Musa Aman (Sarawak Report, 2012). This high-profile case of corruption is still on-going and has presently involved several Swiss banks (Sarawak Report, 2016). Furthermore, this scandal took on a federal level as well, spreading all the way to Prime minister Najib, who closed all investigations into the matter. This happened despite of a large amount of incriminating evidence being handed over to the Attorney General, who happened to be a relative of Musa Aman (Sarawak Report, 2012; Sarawak Report, 2016).

While the information above is linked to the timber industry, the corruption takes place at a level possibly affecting the oil palm industry as well. This suspicion is enforced by the wide-spread of fraudulence in the issuance of native titles in Sabah, as reviewed in section 1.1.4.

Risk conclusion

This indicator has been evaluated as Elevated risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

1.2.6. Risk designation and specification

Elevated risk

1.2.7. Control measures and verifiers

Verifiers:

- NGO investigations and reports (Forest Peoples Programme <http://www.forestpeoples.org>, , Rainforest Action Network www.ran.org, <http://www.schusterinstituteinvestigations.org>, greenpeace.org, Friends of the Earth foe.org, Forest-Trends <http://www.forest-trends.org/>, REDD-Monitor <http://www.redd-monitor.org/>)
- Media reports (Mongabay.com, greenomics.org, red-monitor.org, , eyesontheforest.org, etc.)
- Assess corporate risk – trace origins back to company and compare company ownership based on their policies, practices, initiatives, and goals (utilizing ZSL's Sustainable Palm Oil Transparency Toolkit (SPOTT) <http://www.sustainablepalmoil.org/companies/>)

Control Measures:

- Evidence of a business license and a completed a Business Registration Form (Form A) to the SSM
- Evidence of MPOB License
- Palm Plantations >500 hectares or palm oil plantations clearing more than >50 hectares of land evidence an approved Environmental Impact Assessment (EIA) from the Department of Environment Malaysia (DOE)

Generic

- Tax authorities shall confirm valid tax registration.
- The business register shall confirm valid business licenses to operate within the jurisdiction.
- Stakeholder consultation shall confirm that registration of farm has been granted following legally prescribed processes
- Stakeholder consultation shall confirm that legal status of the operation or rights for conducting the established activities are not subject to court orders or other legally established decisions to cease operations.
- The management contract or other agreements with the owner shall indicate clear management rights.
- Valid business registration documents shall exist.

- The issuance of legal rights and registration shall be subject to public disclosure prior to commencement of any activities within farm.
- Inspections of harvesting site shall confirm that harvesting takes place within property limits.

1.3. Payment of royalties and required fees

Legislation covering payment of all legally required commodity fees such as royalties and other volume based fees. It also includes payments of the fees based on correct classification of quantities, qualities and species. Incorrect classification of products is a well-known issue often combined with bribery of officials in charge of controlling the classification.

1.3.1. Applicable laws and regulations

- Malaysian Palm Oil Board (Licensing) Regulations 2005 - [link](#)
- Malaysia Income Tax Act 1967 - [link](#)
- Windfall Profit Levy Act 1998 (Act 592) - [link](#)
- Promotion of Investments Act 1986 - [link](#)
- Real Property Gains Tax Act 1976 - [link](#)

1.3.2. Legal authority

- The Ministry of Finance: <http://www.treasury.gov.my/index.php/en/ministries-profile/treasurys-profile.html>
- The ministry in charge of formulating and implementing monetary policies and further in charge of distribution and the management of financial resources of Malaysia
- Royal Malaysian Customs Department: http://www.customs.gov.my/en/ci/Pages/ci_vmv.aspx
- Responsible for the nations indirect tax-policies, hereunder the GST
- The Ministry of Plantation Industries and Commodities (MPIC): <http://www.kppk.gov.my/mpic/index.php/en/>
- The main functions of MPIC are policy and strategy development in the plantation and commodity sector, as well as supervision of relevant government department and agencies (e.g. MPOB) in regards to finance and implementation
- Malaysian Palm Oil Board (MPOB): <http://www.mpob.gov.my/en/about-us/about>
- Government agency charged with overseeing, regulating and developing the Malaysian Palm Oil sector.
- Licensing and taxation authority in the palm oil sector

1.3.3. Legally required documents or records

- Proof of ownership is provided by two documents: Issue Document of Title and Register Document of Title

- If the buyer of land is a foreign person or company, the transfer needs to be sanctioned by the State Authority
- A business license is required and is provided by the relevant State authority
- Complete a Business Registration Form (Form A) to the SSM
- MPOB License (MPOB L1):
 - All persons wanting to be involved in the palm oil business needs to be licensed the MPOB according to the MPOB Regulations of 2005.
 - This includes the production, sale, purchase, movement, storage, commence construction of oil palm mill, milling, commence construction of bulking facilities, survey, test, export and import of oil palm products (<http://161.142.157.2/pnp/bi/pelesenan.html>)

1.3.4. Sources of information

Non-government sources

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1.3.5. Risk determination

Overview of Legal Requirements

Taxation in Sabah is governed by the policies set forth by the Federal Government. The agricultural sector is a source of great income for both the Federal- and State governments. Palm oil is heavily taxed through a number of taxes, cesses and levies paid primarily to the Ministry of Finance and MPOB (Chin, 2011). A cess is paid per tonne of CPO produced to the MPOB for research and development. In addition, cesses are paid to the palm oil price stabilization fund and the cooking oil stabilization scheme. The latter is meant to subsidize the price of cooking oil and is only paid by estates larger than 40.46 ha (Chin, 2011). A corporate tax of 25% is paid on all income in Malaysia. In addition, palm oil producers pay a windfall tax when CPO prices are over 3000MYR per tonne in Sarawak. Smallholders with estates under 40 ha are exempt from the windfall tax (Chin, 2011, pp. 9-10). The CPO export duty is also of

significant importance for the Malaysian palm oil industry, and is 5% as of April 2016, but this number fluctuates monthly (Ching, 2016). State income through taxation happens through property assessment tax (cukai pintu) and land taxes. The above information is summarized in the figure² below (note that the data is from 2010). A final tax, especially relevant to Sarawak (see risk description below), is the Real Property Gains Tax (RPGT), which is a tax charged from the profit gained from selling land or property (LHDN, 2015).

Table 3. Taxation on the Malaysian oil palm industry

Charge	Rate
Corporate tax	25% of corporate profit
Cess for MPOB	MYR11 per tonne of CPO
Cess for Price Stabilisation Fund	MYR2 per tonne of CPO
Cess for cooking oil subsidy	5% above CPO price of MYR1700 per tonne
Windfall profit tax	15% above CPO price of MYR2500 per tonne (Peninsular) 7.5% above CPO price of MYR3000 per tonne (Sabah and Sarawak)
Foreign workers levy	MYR540 per worker
Sabah sales tax	7.5% for CPO price at MYR1000 per tonne and above
Sarawak sales tax	2.5% for CPO price at MYR1000–1500 per tonne 5.0% for CPO price above MYR1500 per tonne
Sarawak land tax	MYR5 per ha
Property assessment tax (by District Councils)	0.5% of rental value of land
Export duty on CPO	10%–30% per tonne of CPO
Goods and Service Tax (GST)	4% of sales value on fresh fruit bunch, CPO, processed palm oil (proposed implementation by 2011)

Source: Malaysian Estate Owners Association, quoted in Hanim (2010b)

Description of risk

The main risk of taxation in Sabah seems to be related to high-profile tax evasion and corruption like that of Sarawak. The Sarawak Report and the Bruno Manser Fund have accused major Swiss Bank UBS of laundering more than 90 million US dollars derived from illegal logging through its subsidiaries in Singapore and Hong Kong on behalf of Musa Aman (Bruno Manser Fund, 2015; Sarawak Report, 2016). The case is still ongoing and the UBS has been ordered to produce documents relating to Musa Aman and his vast earnings (Sarawak Report, 2016). Coupled with Malaysia's score of 50/100 on Transparency International's corruption index, corruption is thus an issue in Malaysia. In relation to forestry and oil palm plantation development, Transparency International Malaysia reports that the risks are transfer pricing (tax evasion through undervaluation) and bribery to undervalue timber (Transparency International Malaysia, 2011). It thus seems reasonable to subject that similar risks are present in the oil palm sector. Supporting this claim is the findings by Chin (2011), who reports that there have been several complaints from the palm oil industry about the heavy taxation and this can thus be considered a prime motivation for tax evasion. In Sabah, there is thus a picture of systemized corruption by high-level officials, spreading all the way to the federal

² Retrieved from (Chin, 2011, p. 10)

level, characterized by kick-backs, nepotism, cronyism and money laundering through off-shore accounts.

Risk conclusion

This indicator has been evaluated as Elevated risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

1.3.6. Risk designation and specification

Elevated risk

1.3.7. Control measures and verifiers

Generic

- Receipts shall exist for payments of related royalties, taxes and other required fees.
- Volumes, and qualities given in sales and transport documents shall match the paid fees.
- Classification of volumes and qualities shall match the royalties and fees paid.

Country Specific

- Proof of ownership is provided by two documents: Issue Document of Title and Register Document of Title
- Evidence of a business license and a completed a Business Registration Form (Form A) to the SSM
- Evidence of MPOB License

1.4. Value added taxes and other sales taxes.

Legislation covering different types of sales taxes which apply to the material being sold. Risk relates to situations where products are sold without legal sales documents or far below market price resulting in illegal avoidance of taxes.

1.4.1. Applicable laws and regulations

- The Goods and Services Act 2014 - [link](#)
- Malaysian Palm Oil Board (Licensing) Regulations 2005 - [link](#)

1.4.2. Legal authority

- The Ministry of Finance: <http://www.treasury.gov.my/index.php/en/ministries-profile/treasurys-profile.html>
- The ministry in charge of formulating and implementing monetary policies and further in charge of distribution and the management of financial resources of Malaysia
- Royal Malaysian Customs Department:
http://www.customs.gov.my/en/ci/Pages/ci_vmv.aspx
- Responsible for the nations indirect tax-policies, hereunder the GST

- The Ministry of Plantation Industries and Commodities (MPIC): <http://www.kppk.gov.my/mpic/index.php/en/>
- The main functions of MPIC are policy and strategy development in the plantation and commodity sector, as well as supervision of relevant government department and agencies (e.g. MPOB) in regards to finance and implementation
- Malaysian Palm Oil Board (MPOB): <http://www.mpob.gov.my/en/about-us/about>
- Government agency charged with overseeing, regulating and developing the Malaysian Palm Oil sector.
- Licensing and taxation authority in the palm oil sector

1.4.3. Legally required documents or records

- Proof of ownership is provided by two documents: Issue Document of Title and Register Document of Title
 - If the buyer of land is a foreign person or company, the transfer needs to be sanctioned by the State Authority
- A business license is required and is provided by the relevant State authority
- Complete a Business Registration Form (Form A) to the SSM
- In addition, establishment and management of a palm oil plantation in Sabah requires the following licenses:
 - If the proposed agricultural plantation is of more than 500 ha derived from secondary- or primary forests (or from modification of present land use) it requires project proponents to submit an Environmental Impact Assessment (EIA) and obtain approval from DOE (http://www.rspo.org/files/resource_centre/OP_Chain_Part%20A_new.pdf).
- MPOB License (MPOB L1):
 - All persons wanting to be involved in the palm oil business needs to be licensed the MPOB according to the MPOB Regulations of 2005.

This includes the production, sale, purchase, movement, storage, commence construction of oil palm mill, milling, commence construction of bulking facilities, survey, test, export and import of oil palm products (<http://161.142.157.2/pnp/bi/pelesenan.html>)

1.4.4. Sources of information

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Non-Government sources

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- Ting, E. H. (2015). At a Glance – The Malaysian Goods and Services Tax Act 2014. Abdullah Chan & Co.

1.4.5. Risk determination

Overview of Legal Requirements

The Goods and Services Tax (GST) was implemented on a nation-wide basis April 1st 2015 and replaced the former types of sales- and service tax. The GST is a multi-staged "... consumption based tax on goods and services" (Ting, 2015, p. 2) and as such it differs from direct taxes (RPGT, income tax etc.). The GST applies to goods or services supplied in Malaysia, as well as on any importation of goods into Malaysia (Ting, 2015) and is rated at either 6% or 0% unless explicitly exempt by the law. In relation to palm oil, only cooking oil and FFB are rated at 0%, CPO and other oil palm products are rated at 6%. The GST is imposed on most transactions in the production process and consequently refunded to all parties in the process except for the final consumer.

In Sabah, there has been great commotion about the implementation of the GST in 2015, because Sarawak and Sabah already had their own State Sales Taxes (SST). The SST is imposed on CPO, slot machines and lotteries. From the perspective of Sarawak and Sabah, the issue with the introduction of the GST is the choice between losing important state income and the prospect of 'double taxation' on e.g., CPO. This is because while the SST goes in the State coffers, the GST belongs to the Federal Government. The two Bornean States chose to retain their SST and CPO is thus both subject to GST and SST; something that effects especially the mills and consequently affects the price the mills can pay farmers for their Fresh Fruit Bunches (Borneo Post, 2013; Borneo Post, 2016).

Description of risk

The discontent with the introduction of GST on Borneo and the increased costs of production carried by the planters and millers of CPO may provide motivation for the circumvention of GST

and SST. The extent of the circumvention of GST and SST is difficult to estimate, but the double-taxation on CPO serves as an incentive to avoid this extra cost. Considering Malaysia's low score on Transparency International's Corruption Perception Index (CPI), avoidance of tax seems to be an actual risk. Family, government and foreign ownerships, in particular, have been proven as the potential determinants of corporate tax avoidance (Annuar, 2014); these types of ownerships are also found in the palm oil plantation sector in Malaysia.

Despite the level of corruption in Malaysia and indicators pointing to tax evasion especially by family, government and foreign ownerships GST is not imposed on palm oil plantations selling FFB

Risk conclusion

This indicator has been evaluated as low risk as GST is not imposed on palm oil plantations selling FFB.

1.4.6. Risk designation and specification

Low risk

1.4.7. Control measures and verifiers

N/A

1.5 Income and profit taxes

Legislation covering different types of sales taxes which apply to the material being sold. Risk relates to situations where products are sold without legal sales documents or far below market price resulting in illegal avoidance of taxes.

1.5.1. Applicable laws and regulations

- Malaysian Palm Oil Board (Licensing) Regulations 2005 - [link](#)
- Malaysia Income Tax Act 1967 - [link](#)
- The Goods and Services Act 2014 - [link](#)

1.5.2. Legal authority

- The Ministry of Finance: <http://www.treasury.gov.my/index.php/en/ministries-profile/treasurys-profile.html>
- The ministry in charge of formulating and implementing monetary policies and further in charge of distribution and the management of financial resources of Malaysia
- Royal Malaysian Customs Department: http://www.customs.gov.my/en/ci/Pages/ci_vmv.aspx
- Responsible for the nations indirect tax-policies, hereunder the GST
- The Ministry of Plantation Industries and Commodities (MPIC): <http://www.kppk.gov.my/mpic/index.php/en/>

- The main functions of MPIC are policy and strategy development in the plantation and commodity sector, as well as supervision of relevant government department and agencies (e.g. MPOB) in regards to finance and implementation
- Malaysian Palm Oil Board (MPOB): <http://www.mpob.gov.my/en/about-us/about>

Government agency charged with overseeing, regulating and developing the Malaysian Palm Oil sector.

Licensing and taxation authority in the palm oil sector

1.5.3. Legally required documents or records

- Proof of ownership is provided by two documents: Issue Document of Title and Register Document of Title
 - If the buyer of land is a foreign person or company, the transfer needs to be sanctioned by the State Authority
- A business license is required and is provided by the relevant State authority
- Complete a Business Registration Form (Form A) to the SSM
- MPOB License (MPOB L1):
 - All persons wanting to be involved in the palm oil business needs to be licensed the MPOB according to the MPOB Regulations of 2005.
 - This includes the production, sale, purchase, movement, storage, commence construction of oil palm mill, milling, commence construction of bulking facilities, survey, test, export and import of oil palm products (<http://161.142.157.2/pnp/bi/pelesenan.html>)

1.5.4. Sources of information

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1.5.5. Risk determination

Overview of Legal Requirements

In Malaysia, the standard taxation of corporate income is at 25% percent. This level of taxation applies to all sectors, except for the following: banking, insurance, air transport and shipping. Taxable income is all earnings derived from Malaysia and covers gains from dividend, royalty and land trading. Companies with annual earnings below 2,500,000MYR is classified as 'Small-to-Medium Enterprise' (SME) and qualifies for a 5% tax decrease for the first 50,000MYR (PwC, 2016).

Description of risk

The main risk in relation to taxation is related to corruption. Malaysia scores a 50/100 on Transparency International's corruption index and thus corruption is an issue in Malaysia. In relation to forestry and oil palm plantation development, Transparency International Malaysia (2011) reports that the risks are transfer pricing (tax evasion through undervaluation) and bribery to undervalue timber. In particular, family, government and foreign ownerships have been proven as the potential determinants of corporate tax avoidance (Annuar, 2014); these types of ownerships are also found in the palm oil plantation sector in Malaysia.

It thus seems reasonable to subject that similar risks are present in the oil palm sector. Supporting this claim is the findings by Chin (2011), who reports that there have been several complaints from the palm oil industry about the heavy taxation and this can thus be considered a prime motivation for tax evasion.

Risk conclusion

This indicator has been evaluated as elevated risk taking a precautionary approach based on the level of overall corruption in Malaysia and evidence of tax evasion commonly linked to businesses with family, government and foreign ownerships.

1.5.6. Risk designation and specification

Elevated risk

1.5.7. Control measures and verifiers

Country Specific

Evidence of:

- Proof of ownership is provided by two documents: Issue Document of Title and Register Document of Title
- Evidence of a business license and a completed a Business Registration Form (Form A) to the SSM
- Evidence of MPOB License

Generic

- Consultation with financial authority to verify that all required income and profit taxes have been paid.

1.6. Disclosure of information

Legislation covering requirements for regular business reporting to ensure information disclosure and transparency. Risk relates to lack of business transparency and/or incorrect disclosure of legally required business information.

1.6.1. Applicable laws and regulations

- Companies Act 1965 (Act 125) - [link](#)

1.6.2. Legal authority

- Malaysian Accounting Standard Board (MASB): <http://masb.org.my/pages.php?id=14>

In charge of formulating accounting standards

1.6.3. Legally required documents or records

N/A

1.6.4. Sources of information

Non-Government sources

- Othman, R., & Ameer, R. (2010). Environmental Disclosures of Palm Oil Plantation Companies in Malaysia: A Tool for Stakeholder Engagement. Corporate Social Responsibility and Environmental Management, 52-62.

1.6.5. Risk determination

Overview of Legal Requirements

Subject to the Companies Act 1965, reporting in the palm oil industry is confined only to financial data with no reference to disclosure to environmental information. However, the Financial Reporting Standard 1 (FRS) does make a special reference to environmental disclosures, but it only encourages companies to present additional information and environmental reporting is thus voluntary (Othman & Ameer, 2010).

Description of risk

In their research on environmental disclosures in the Malaysian oil palm industry, Othman & Ameer (2010) found that companies only disclosed limited information in their annual reports (p. 61). With the increasing media- and public attention towards both social- and environmental consequences of oil palm plantation development, it must be assumed that stakeholders and investors must be increasingly dissatisfied with the lack of disclosure. However, no information can be found on whether the current legal requirements are being adhered to.

Risk conclusion

This indicator has been evaluated as low risk. Identified laws are upheld. Cases where law/regulations are violated are efficiently followed up via preventive actions taken by the authorities and/or by the relevant entities.

1.6.6. Risk designation and specification

Low risk

1.6.7. Control measures and verifiers

N/A

SOCIAL ISSUES

2.1. Civil rights - legal employment

Legal requirements for employment of personnel involved in plantation activities including requirement for contracts and working permits, requirements for obligatory insurances, requirements for competence certificates and other training requirements, and payment of social and income taxes withhold by employer. Risk relates to situations/areas where systematic or large scale noncompliance with labor and/or employment laws. The objective is to identify where serious violations of the legal rights of workers take place, such as forced, underage or illegal labour.

2.1.1. Applicable laws and regulations

- Sabah Labour Ordinance - [link](#)
- Minimum Wages Order 2016 - [link](#)
- Industrial Relations Act 1967 (Act 177) - [link](#)
- Employment (Restriction) Act 1968 - [link](#)
- Employment (Information) Act 1953 - [link](#)
- Sabah Weekly Holidays Ordinance - [link](#)
- Wages Council Act 1947 - [link](#)
- Workers Minimum Housing Standards and Amenities Act 1990 (Act 446) - [link](#)
- Employees Provident Fund Act 1991 - [link](#)
- Employee Social Security Act 1969 - [link](#)
- Workmen's Compensation Act 1952 - [link](#)
- Children and Young Persons (Employment) Act 1966 - [link](#)
- Occupational Safety and Health 1994 - [link](#)
- Employment (Restriction) Act 1968 - [link](#)
- Trade Unions Act 1959 (Act 262) - [link](#)
- Immigration Act 1957 - [link](#)
- Immigration Regulations 1959/63 - [link](#)
- Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Amendment 2010) - [link](#)

2.1.2. Legal authority

- The Ministry of Human Resources (MOHR): Ministry charged with the regulation of wages as well as health and safety standards
 - Department of Labour Sabah
 - Occupational Health and Safety Department – Responsible for reviewing, enforcing and promoting industrial health and safety

- The Industrial Court of Malaysia: Main functions are to "... hear and down decisions or awards in industrial disputes referred to it by the Minister or directly by the parties" (Industrial Court of Malaysia, n.d.) and to monitor the collective agreement reached between the employer/trade union of employers and trade union of employees (<http://www.mp.gov.my/en/about-us/client-s-charter>)
- Social Security Organization (SOSCO): Government Agency administering and enforcing the Employee Social Security Act 1969 and Employee Social Security General Rules 1971
- Ministry of Finance
 - Employees' Provident Fund (EPF): Management of mandatory savings- and retirement planning for all Malaysian workers in the private sector. To Malaysians, membership of EPF is obligatory and voluntary for non-Malaysian workers.
- Ministry of Home Affairs: Main function is "To ensure orderly management of the issue of travel documents, entry/exit of citizens and foreign nationals as well as the issue of appropriate passes to foreign nationals who reside in this country in accordance with immigration acts and regulations" (<http://www.moha.gov.my/index.php/en/maklumat-korporat/fungsi-kementerian>)
 - The Immigration Department: Charged with issuance of passports and travel documents to Malaysians, visas, passes and permits to foreign nationals and management the movement of people at authorized entry and exist points (<http://www.imi.gov.my/index.php/en/corporate-profiles/introduction.html>)
- Plantation Industries and Commodities Ministry: The main functions of MPIC are policy and strategy development in the plantation and commodity sector, as well as supervision of relevant government department and agencies in regards to finance and implementation – e.g. MPOB (<http://www.kppk.gov.my/mpic/index.php/en/>)

2.1.3. Legally required documents or records

- Employment Contract
 - An employer or self-employed person must provide his/her employees with a written contract of employment (unless the duration of the work is less than one month, in which an oral contract will suffice)
 - The contract must include the following information:
 - Names of both employer and employee
 - Job title
 - Date of commencement of work
 - Place of work as well as work address
 - Required notice period as well as retirement age
 - By law, following minimum terms and conditions must be adhered to:
 - No more than 48 hours per week
 - No more than 8 hours per day (maximum 10 hours if spread over a day)

- A minimum 30 minute of rest for every five hours worked
- One day off per week
- Migrant workers have a valid passport, valid visa as well as pass a medical exam prior to employment

2.1.4. Sources of information

Government sources

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Non-Government sources

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- Sapienza, S. (2013, February 12). Growing Demand for Palm Oil Drives Malaysia to Employ Child Migrant Workers. Retrieved from [www.pbs.org: http://www.pbs.org/newshour/bb/world-jan-june13-palmoil_02-12/](http://www.pbs.org/newshour/bb/world-jan-june13-palmoil_02-12/)
- US Department of State. (2016). 2015 Trafficking in Persons Report . US Department of State.
- Villadiego, L. (2015). Palm oil: why do we care more about orangutans than migrant workers? *The Guardian*.

2.1.5. Risk determination

Overview of Legal Requirements

The major piece of legislation governing employment rights in Sabah is the Sabah Labour Ordinance (SLO). The SLO covers all persons with a monthly salary not exceeding 2,500MYR. In addition, the SLO covers all persons, regardless of wage, engaged in the following professions: manual labour, supervision of manual labour, operation of propelled machinery, recruitment of labour, engaged in ships and domestic servants (ICLG, 2016). The coverage of manual labour means that the SLO effectively covers a vast majority of the farm workers and as such it is of significant importance to the palm oil industry.

Employees covered by the SLO have the following minimum terms and conditions of employment:

- Maximum hours of work per day and per week;
- Overtime payment for work more than normal hours of work;
- Protection from deduction of wages;
- Paid annual leave/vacation leave;
- Paid sick leave
- 16 paid public holidays, five of which are determined by law
- Termination notice period
- Payment of termination benefits, except in cases where the termination of employment is due to misconduct or poor performance
- A minimum wage of 920MYR per month or 4.42 per hour in Sabah (ICLG, 2016)

An important note here is that term and conditions in any employment contract must comply with the minimum standards set out in the law. In addition, the SLO requires all employees in the private sector to be members of the Employee's Provident Fund (EPF) and the Social Security Organization (SOC SO). EPF handles savings- and retirement- planning, while SOC SO provides medical insurance. SOC SO membership is contingent upon a salary not exceeding 3,000MYR unless the employee is a registered contributor (PERKESO, n.d.). An important note is that foreign nationals working in Malaysia are excluded from EPF and SOC SO (ICLG, 2016). Instead, foreign workers are covered by the Workmen's Compensation Act. The SLO also states that all contracts with a duration of one month or more must be in written form and contain provision for termination. Should a written contract not exist, the employment relationship and contractual terms still stand (ICLG, 2016). Summing up, people working on palm oil farms in Malaysia are covered by the SLO and thus enjoy a set of minimum terms and conditions of employment, as well as implied rights to protection from unjust dismissal (ICLG, 2016). Unionizing is governed by the Trade Unions Act 1959 and the Industrial Relations Act 1967. Membership is restricted to sectors and the law prohibits migrant workers from forming a trade union, but allows for migrant workers to join an existing union. Subject to section 28(1) of the Trade Union Act, a migrant worker cannot hold an executive position in a trade union.

Malaysian law states that all job vacancies must be offered to Malaysian nationals before opening for migrant applications. In the case of vacancies, which is the norm in the palm oil industry, an application to the Immigration Department (ID) is made by the employer and if

successful, the ID will grant the employer with a license to import migrant workers. Migrant workers must then be able to show a valid visa and passport as well as pass a medical exam (Othman & Rahim, 2014). Upon expiry of the visa (usually valid for three months), the migrant worker is terminated. Migrant labour is thus temporary and workers are tied to one Malaysian employer. Referent to the Workmen's Compensation Act of 1952, all employers must insure all their foreign employees. In addition, it is the duty of the employer to produce a written OSH policy for the workplace, hire a safety and health officer (only in some cases) as well as provide the necessary training to the employees (ILO, 2013). Migrant labour in Malaysia thus enjoys legal protection like that of Malaysians.

Description of risk

The main risk of legal employment is related to the import and working conditions of migrant workers. Industrial growth in Malaysia has often led to an acute labour shortage in certain sectors, necessitating an influx of migrant workers. According to the 2015 Trafficking in Persons (TIP) report prepared by the US Department of State, Malaysia is a major destination for illegal trafficking and forced labour. This has been especially evident in the palm oil industry in Malaysia and Indonesia, which employ some 3,5 million workers (Villadiego, 2015). In Malaysia, a majority of workers are migrant workers from the Philippines, Nepal, Bangladesh and Indonesia.

According to the 2015 Trafficking in Persons (TIP) report prepared by the US Department of State, Malaysia is a major destination for illegal trafficking and forced labour. It is estimated that Malaysia presently has two million documented and even more undocumented foreign workers (US Department of State, 2016, p. 254). Furthermore, it is concluded that Malaysia's legal framework currently is insufficient to protect foreign workers, because the law imposes several processing fees and levies on the employer and consequently allow for these fees to be deducted from the workers' wages, thus incentivizing forced labour and debt bondage (US Department of State, 2016). Common policies in the treatment of foreign workers further include passport retention (both authorized and unauthorized), contract violations, restricted movement, wage fraud and imposition of debt by both recruitment agents and employers (US Department of State, 2016, p. 255). Hence, despite being protected by several Malaysian laws, migrant workers are often mistreated and several laws thus broken. In 2002, the Human Rights Resource Centre concluded that: "There have been complaints of mistreatment, exploitation by unscrupulous recruitment agencies, physically abuse and poor living and work conditions of foreign workers" (Lih, 2012) and further that these problems are exacerbated by the lack of law enforcement.

In Sabah, as in Sarawak, the issue of migrant workers is especially pertinent, as Sabah currently faces a significant shortage of labour in the oil palm industry (Borneo Post 2016). Recognizing that need for foreign labour as locals seems unwilling to take the dirty, dangerous and difficult (3D) work as oil palm harvesters, Sabah has been allowed to import its own foreign labour (Borneo Post, 2016). However, this sourcing of migrant labour is not without risks. Several reports of the use of child labour in Sabah have hit the media (Motlagh, 2013; Sapienza, 2013) and coupled with the report from the Wall Street Journal uncovering systematic abuses in the import and treatment of migrant workers in Malaysia (though most related to Peninsular Malaysia), we have a picture of a Malaysian palm oil industry oftentimes unconcerned with the large majority of immigrants performing 3D work.

Risk conclusion

This indicator has been evaluated as Elevated risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

2.1.6. Risk designation and specification

Elevated risk

2.1.7. Control measures and verifiers

Evidence of:

- List of employees (e.g., request the employer's payroll list) and ask for a sample of Employment Contract(s) of those employees on the list.
 - The contract must include the following information:
 - Names of both employer and employee
 - Job title
 - Date of commencement of work
 - Place of work as well as work address
 - Required notice period as well as retirement age
- Request the employer's payment voucher and evidence that that required payments such as social security contributions are being paid.
- Request from the employee or the employer pay stubs to verify it is in line within the relevant contract agreement
- Interviewing employees and ask what activity performed, that amount paid by the employer for the activity, which method of payment have (daily / daily wage, monthly, performance / production), how long working hours, few days a week they work.
- To ensure that employees are registered with EPF and SOCSO, one can cross check the record of salary payment slips with receipts from EPF and SOCSO and the corresponding payment forms (Form A for EPF and Form 8A for SOCSO)

Generic

- All workers are employed according to the regulation and required contracts are in place
- Persons involved in farm management activities shall be covered by obligatory insurances.
- Persons involved in farm management activities shall hold required certificates of competence for the function they carry out.
- At least the legally established minimum salaries shall be paid for personnel involved in farm management activities.
- Salaries shall be paid officially and declared by the employer according to requirements for personnel involved in farm management activities.
- Minimum age shall be observed for all personnel involved in farm management activities.
- Minimum age shall be observed for all personnel involved in hazardous work.

- Stakeholders shall confirm that forced or compulsory labour is not involved in farm management activities.

2.2. Health and Safety

National and sub national laws and regulations incorporation of the ILO Fundamental Conventions. This is to ensure minimum employment requirements cover an observance of minimum working age, legislation against forced and compulsory labour, and discrimination and freedom of association etc. Risk relates to if there are gaps in the national and/or sub national laws and regulations with the ILO Fundamental Conventions. The objective is to identify the gaps and/or where there may be serious violations of the legal rights of workers take place against the eight core ILO Fundamental Conventions.

2.2.1. Applicable laws and regulations

- Occupational Safety and Health Act 1994 (Act 514) - [link](#)
- Factories and Machinery Act 1967 (Act 139) - [link](#)
- Petroleum (Safety Measures) Act 1984 (Act 302) - [link](#)

2.2.2. Legal authority

- The Ministry of Human Resources (MOHR): Ministry charged with the regulation of wages as well as health and safety standards
- The Department of Occupational Safety and Health (DOSH) Sarawak is the department under MOHR responsible for the safety, health and welfare of the working people.

2.2.3. Legally required documents or records

- It is required of all employer and self-employed persons to produce a written Occupational Health & Safety policy. It is further the responsibility of the employer to advise about the content of the policy, revise it as well as alter it based on suggestions made by his employees
- Furthermore, for large-scale oil palm plantations and mills, the hiring of a health and safe officer is a requirement.

2.2.4. Sources of information

Non-Government sources

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2.2.5. Risk determination

Overview of Legal Requirements

The main components guiding Occupational Health and Safety (OSH) in Malaysia are the Occupational Safety and Health Act 1994, the Factories and Machinery Act 1967, the Petroleum Act (safety measures) 1984. There are others laws mentioning OSH, but the three above are the most important. Of special relevance to the palm oil industry are concerns such as legally required protection and training, safety requirements of machinery and safety requirements in relation to chemical usage.

Section 15(1) of the Occupational Safety and Health Act 1994 states that it is the duty of every employer and self-employed person to ensure the safety and welfare of all his employees while at work. The act further states in section 24(1c) that it is the duty of the employer to provide the necessary protective equipment for the workers. The employer has the duty to ensure the usage of the protective equipment. The employer should provide first-aid kit, sanitary installations, drinking water as well as rest- and eating areas (ILO, 2013). Furthermore, it is the duty of the employer to produce a written OSH policy for the workplace, hire a safety and

health officer (only in some cases) as well as provide the necessary training to the employees (ILO, 2013).

An important feature of the Occupational Safety and Health Act 1994 is that it is based on the concept of self-regulation, meaning that health and safety concerns should be handled by whoever creates the risks. Self-regulation comes in one of three forms; voluntary self-regulation, mandated full self-regulation or mandated partial self-regulation (Bahrin, 2016). Voluntary self-regulation is pure self-regulation, where the company or industry makes the rules and enforces these rules without government intervention. Mandated full self-regulation means that both rules and enforcement are handled by the company or industry, but subject to government monitoring and enforcement, if necessary. Finally, mandated partial self-regulation means that the company or industry can choose to either make the rules or enforce the rules, but not both. This effectively means public enforcement of private rules or vice versa (Bahrin, 2016).

Description of risk

The above walk-through of the central OSH legal requirements relevant to the palm oil industry shows a Malaysian regulatory framework protective of its workers. This protection is indeed necessary, as workers in oil palm plantations face several OSH hazards daily. Some major risks are:

- Falling fruit bunches (weighing 15-25 kilograms)
- Injuries from cutting tools
- Eye damage from falling fronds
- Bites from insects and snakes as well as oil palm pest (fire caterpillars)
- High level of sun exposure causing heating, dehydration and increased risk of skin cancer
- Poisoning from toxic herbicides (such as paraquat)
- Abrasion from the thorns of the palm oil fruit
- Injuries from heavy lifting and carrying as well as repetitive movements (ILO, 2004)

It is evident that the legal framework in Malaysia effectively covers the hazards listed above, however several instances of breaches of Malaysian health and safety standards have surfaced in the last years. While the perhaps most prominent report from the Wall Street Journal (Al-Mahmood, 2015) was related specifically to Peninsular Malaysia, it also reported that a lack of protective equipment, training and contact with dangerous herbicides were systematic throughout Malaysia and Southeast Asia generally. Several sources have reported instances of breaches of health and safety both throughout Malaysia (Asia Pacific Migration Network, 2014; Business & Human Rights Resource Centre, 2015; US Department of Labour, 2014; US Department of State, 2016). One study conducted by Kumar, Ismail & Govindarajo (2014) suggested that OSH breaches were more common in smallholder- than large-scale plantations. However, this suggestion stands in contradiction to the widespread OSH breaches reported in FELDA-plantations by Al-Mahmood (2015).

The National Institute of Occupational Safety and Health (Niosh) recorded 94 cases of industrial accidents in the palm oil industry in 2013³. In comparison, the combined industries of agriculture, forestry and fisheries recorded 89 incidents in the same period (Daily Express, 2014). While the evidence presented are not directly connected to Sabah, there is overwhelming evidence that OSH breaches are common throughout the palm oil industry and it thus plausible to assume that similar risks are present in Sabah as well.

Risk conclusion

This indicator has been evaluated as Elevated risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

2.2.6. Risk designation and specification

Elevated risk

2.2.7. Control measures and verifiers

Seek evidence on:

- Company's occupational safety and health (OSH) management system reporting via published annual sustainability reports in combination with:
- Verify that the company has an occupational safety and health (OSH) program, and that the program used in practice.
 - Verify that the employees of the company have been trained about work safety
 - Obtain records of reports of workplace deaths. Deaths in the workplace must be recorded.

For Large-scale private plantations [>40 - >100,000 ha] and Government land development schemes

- Evidence of a H&S officer position and training, procedures and equipment are in place

Generic

- All safety and health regulations shall be followed and all required safety equipment shall be used
- Occupational health and safety requirements shall be observed by all personnel involved in farm management activities.
- Interviews with staff and contractors shall confirm that legally required protection equipment is required/provided by the organization.
- All requirements on prevention of air and water pollution shall be followed and are verified through reports monitoring pollution (when applicable).

2.3. ILO Fundamental Conventions are upheld

Legally required personnel protection equipment for persons involved in plantation activities and safety requirements to machinery used. Legally required safety requirements in relation to chemical usage. The

³ Latest available data from www.niosh.com.my

health and safety requirements that shall be considered relate to operations on the plantation. Risk relates to situations/areas where health and safety regulations are consistently violated to such a degree that puts the health and safety of plantation workers at significant risk throughout plantation establishment and management operations.

Context

Country under assessment has ratified the following ILO Fundamental Conventions:

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – NOT ratified
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98) - Ratified
- Forced Labour Convention, 1930 (No. 29) - Ratified
- Abolition of Forced Labour Convention, 1957 (No. 105) – Ratified (denounced 10 Jan 1990 – not in force)
- Minimum Age Convention, 1973 (No. 138) - Ratified
- Worst Forms of Child Labour Convention, 1999 (No. 182) - Ratified
- Equal Remuneration Convention, 1951 (No. 100) - Ratified
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - NOT ratified

For ratified ILO conventions by Malaysia:

http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::no:11200:p11200_country_id:102960

For non-ratified ILO conventions by Malaysia:

http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:375936265133562:::P11210_INSTRUMENT_SORT:1

For information on ILO Conventions and Recommendations:

<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

2.3.1. Applicable laws and regulations

Relevant Legislation (see section 2.1.1 for hyperlinks to applicable legislation):

- Federal Constitution of Malaysia
- Part II outlines right to personal liberty, freedom of speech, assembly and association
- Art. 6 provides protection from forced labour
- Art. 8 states that all are equal before the law and that there shall be no discrimination based on religion, race, descent or place of birth
 - Provides minimum protection to employees regarding their terms and conditions of service consisting of working hours, wages, holidays and retrenchment benefits (see section 2.1.4) (ILO, 2014)
- Workers Minimum Housing Standards and Amenities Act 1990 (Act 446)
 - Prescribes minimum standards of housing while requiring employers to provide medical- and social amenities for workers (ILO, 2014)

- Workmen Compensation Act 1952 (Act 273)
 - Provides payment of compensation for injuries sustained in accidents during employment (ILO, 2014)
- Children and Young Persons (Employment) Act 1966
 - Provides regulation to protect children and young persons engaged in employment in terms of working hours, type of work, abuse, etc. (ILO, 2014)
- Occupational Safety and Health 1994
 - Provides regulations to secure the safety, health and welfare at work against risks to safety or health arising out of the activities of persons at work (ILO, 2014)
- Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007

2.3.2. Legal authority

See 2.1.2

2.3.3. Legally required documents or records

See 2.13

2.3.4. Sources of information

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2.3.5. Risk determination

Malaysia has only ratified six of the eight fundamental ILO conventions and further denounced convention number 105, meaning that five of eight conventions currently are in force. However, from the legislation above it is evident that Malaysia has an encompassing legal framework for labourers effectively covering the eight fundamental conventions of employment. Additionally, the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 signifies an increased Malaysian awareness on the issue of human trafficking and illegal immigration, which is a serious issue in the palm oil sector. While the increased intention towards human trafficking and smuggling is a positive and indeed necessary development, little attention is awarded to the rights of migrant workers. Malaysia has not ratified ILO Conventions 97 (Migration for Employment Convention) and 143 (Migrant Workers (Supplementary Provisions)) or the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Considering that a vast majority of oil palm plantation workers is foreign labours, this lack of ratification of international conventions can be seen as worrisome.

Evidence and reports from both newspaper articles and official government departments suggests that the Malaysian legal framework covering areas of employment is not consistently enforced in the palm oil sector. Reports of use of illegal immigrants and abuse of foreign workers in plantations suggests that neither ILO conventions or the Malaysian legal framework are being sufficiently enforced. Amnesty reports that freedoms like freedom of association and collective bargaining are not upheld and that there currently is an erosion of civil liberties in Malaysia (Amnesty, 2016, p. 240). In addition, there have been several reports of:

- Forced labour (Asia Pacific Migration Network, 2014; US Department of State, 2016; US Department of Labour, 2014),
- Discrimination (Pusat Komag, 2016),
- Workers under the minimum age (US Department of Labour, 2014),
- Worst forms of child labour (US Department of Labour, 2014) as well as
- Discrimination and mistreatment of foreign and migrant laborers (see section 2.1.4).

Description of risk

In relation to the ILO fundamental conventions and Malaysian legal framework, the risks seem to be twofold. First, it is a clear risk that Malaysia currently has only ratified 5/8 ILO fundamental conventions. Second, despite the existence of an encompassing legal framework, there exist several cases of alleged illegal labour, human trafficking, child labour and abuses of foreign workers in oil palm plantations in Sabah. Abuses include lack of safety training, inadequate housing, unfair withholding of pay and a lack of medical insurance in case of injury (Al-Mahmood, 2015; Villadiego, 2015).

Risk conclusion

Region under assessment has not ratified the ILO Fundamental Conventions and ILO Fundamental Conventions related laws are not upheld consistently by all entities and/or are systematically ignored, and/or are not enforced by relevant authorities.

2.3.6. Risk designation and specification

Elevated risk

2.3.7. Control measures and verifiers

Verifiers:

- Review the Zoological Society of London (ZSL)'s Sustainable Palm Oil Transparency Toolkit (SPOTT) tool to assess the palm oil producer's commitments to environmental and social best practice which is based on publicly available information on disclosure of their operations. Check palm oil producers scores: <http://www.sustainablepalmoil.org/companies/> and review the relevant company(s) annual or sustainability report to determine if and how they are reporting on labour right issues.

Control Measures:

- Evidence of that the palm oil farm(s) have a clear policy and compliance system is in place that prohibits child labour and its worst forms and sets the minimum age for employment consistent with applicable law.
- Documentation of pay and conditions and evidence is provided it is being implemented credibly (additional cross checks with employees and/or objective observers/stakeholders could be conducted). Also, see control measures under 2.1.5 for more guidance on evidence of legal employment.

Generic

- At least the legally established minimum salaries shall be paid for personnel involved in farm management activities.
- Salaries shall be paid officially and declared by the employer according to requirements for personnel involved in farm management activities.
- Minimum age shall be observed for all personnel involved in farm management activities.
- Minimum age shall be observed for all personnel involved in hazardous work.
- Stakeholders shall confirm that forced or compulsory labour is not involved in farm management activities.

There evidence and/or employees confirm the employer allows them the right to organize and collective bargain.

2.4. The rights of indigenous and traditional peoples are upheld

Legislation requirements addressing: i) customary rights relevant to plantation activities including requirements covering sharing of benefits and indigenous rights ii) "free prior and informed consent" in connection with transfer of plantation management rights and customary rights to the organisation in charge of the plantation operation iii) Legislation that regulates the rights of indigenous/traditional people as far as it's related to plantation activities. Possible aspects to consider are land tenure, right to use certain plantation related resources or practice traditional activities, which may involve plantation lands.) When there is no or inadequate legislation addressing the rights of traditional and indigenous peoples, their rights are still upheld by the relevant plantation operation(s). Risk relates to the violation of indigenous and traditional peoples' rights including land tenure rights, resource access and use rights, a due process has been follow in cases of transference of rights, a recognised dispute conflict resolution process exists etc.

Context and considerations

Sabah is extremely diverse and currently has at least 42 ethnic groups and more than 200 sub-groups, which constitutes a majority of the population in Sabah, but is still considered minorities in a Malaysian perspective (Chan, 2015). A review of the Federal Constitution of Malaysia shows that the indigenous interests of Sabah and Sarawak is protected. Article 153(1) establishes that the Federal Government needs to safeguard the special position of natives in Sabah and Sarawak. In addition, and in respect of the native legal system in place prior to British colonialization, a system of legal pluralism is present in Sabah and Sarawak. Native courts are present as an addition to the existing courts and hears matters regarding breaches of native laws or customs involving native parties. In Sabah, the Native Court is established under the Native Courts Enactment 1992 and is comprised of a court of appeal, a district native court as well as a native court. However, despite a constitutional protection of native custom, it is evident that the indigenous peoples of Sabah suffer from a high level of tenure insecurity. Governed by the Sabah Land Ordinance, the law on land tenure in Sabah is biased towards restriction of indigenous access to land and maximizing land available for private- or plantation development (Toh & Grace, 2006). As an example, this bias is exercised through the requirement of indigenous land to be continually developed to retain land rights; something which contradicts the methods of shifting agriculture and crop rotation often exercised by indigenous communities.

The Malaysian legal framework on the indigenes of Sabah, provides on the one side recognition and protection of the native customs legal system while also affording incontestable power over land matters to the State authority to promote private land development over NCR rights. Consequently, while there exists little doubt of the encroachment of land development projects on NCR land, both the Federal- and State governments oftentimes operate within the law to make these concessions. However, the customary right to land is increasingly recognized by the courts in Malaysia, which have ruled in favour of the indigenous groups on a number of disputes in Sabah and thus indicated that the government's limited interpretation of NCR rights is faulty (Forest People Programme, 2016). An important note on this subject is that Malaysia has adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and thus adheres to some level of international standards. As argued by Subramaniam (2015), while UNDRIP might not be legally enforceable as such, its adoption does bring about some moral and ethical expectations (p. 72). Hence, while perhaps not in direct opposition to the national legal framework, the status and treatment of the indigenous peoples of Sabah in relation to land tenure is in contradiction with Malaysia's international moral obligations.

The complex nature of land tenure in Sabah and the high level of corruption has made NCR breaches one of the most prominent issues in Malaysia for many years. According to government records, in 2013 there were 32,554 cases of pending land claims in Sabah out of which 2,000 was regarding NCR (Colchester, Jalong, & Alaza, 2013). While this may not signify violations, it shows a highly inefficient system of land registration potentially causing frustration and land conflict. There have been several prominent conflicts ending up in the High Court and consequently attracting large amounts of public attention. However, the most famous case has been Genting Plantations vs. the Sungai and Dusun Peoples, which have lasted from 2002-2016. In April 2016, the High Court handed down the decision of the land dispute. While the details of the final settlement are unknown, the court decided to uphold the NCR claims (Forest People Programme, 2016).

In general, the disputes between the Orang Asli and the State- and Federal government have been solved in the courts and the decisions of the courts seems to be respected by both

parties. An issue here is that a court case is both protracted and expensive and consequently oftentimes out of reach for the indigenous groups of Malaysia.

2.4.1. Applicable laws and regulations

- Malaysia Federal Constitution - [link](#)
- Art. 76(4), 88(a)
- Aboriginal Peoples Act 1954 - [link](#)
- National Land Code (Act No. 56 of 1965) - [link](#)
- Land Acquisition Act 1960 - [link](#)
- United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) - [link](#)

2.4.2. Legal authority

- Federal Government
 - Ministry of Rural Development
 - Ministry of Home Affairs
 - The National Registration Department (NRD)

Responsible for the registration of important events of all Malaysians, including birth, adoption, marriage, divorce and death. NRD also distributes Identification Cards and determines citizenship status.

2.4.3. Legally required documents or records

- See also legal documents required under 1.1.2
- Malaysian Identity Card (MyKad)
 - Mandatory identity card for all Malaysians over the age of 12. The card must be carried always and functions as a driver's license, ATM card as well as public key. In relation to traditional rights, the MyKad shows ethnicity and thus determines whether a person can be a Malaysian aborigine.

2.4.4. Sources of information

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2.4.5. Risk determination

Description of risk

The main risks related to traditional- and indigenous rights seem to be a legal framework incapable of adequately protecting indigenous rights as well as State- and Federal governments, who have used this legal framework systematically to prioritize 'public purpose development' over customary land rights. Malaysia has not ratified ILO convention 169 on indigenous and tribal peoples and the national legal framework does not adequately cover all rights of indigenes. While a positive development is traceable in the Malaysian court system, this road to justice oftentimes requires vast amounts time and resources not in the possession of all indigenous communities.

Risk conclusion

The ambiguous legal framework coupled with the high presence of indigenous conflicts in Sabah warrants an Elevated Risk designation

2.4.6. Risk designation and specification

Elevated risk

2.4.7. Control measures and verifiers

Verifiers:

- Review updated information and news on indigenous issues via:
- NGO investigations and reports (Forest Peoples Programme <http://www.forestpeoples.org>, , Rainforest Action Network www.ran.org, <http://www.schusterinstituteinvestigations.org>, greenpeace.org, Friends of the Earth foe.org, The Human Rights Commission of Malaysia (SUHAKAM) (<http://www.suhakam.org.my/>), Pusat Komnas (komnas.org), Cultural Survival (culturalsurvival.org))
- Media reports (Mongabay.com, greenomics.org, red-monitor.org, eyesontheforest.org, sarawakreport.org, malaysiakini.com, www.theborneopost.com)
- Global Platform of Indigenous and Community lands: <http://www.landmarkmap.org/>
- Review the Zoological Society of London (ZSL)'s Sustainable Palm Oil Transparency Toolkit (SPOTT) tool to assess the palm oil producer's commitments to environmental and social best practice which is based on publicly available information on disclosure of their operations.

For land tenure issues check palm oil producers' 'Landbank' scores: <http://www.sustainablepalmoil.org/companies/>

This data can support SPOTT users in conducting further research to verify whether or not company commitments are being implemented on the ground.

Under Map of Concessions found here: <http://www.sustainablepalmoil.org/about/> use the map search bar to find specific company concessions or locations. Click the concession sites marked by pins to zoom in for more information, then go to the company pages of featured concessions to view their assessments and for legality particularly pay attention to the layer called 'government allocated areas' to ensure the palm oil producer is operating in a legal area. For more on how to use the SPOTT map see the ZSL FAQs page.

Country specific Control Measures:

- Evidence of palm oil farms obtaining proof of ownership documents: Issue Document of Title and Register Document of Title
- Evidence of MPOB License
- Palm Oil Plantations >500 hectares or palm oil plantations clearing more than >50 hectares of land: evidence an approved Environmental Impact Assessment (EIA) from the Department of Environment Malaysia (DOE)

And

- Records from the farm that demonstrate active consultation and/or evidence of a participatory social impact assessment and/or conducting a Free Prior Informed Consent before developing farm activities.
- Evidence of maps of an appropriate scale showing the extent of recognised legal, customary or user rights developed through participatory mapping involving affected parties (including neighbouring communities where applicable, and relevant authorities) are available.
- Copies of negotiated agreements detailing the process of free, prior and informed consent are available.
- Evidence of an absence of significant disputes on land use, tenure and access is provided and corroborated by local stakeholders and/or evidence of consent of indigenous and/or traditional communities has obtained.
- Evidence there is a mutually agreed and documented system for dealing with complaints and grievances and is accessible and agreed upon by all affected parties and that where conflicts have arisen the conflict resolution mechanism is being used and outcomes are considered mutually agreed including by affected parties.

THE ENVIRONMENT

3.1. Environment

National and sub national laws and regulations related to the identification and/or protection of environmental values including but not limited to those relating to water use, air and green-house gas emissions, chemical, fertilizer and pesticide use. Risk relates to systematic and/or large scale non-compliance with legally required environmental protection measures that are evident to an extent that threatens natural resources or other environmental values.

3.1.1. Applicable laws and regulations

- Environmental Quality Act 1974 (Prescribed Premises) (Crude Palm-Oil) Regulations 1977 - [link](#)
- Environmental Quality (Clean Air) Regulation 1978 - [link](#)
- Environmental Quality (Prescribed Activities) (Environmental Impact Assessment) Order 1987 - [link](#)
- Environment Quality (Scheduled Wastes) Regulations 2005 - [link](#)
- Environment Quality (Declared Activities) (Open Burning) Order 2003 - [link](#)
- Environmental Quality (Control of Emission from Diesel Engines) Regulation 1996 - [link](#)
- Environmental Quality (Control of Emission from Petrol Engines) Regulation 1996 - [link](#)
- Factories and Machinery (Noise Exposure) Regulations 1989 - [link](#)
- Land Conservation Act 1960, revised 1989 - [link](#)
- National Land Code 1965 - [link](#)
- Pesticide Act 1974 (Pesticide Registration) Rules 2008 - [link](#)
- Pesticide (Labelling) Regulations 1984 - [link](#)
- Pesticide (Sale and Storage Licencing) Rules 2007 - [link](#)
- MPOB Code of Good Agricultural Practice for Oil Palm - [link](#)
- Malaysian Standard Good Agricultural Practice - [link](#)
- Street, Drainage & Building Act 1974 (Act 133) - [link](#)
- Irrigation Areas Act 1953 (Revised 1989) - [link](#)
- Garis Panduan Pembangunan Melibatkan Sungai dan Rizab Sungai, Department of Irrigation and Drainage Malaysia - [link](#)
- Destruction of Disease-Bearing Insects Act (1975) - [link](#)
- Food Act 1983 (Act 281) - [link](#)
- Food Regulations, 1985 - [link](#)
- OSH Act 1994 (Act 514) Regulations and Orders - [link](#)
- Use & Standards Exposure of Chemicals Hazardous to Health (USECHH) Regulations 2000 - [link](#)

- Road Transport Act 1987(Act 334) - [link](#)
- Water Act 1920 (Act 418) - [link](#)
- Wildlife Conservation Act 2010 - [link](#)
- Sabah Biodiversity Enactment 2000 - [link](#)
- Wildlife Conservation Enactment 1997 - [link](#)
- Environment Protection Enactment 2002 - [link](#)
- Environment Protection (Prescribed Activities)(Environmental Impact Assessment) Order 2005 - [link](#)
- Forest Enactment 1968 - [link](#)
- Sabah Water Resources Enactment 1998 - [link](#)

3.1.2. Legal authority

- Sabah Department of Environment (DOE): is responsible to prevent, eliminate, control pollution and improve the environment, consistent with the purposes of the Environmental Quality Act 1974.
- Sabah Department of Occupational Safety and Health (DOSH): is responsible for the administration and enforcement of legislations related to occupational safety and health of the country.
- Sabah Department of Director General of Lands and Mines (JKPTG): is responsible for Amendment or improvement of any provision of land law and legislation regarding with land administration; Management of the record of Federal Government's Property in Land; Acquisition of the alienated land for Federal Project purposes; Tenancy and enforcement of Federal Government's Property in Land; and Management of Small Estate Distribution.
- Sabah Forestry Department: is responsible to ensure that the management and development of Sabah's forest reserves are in accordance with the principles of Sustainable Forest Management under the principal forestry law in Sabah that is the Forest Enactment 1968.
- Sabah Department of Agriculture (DOA): is responsible for the provision of consultation services, technical support and professional advice in various agricultural field to ensure sufficient food production that are safe for consumption and control environmental pollution.
- Sabah Department of Irrigation and Drainage (DID): is responsible to provide engineering expertise services and water resources management including river management, coastal and manage flood and drought to improve water security and environment sustainability.
- Malaysian Palm Oil Board (MPOB): an agency under the Ministry of Plantation Industries and Commodities with the stated goal to enhance the Malaysian oil palm industry. MPOB is responsible for research and development, regulatory and enforcement functions.
- Department of Wildlife: Protection and conservation of wildlife and associated tourism products, and provide opportunities for tourism development through research, identification of potential tourism spot, eco-tourism partnership, and technical assistance.

- Environment Protection Department: Advise the government of development activities, to comply with various environmental legislation and guidelines so that the process of development do not unduly degrade the environment.
- Sabah Parks: Protection and management of designated conservation areas as parks, for conservation needs and other uses. It also provides a resource for the development of various tourism related business opportunities, directly and indirectly.

3.1.3. Legally required documents or records

- Environmental Impact Assessment reports are required for the following prescribed activities under Environment Protection Enactment (Prescribed Activities) (Environmental Impact Assessment) Order 2005:
 - Development of agricultural estates or plantations covering an area of 500 hectares or more;
 - Development of agricultural estates or plantations involving change in type of crops covering an area of 500 hectares or more;
 - Conversion of wetland forests into agricultural estates or plantations covering an area of 50 hectares or more; or
 - Agricultural programmes involving the settlement of 100 families or more
- List of Prescribed Activities Requiring Proposal for Mitigation Measures Report (PMM):
 - Development of agricultural estates or plantations covering an area of 100 hectares or more but less than 500 hectares;
 - Development of agricultural estates or plantations involving change in type of crops covering an area of 100 hectares or more but less than 500 hectares; or
 - Conversion of wetland forests into agricultural estates or plantations covering an area of 20 hectares or more but less than 50 hectares.
- Preparation of EIA reports shall be undertaken by environmental consultants that are registered with the Sabah Environment Protection Department and hold valid certificates of practice.
- Any person intending to construct on any land or any building; or carrying out work that would cause the land or building to become prescribed premises (crude palm oil mills, raw natural rubber processing mills, and treatment and disposal facilities of scheduled wastes), as stipulated under Section 19 of the Environmental Quality Act, 1974 must obtain prior written permission from the Director-General of Environmental Quality. (Applies to whole of Malaysia.)
- A separate license from DOE is required to occupy and operate crude palm oil mills (Applies to whole of Malaysia).

3.1.4. Sources of Information

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3.1.5. Risk determination

Overview of Legal Requirements

The Environment Quality Act (EQA) 1974 forms the backbone of Malaysia's system of environmental legislation to regulate industrial pollution. Palm oil production was one of the major industrial activities that necessitates the EQA 1974 (Ministry of the Environment, Japan). Under that law, the DOE has comprehensive jurisdiction over environmental administration related to industrial activities and is charged with formulating environmental rules and regulations; enforcing legislation and carrying out monitoring in relation to water pollution, air pollution, and hazardous substances; conducting environmental impact assessment (EIA) of proposed development projects; and carrying out Site Suitability Evaluation of proposed factories (Ministry of the Environment, Japan, n.d.). More specific environmental controls for the palm oil sector consist of a raft of regulations and orders, formulated separately under the provisions of the EQA, and several guidelines (Ministry of the Environment, Japan, n.d.).

In Sabah, state-level enactments and agencies are established to carry out EIAs for forestry and land conversion activities while the DOE covers EIAs related to other activities such as emissions from factories (Lim, 2013). Sabah asserts its autonomy on land and forestry matters via the state-level Environmental Protection Enactment 2002 which provides for an Environmental Protection Department (EPD) and controls impacts via a series of regulations including the Environment Protection (Prescribed Activities) (Environmental Impact Assessment) Order 2005 (Lim, 2013). This Order creates two schedules of prescribed activities

for which a "Proposal for Mitigation Measures" (PMM) or "Environmental Impact Statement" (EIS) (the latter being more stringent) are required (Lim, 2013). Most major land use activities trigger the requirement for an EIS. EIAs are carried out for most large plantation projects in Sabah (Lim, 2013).

More specifically to the palm oil sector, the Malaysian Palm Oil Board Act 1998 (Act 582) led to the establishment of the Malaysian Palm Oil Board (MPOB) in 2000 to regulate the quality and standards of palm oil business activities relating to the planting, supply, sale, purchase, distribution, movement, storage, surveying, testing, inspecting, export and import of oil palm products and the milling of oil palm fruit (Malaysia Productivity Corporation, 2014). While MPOB is entrusted to improve practices in the palm oil sector including environmental sustainability standards, its stated mission is to "enhance the well-being of the Malaysian oil palm industry through research, development and excellent services" (Malaysian Palm Oil Board, 2016). Legislations under agriculture, forestry, conservation, land management and infrastructure development also regulate the palm oil industry in terms of the environment. These include the Pesticide Act 1974, Forest Enactment 1968, Wildlife Conservation Enactment 1997 and Land Conservation Act 1960, and Street, Drainage & Building Act 1974.

Description of risk

The expansion of oil palm plantations in the tropics has been associated with a host of environmental problems such as deforestation, biodiversity loss, water pollution, soil erosion, carbon emissions resulting from land use change and forest fires, and pesticide use (Chin, 2011). Malaysia is geographically a very large territory to administer while the DOE has had limited resources to undertake its functions (Memon, 2012). Despite the significant numbers of breaches of environmental law, the proportion of prosecutions or other enforcement action is extremely low (Maidin, 2005). To date there are only five reported cases under the heading of environmental law in the law reports in Malaysia (Maidin, 2005). The local authorities and other government agencies prosecute environmental offenders using laws other than the environmental law, principally tort law (i.e. nuisance, trespass, negligence) (Maidin, 2005). The DOE, as the principal agency entrusted to implement and enforce the environmental protection legislation has limited powers to deal with the land planning system (Maidin, 2005). This is because power to regulate land development is solely within the discretion of the State Planning Committee at the state government level and the local planning authorities at the local government level (Maidin, 2005). In Sabah, the establishment of state-level enactments and the agency Environment Protection Department to carry out EIAs for forestry and land conversion activities while the DOE covers EIAs related to other activities such as emissions from factories (Lim, 2013).

"In Sabah, it is estimated that about 80% of oil palm plantations submit EIAs for new plantings and some companies apply for EIAs retrospectively (after the forest has been felled). Around 90% of EIAs submitted are eventually approved with a number of mitigation measures prescribed. However, in practice, there is considerable non-compliance with mitigation due to ambiguities regarding the implementation of these measures. The environmental authorities face a number of challenges in enforcing the mitigation measures highlighted above. They recognize that streams and slopes identified by 1:50,000 scale maps inadequately represent the reality on the ground. However, the maximum fine for non-compliance is limited (in Sabah this is only RM20,000 (approx. USD 4,500) per compliance audit visit). Such fines are hardly a deterrent when the additional revenue gained by noncompliance can be in the order of

hundreds of millions of ringgit. Sabah's EPD has only 13 enforcement officers to monitor more than 300 active projects" (Lim, 2013).

There are also serious problems with the EIA system under the law as there is commonly conflict of interest involved with the companies hiring consultants to do the EIA, and loopholes whereby EIA is required based on the size of the project but plantation companies can easily break the project into smaller lots to avoid the EIA requirement (Sharom, 2008). Most officials from environment related departments including the Town and Country Planning Department and the DOE often lack sufficient expertise to vet the Development Proposals and the EIA reports submitted by the applicants seeking for grant of planning permission (Maidin, 2005). Despite the realisation of the importance of monitoring compliance of the EIA process, it is lacking due to lack of personnel and increasing numbers of newly approved development projects (Maidin, 2005).

While MPOB has the responsibility to enforce environmental standards on the palm oil industry, information available seems to suggest that its core activities remain to be research and enforcement for improving yield and profitability.

Risk conclusion

This indicator has been evaluated as Elevated risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

3.1.6. Risk designation and specification

Elevated risk

3.1.7. Control measures and verifiers

Country specific

- For palm oil plantations > 500 ha or palm oil plantations clearing more than >50 hectares of land seek a completed and approved Environmental Impact Assessment for areas that require them (see section 3.1.3) (check list of approved EIAs on the DOE website: <http://www.doe.gov.my/eia/eia-reports/>) and verify that environmental controls are followed in the field through evidence of an audit. Ensure that any legal requirements relating to the protection of the species or habitat are met.
- Agricultural land title or lease to prove site location is on agricultural land.
- Written Permission to Construct a Palm Oil Mill from the mill
- License to occupy and operate a crude palm oil mill from the mill

3.2. Protected sites and species

International, national, and sub national treaties, laws, and regulations related to protected areas allowable forest uses and activities, and/or, rare, threatened, or endangered species, including their habitats and potential habitats. Risk relates to illegal plantation establishment and/or management within protected sites. Note that protected areas may include protected cultural sites, including sites with historical monuments.

3.2.1. Applicable laws and regulations

- Convention on Biological Diversity (CBD) - [link](#)

- The International Trade in Endangered Species Act 2008 - [link](#)
- The National Parks Ordinance 1962 - [link](#)
- Sabah Biodiversity Enactment 2000 - [link](#)
- Wildlife Conservation Enactment 1997 - [link](#)
- Environment Protection Enactment 2002 - [link](#)
- Environment Protection (Prescribed Activities)(Environmental Impact Assessment) Order 2005 - [link](#)
- Forest Enactment 1968 - [link](#)
- Sabah Water Resources Enactment 1998 - [link](#)
- Land Conservation Act 1960, revised 1989 - [link](#)
- Customs Act 1967 (amended in 1988) - [link](#)
- Environmental Quality Act 1974 (amended 1985) - [link](#)
- Local Government Act No. 171 of 1976 - [link](#)
- Fisheries Act 1985 (Act 317) - [link](#)
- Wildlife Conservation Act 2010 - [link](#)

3.2.2. Legal authority

- Sabah Department of Environment (DOE): enforces the Environmental Quality Act 1974.
- Sabah Department of Director General of Lands and Mines (JKPTG): enforces land law and legislation regarding with land administration.
- Royal Malaysian Customs Department (RMC): enforces Customs Act 1967 (amended in 1988).
- Sabah Department of Fisheries (DOF): enforces Fisheries Act 1985 (Act 317).
- Sabah Forestry Department: is responsible for enforcing the Forest Enactment 1968.
- Sabah Department of Irrigation and Drainage (DID): enforces Sabah Water Resources Enactment 1998.
- Sabah Wildlife Department: enforces Wildlife Conservation Enactment 1997.
- Environment Protection Department: Advise the government of development activities, to comply with various environmental legislation and guidelines so that the process of development do not unduly degrade the environment.
- Sabah Parks: Protection and management of designated conservation areas as parks, for conservation needs and other uses. It also provides a resource for the development of various tourism related business opportunities, directly and indirectly.

3.2.3. Legally required documents or records

- Native Title
- Gazette notification of Protected Forest

- Gazette notification of Forest Reserve
- Gazette notification of Communal Forest
- DWNP Plant Collection License
- CITES permit

3.2.4. Sources of Information

Government sources

- Ministry of Natural Resources and Environment, Malaysia. (2014). Fifth National Report to the Convention on Biological Diversity. Putrajaya: Ministry of Natural Resources and Environment, Malaysia. Retrieved from <https://www.cbd.int/doc/world/my/my-nr-05-en.pdf>

Non-Government sources

- Azhar, B., Sapari, M., Zulkifly, S., Suhailan, W. M., & Sajap, A. S. (2013). Protecting Biodiversity outside Natural Forests: Environmental-friendly Oil Palm Plantations as an Off-reserve Strategy in Peninsular Malaysia. TROPICAL AGRICULTURAL SCIENCE. Retrieved from [http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JTAS%20Vol.%2036%20\(S\)%20Dec.%202013/21%20Page%20231-246%20\(JTAS%200476-2012\).pdf](http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JTAS%20Vol.%2036%20(S)%20Dec.%202013/21%20Page%20231-246%20(JTAS%200476-2012).pdf)
- Human Rights Commission of Malaysia (SUHAKAM). (2013). REPORT OF THE NATIONAL INQUIRY INTO THE LAND RIGHTS OF INDIGENOUS PEOPLES. Human Rights Commission of Malaysia (SUHAKAM). Retrieved from <http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/SUHAKAM%20BI%20FINAL.CD.pdf>
- Lim, T. W. (2013). Illegality in Forest Clearance for Large-scale Commercial Plantations. Forest Trends. Retrieved from http://www.forest-trends.org/publication_details.php?publicationID=4195
- Yong, C., SACCESS, & JKOASM. (2014). Deforestation Drivers and Human Rights in Malaysia. Forest Peoples Programme. Retrieved from <http://www.forestpeoples.org/topics/climate-forests/publication/2014/deforestation-drivers-and-human-rights-malaysia>

3.2.5. Risk determination

Overview of Legal Requirements

As a signatory of the CBD, Malaysia has an obligation to contribute to global targets for protected areas.

The Protection of Wildlife Act 1972 was repealed and replaced by the Wildlife Conservation Act 2010 which came into force in 2011 (Ministry of Natural Resources and Environment, Malaysia, 2014). The new Act contains significantly stricter provisions on species protection by assigning new species a protective status and raising the protection status of a number of other species (Ministry of Natural Resources and Environment, Malaysia, 2014). The Act also provides for “presumptions under the law” (Ministry of Natural Resources and Environment, Malaysia, 2014). Simply by being in possession of snares, the presumption under the law is that there was the intention to hunt, trap and/or kill wildlife which is punishable by a fine of up to

RM100,000 and a prison term of up to three (3) years, or both. There is also the presumption now that if any wildlife or any part or derivative or any wildlife or snare is found on any premises, the 'occupier' of the premises is presumed to be in possession of the above (Ministry of Natural Resources and Environment, Malaysia, 2014). The Act also provides for more punitive measures (Ministry of Natural Resources and Environment, Malaysia, 2014). For example, any person who has been convicted of an offence under the Act or any of its subsidiary legislation may be barred from holding any license, permit or special permit for a period not exceeding five (5) years from the date proceedings in respect of the conviction concludes (Ministry of Natural Resources and Environment, Malaysia, 2014). Another significant change made under the new Act relates to the power to compound offences under the previous Act (Ministry of Natural Resources and Environment, Malaysia, 2014). As a result, certain offences such as failure to obtain prerequisite special permits in relation to Totally Protected species, the female or the immature of a Totally Protected species will result in prosecution of the offence rather than an offer to compound the offence through a fine (Ministry of Natural Resources and Environment, Malaysia, 2014).

The Sabah Land Ordinance of 1930 upholds the principle of the protection of natives' rights to their lands as well as the recognition that natives practised their own customs and laws. Administrators are required to give careful regard to those customs. Native Customary Rights land can be established through Customary Tenure, Native Title, Communal Title, and Native Reserves (Human Rights Commission of Malaysia (SUHAKAM), 2013).

Description of risk

Malaysia's Fifth National Report to the Convention on Biological Diversity states that the country's monitoring against CBD targets is weak: "The lack of cohesive and comprehensive monitoring mechanisms/indicators towards the National Policy on Biological Diversity has posed some challenges towards measuring actual progress in certain conservation areas. Malaysia recognises the need to step up efforts on awareness raising on the importance and significance of biodiversity conservation, protection and management across all levels of society in Malaysia (Ministry of Natural Resources and Environment, Malaysia, 2014)."

Biodiversity conservation in oil palm-dominated landscapes is critical for several reasons: (1) biodiversity resources can be found in oil palm-dominated landscapes. Planted oil palm areas cover more than 4,000,000 ha of oil palm plantation estates and more than 700,000 ha of semi-traditional smallholdings in Malaysia (MPOB, 2011), (2) most protected areas and forest reserves are surrounded by oil palm plantations and smallholdings (e.g. Taman Negara, Krau Wildlife Reserve, and Endau Rompin National Park), (3) the application of agrochemicals such as pesticides and herbicides in oil palm dominated landscapes, if uncontrolled, may harm wildlife or kill non-target fauna, (4) high conservation value species (e.g. elephants, tigers, and pangolins) may be persecuted or illegally hunted within oil palm-dominated landscapes, (5) the palm oil industry, through its downstream operations (processing factories), has caused environmental pollution (e.g. water quality) which may further degrade wildlife habitat, and (6) limited data on the number of ecological studies conducted in oil palm-dominated landscapes worldwide for supporting biodiversity conservation in industrial plantations (Azhar, Sapari, Zulkifly, Suhailan, & Sajap, 2013).

Unfortunately, Malaysian authorities, underfunded and undermanned, continue to play catch-up with illegal wildlife traffickers (Clean Malaysia, 2016).

Given the complexity of the natural ecosystems, environmental consultants have difficulty identifying specific mitigation measures for the protection of certain rare and threatened species in oil palm plantations. Few proponents are willing to pay for expertise that addresses the full range of species found in a natural project site. There is no central source of practical information related to the distribution of rare species in Malaysia. Given this scenario, environmental consultants often address biodiversity conservation indirectly by focusing on keeping an area of natural habitat intact via river buffers and slope protection, with the occasional addition of token set-aside areas associated with salt-licks or swampy areas that would not be operable anyway (Lim, 2013).

There is a growing number of land dispute cases filed in courts by native landowners against oil palm plantation companies, state government and others in the industry (Yong, SACCESS, & JKOASM, 2014). Apart from loss of land, many community witnesses complained that the opening of plantations has resulted in destruction of graveyards and crops, and pollution of rivers and loss of livelihoods and traditional ways of life (Human Rights Commission of Malaysia (SUHAKAM), 2013). In Sabah, insufficient notice being given of the gazettal of areas – as well as failure to properly consult forest communities – has resulted in communities losing their customary rights to land when it is gazetted as forest reserve or other protected area or when it is alienated for development projects like oil palm plantations (NEPCon, 2016). There are longstanding issues pertaining to validation of the claims by the Indigenous people, including the lack of genuine consultation with the indigenous communities affected by the plantations (NEPCon, 2016). Risk exists that native people lose their rights to ancestral land despite recognized legislative rights to keep this land (NEPCon, 2016).

Risk conclusion

This indicator has been evaluated as Elevated risk. Identified laws are not upheld consistently by all entities and/or are often ignored, and/or are not enforced by relevant authorities.

3.2.6. Risk designation and specification

Elevated risk

3.2.7. Control measures and verifiers

Verifiers:

- NGO investigations and reports (Indigenous Peoples Network of Malaysia (JOAS) <http://orangasal.blogspot.my/>, Malaysian Nature Society (MNS) <https://www.mns.my/>, WWF Malaysia <http://www.wwf.org.my/>, Forest Peoples Programme <http://www.forestpeoples.org>, Rainforest Action Network www.ran.org, <http://www.schusterinstituteinvestigations.org>, greenpeace.org, Friends of the Earth foe.org)
- Media reports (Clean Malaysia <http://cleanmalaysia.com/>, Malaysian Environmental NGOs <http://www.mengo.org/>, Mongabay.com, red-monitor.org)
- Review the Zoological Society of London (ZSL)'s Sustainable Palm Oil Transparency Toolkit (SPOTT) tool to assess the palm oil producer's commitments to environmental and social best practice which is based on publicly available information on disclosure of their operations. Particularly review environmental management and fragile, marginal and peat

soils in addition to reviewing the company's latest sustainability and/or annual report if the scorecard is out of date.

- <http://www.iucnredlist.org/>

Country Specific

- For palm oil plantations > 500 ha or palm oil plantations clearing more than >50 hectares of land seek a completed and approved Environmental Impact Assessment for areas that require them (see section 3.1.3) (check list of approved EIAs on the DOE website: <http://www.doe.gov.my/eia/eia-reports/>) and verify that environmental controls are followed in the field through evidence of an audit. Ensure that any legal requirements relating to the protection of the species or habitat are met.
- Agricultural land title or lease to prove site location is on agricultural land.
- Evidence that comprehensive biodiversity surveys and/or a High Conservation Value (HCV) assessment that includes both the planted area itself and relevant wider landscape-level considerations (such as wildlife corridors) to identify HCV 1- 6 have been undertaken.
[<https://www.hcvnetwork.org/als/public-summaries>]
- Evidence of management plans for rare, threatened or endangered species (RTE) include actions for their protection, survival, and prevention of poaching, are develop for the management area and surrounding landscape have been developed and are implemented.
- The RTE management plan takes into consideration traditional hunting by communities outside the management area and includes specific activities to contribute to the protection and survival of RTE species affected by hunting.
- Supplier records of stakeholder consultation with environmental NGOs knowledgeable on protected areas (see NGOs listed in verifier)
- Obtain information on location of the farm (e.g. from management plan) and compare with locations of protected areas in Malaysia
- Information on protected areas in Malaysia:
- Protected Area Master List owned by the Ministry of Natural Resources and Environment (contact: <http://www.nre.gov.my/en-my/ContactUs/Pages/default.aspx>), which is not publicly available. Older version of the list compiled by WWF-Malaysia can be found here: http://awsassets.wwf.org.my/downloads/list_of_pa.pdf

3.3. High Conservation Values (HCV)

International, national, and sub national treaties, laws, and regulations related to protected areas allowable forest uses and activities, and/or, rare, threatened, or endangered species, including their habitats and potential habitats. Risk relates to illegal plantation establishment and/or management within protected sites. Note that protected areas may include protected cultural sites, including sites with historical monuments.

Overall Context

In Sabah and Sarawak, most forest conversion projects located on State Land and Alienated Land, do produce EIAs. In Sabah, it is estimated that about 80% of oil palm plantations submit EIAs for new plantings and some companies apply for EIAs retrospectively (after the forest has

been felled). Around 90% of EIAs submitted are eventually approved with a number of prescribed mitigation measures. However, in practice, there is considerable non-compliance with mitigation, due to ambiguities regarding the implementation of the prescribed measures. The environmental authorities face a number of challenges in enforcing the mitigation measures highlighted above. They recognize that streams and slopes identified by 1:50k scale maps inadequately represent the reality on the ground. However, the maximum fine for non-compliance is limited (in Sabah it is only RM20,000 per compliance audit visit). Such fines are hardly a deterrent when the additional revenue gained by non-compliance can be in the order of hundreds of millions of ringgits. Sabah's EPD has only 13 enforcement officers to monitor more than 300 active projects.

Extensive allegations of corruption have been made against the Chief Ministers of Sabah in the form of kickbacks and cronyism connected with the clearance of natural forests for plantations. The high-level corruption in the system allegedly encourages corruption owing to the lack of accountability of the concessionaires. On the other hand, the fact that corruption is tolerated in the upper echelons means that mixed signals are being given to enforcers on the ground who are often not very well remunerated and it is acknowledged that bribery takes place at the enforcement level as well. Three-quarters of the cases of alleged illegalities in agro-conversion in Malaysia documented by the author include allegations of corruption. Almost all cases relate to political patronage, cronyism, and nepotism in the issuance of licenses, usually at a very high level.

3.3.1. Species Diversity – HCV 1

Concentrations of biological diversity including endemic species, and rare, threatened or endangered species that are significant at global, regional or national levels. HCV 1 sub-categories also consider:

- a) Areas that contain species that are listed as rare, threatened or endangered by IUCN and or Official National and/or regional lists;*
- b) Centres of endemism where concentrations of endemic species occur;*
- c) Areas that contain species that are listed as depleted or poorly reserved at national or regional scale;*
- d) Areas with mapped significant seasonal concentrations of species (e.g. migratory staging areas);*
- e) Areas of high species/communities diversity*
- f) Areas that are identified in the literature as refugia.*

3.3.1.1. HCV Occurrence

HCV1 occurs throughout the natural forests and other ecosystems of Sabah. The region contains over 270 threatened and endangered land species according to the IUCN redlist (2016). It is home to endangered mammals such as the Sumatran Rhino (*Dicerorhinus sumatrensis*), the Orang utan (*Pongo pygmaeus*) and the Proboscis Monkey (*Nasalis larvatus*).

Annex 2 shows a GFW map with proxy HCV 1 and 3 mapped areas (Protected Areas, BirdLife Endemic Bird Areas and Conservation International Biodiversity Hotspots) and indicates the whole area is a Biodiversity Hotspot.

3.3.1.2. Sources of information

- Annex 2 – Global Forest Watch Maps: <http://www.globalforestwatch.org/>

- Azhar, B., Sapari, M., Zulkifly, S., Suhailan, W. M., & Sajap, A. S. (2013). Protecting Biodiversity outside Natural Forests: Environmental-friendly Oil Palm Plantations as an Off-reserve Strategy in Peninsular Malaysia. Tropical Agricultural Science. Retrieved from [http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JTAS%20Vol.%2036%20\(S\)%20Dec.%202013/21%20Page%20231-246%20\(JTAS%200476-2012\).pdf](http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JTAS%20Vol.%2036%20(S)%20Dec.%202013/21%20Page%20231-246%20(JTAS%200476-2012).pdf)
- Ministry of Natural Resources and Environment, Malaysia. (2014). Fifth National Report to the Convention on Biological Diversity. Putrajaya: Ministry of Natural Resources and Environment, Malaysia. Retrieved from <https://www.cbd.int/doc/world/my/my-nr-05-en.pdf>
- Persey, S., Imanuddin, & Sadikin, L. (2011). A Practical Handbook for Conserving High Conservation Value Species and Habitats within oil palm landscapes. Zoological Society of London. Retrieved from <http://www.sustainablepalmoil.org/wp-content/uploads/sites/2/2015/11/A-Practical-Handbook-for-Conserving-High-Conservation-Value-species-and-Habitats-within-Oil-Palm-Landscapes-Indonesia-focus.pdf>
- The IUCN Red List of Threatened Species: <http://www.iucnredlist.org>

3.3.1.3. Risk determination

Annex 2 shows a GFW map of significant total tree cover loss from 2005-2014 in proxy HCV 1 and 3 mapped areas (Protected Areas, BirdLife Endemic Bird Areas and Conservation International Biodiversity Hotspots).

In addition, in Sabah, it is estimated that about 80% of oil palm plantations submit EIAs for new plantings and some companies apply for EIAs retrospectively (after the forest has been felled). Around 90% of EIAs submitted are eventually approved with a number of prescribed mitigation measures. However, in practice, there is considerable non-compliance with mitigation due to ambiguities regarding the implementation of the prescribed measures. However, the maximum fine for non-compliance is limited (in Sabah it is only RM20,000 per compliance audit visit). Such fines are hardly a deterrent when the additional revenue gained by non-compliance can be in the order of hundreds of millions of ringgit. Sabah's Environmental Protection Department (EPD) has only 13 enforcement officers to monitor more than 300 active projects.

Malaysia is a signatory to the Convention on Biological Diversity (CBD). Malaysia's Fifth National Report to the Convention on Biological Diversity states that the country's monitoring against CBD targets is weak: "The lack of cohesive and comprehensive monitoring mechanisms/indicators towards the National Policy on Biological Diversity has posed some challenges towards measuring actual progress in certain conservation areas. Malaysia recognises the need to step up efforts on awareness raising on the importance and significance of biodiversity conservation, protection and management across all levels of society in Malaysia (Ministry of Natural Resources and Environment, Malaysia, 2014)."

In conclusion, due to the risk of corruption and violation of environmental regulations and given the threats to HCV 1 are mainly caused by conversion of natural forests into oil palm plantations (see also Section 4) which results in habitat removal and fragmentation this indicator is considered Elevated risk.

3.3.1.4. Risk designation and specification

Elevated risk

3.3.1.5. Control measures and verifiers

Country Specific

- For plantations >500 ha or palm oil plantations clearing more than >50 hectares of land seek a completed and approved Environmental Impact Assessment for areas that require them (see section 3.1.3) (check list of approved EIAs on the DOE website: <http://www.doe.gov.my/eia/eia-reports/>) and verify that environmental controls are followed in the field through evidence of an audit. Ensure that any legal requirements relating to the protection of the species or habitat are met.
- Agricultural land title or lease to prove site location is on agricultural land.
- Evidence that comprehensive biodiversity surveys and/or a High Conservation Value (HCV) assessment that includes both the planted area itself and relevant wider landscape-level considerations (such as wildlife corridors) to identify HCV 1- 6 have been undertaken. [<https://www.hcvnetwork.org/als/public-summaries>]
- Evidence of management plans for rare, threatened or endangered species (RTE) include actions for their protection, survival, and prevention of poaching, are develop for the management area and surrounding landscape have been developed and are implemented.
- The RTE management plan takes into consideration traditional hunting by communities outside the management area and includes specific activities to contribute to the protection and survival of RTE species affected by hunting.
- Supplier records of stakeholder consultation with environmental NGOs knowledgeable on protected areas (see NGOs listed in verifier)
- Obtain information on location of the farm (e.g. from management plan) and compare with locations of protected areas in Malaysia
- Information on protected areas in Malaysia:
- Protected Area Master List owned by the Ministry of Natural Resources and Environment (contact: <http://www.nre.gov.my/en-my/ContactUs/Pages/default.aspx>), which is not publicly available. Older version of the list compiled by WWF-Malaysia can be found here: http://awsassets.wwf.org.my/downloads/list_of_pa.pdf

3.3.2. Landscape-level ecosystems and mosaics – HCV 2

Large landscape-level ecosystems and ecosystem mosaics that are significant at global, regional or national levels, and that contain viable populations of the great majority of the naturally occurring species in natural patterns of distribution and abundance. Sub-categories:

- a) *Intact Forest Landscapes (IFL map⁴ uses the most recent coverage)*
- b) *Landscape-scale natural forests that have experienced lesser levels of past human disturbance (e.g., minimal timber harvesting) or other management (e.g. fire suppression), or areas within such forests.*
- c) *Forests recognised as being regionally significant at the bioregion or larger scale by conservation organisations (in formally recognised reports or peer reviewed journals) due to the unusual*

⁴ <http://www.intactforests.org/world.map.html>

landscape-scale biodiversity values provided by size and condition of the forest relative to regional forest land cover and land use trends.

- d) Forests that provide regionally significant habitat connectivity between larger forest areas or between refugia and mosaics.*
- e) Significant Roadless areas.*
- f) Significant Forests that haven't been affected by forest management activities.*

3.3.2.1. HCV Occurrence

Based on the Global Forest Watch interactive map, there are three areas that are considered Intact Forest Landscapes (IFLs) and currently gazetted as protected areas (Maliau Basin, Kinabalu Park, and the Crocker Range), all of which are high in elevation and have no presence of palm oil operations. In addition to this, there is a major wildlife corridor sandwiched between two protected areas, i.e. Maliau Basin and Danum Valley.

Ecologically speaking, plantations are areas that have been cleared of original vegetation, possibly drained and cut and maintained with an alternative plant cover (Copenhagen Zoo, 2010). These lands are considered ecologically altered – cleared and no longer in their original state or maintained in a state of arrested or deflected succession (Copenhagen Zoo, 2010). Therefore, oil palm plantations themselves do not contain HCV 2, and loss of HCV 2 due to conversion will be dealt with under CSR Category 4.

3.3.2.2. Sources of information

Annex 1 – Global Forest Watch: www.globalforestwatch.org/maps

Copenhagen Zoo. (2010). Red list Of Mammals For Peninsular Malaysia. Kuala Lumpur: Department of Wildlife and National Parks Peninsular Malaysia. Retrieved from http://www.wildlife.gov.my/images/stories/penerbitan/lain_lain/Redlist%20Final.pdf

3.3.2.3. Risk determination

The threats to be considered for this category – mainly fragmentation, including through establishment of road infrastructure. Given the fact the most oil palm plantations themselves are unlikely to contain HCV 2 due to the remaining HCV 2 areas be located at a higher elevation than where oil palm plantations are normally established this indicator is consider low risk.

3.3.2.4. Risk designation and specification

Low risk

3.3.2.5. Control measures and verifiers

N/A

3.3.3. Ecosystems and habitats – HCV 3

Rare, threatened, or endangered ecosystems, habitats or refugia. Sub categories:

- a) Existing forests in forest landscapes where these ecotypes are rare;*
- b) Areas of important genes or genetically distinct populations;*

- c) *Ecosystems that are depleted or poorly reserved at the regional or national scale;*
- d) *Old growth forests, outside of forest biomes where the concept is redundant;*
- e) *Remnant natural forest vegetation in heavily cleared landscapes.*

3.3.3.1. HCV Occurrence

In Sabah, there are several types of ecosystems that are rare including Extreme Lowland Forest, Freshwater Swamp Forest, Limestone Forests and Peat Swamp Forests. Limestone Forests appear in several types of ecosystem, i.e., lowland and upland, but the large ones have been set aside as conservation areas (e.g. in Class I) and the remainder are quite small in area. The only Peat Swamp Forest in Sabah is located on the Klias Peninsula and is excluded from forest harvesting activities.

Additionally, Annex 2 shows a GFW map with proxy HCV 1 and 3 mapped areas (Protected Areas, BirdLife Endemic Bird Areas and Conservation International Biodiversity Hotspots) and indicates the whole area is a Biodiversity Hotspot.

3.3.3.2. Sources of information

- Annex 2 – Global Forest Watch Maps: <http://www.globalforestwatch.org/>
- Zuraidah, S., & Sukswan, S. (2014). Taking stock: how are we doing at conserving our natural ecosystems and biodiversity heritage? First National Protected Area Managers' Conference (PAMC) (pp. 30-34). Penang: United Nations Development Programme 2015. Retrieved from http://www.protectedareasmalaysia.my/wp-content/uploads/2016/05/Proceedings_PAMC-2014.pdf
- Ministry of Natural Resources and Environment. (2016). National Policy on Biological Diversity 2016-2025. Ministry of Natural Resources and Environment. Retrieved from <http://www.nre.gov.my/ms-my/PustakaMedia/Penerbitan/National%20Policy%20on%20Biological%20Diversity%202016-2025.pdf>
- Rainforest Journal. (2011). Hill dipterocarp forest. Retrieved from: <http://www.rainforestjournal.com/hill-dipterocarp-forest/>
- Wetlands International – Malaysia. (2010). A QUICK SCAN OF PEATLANDS. Wetlands International – Malaysia. Retrieved from <http://luk.staff.ugm.ac.id/rawa/Wetlands/PeatlandsInMalaysia.pdf>
- Zainudin, Z., Ansari, A. H., & Baharudin, H. (2013). Riparian Zone Management and Rehabilitation in Malaysia through Restorative Justice. Advances in Environmental Biology. Retrieved from <http://www.aensiweb.com/old/aeb/2013/3264-3270.pdf>
- Ministry of Natural Resources and Environment, Malaysia. (2014). Fifth National Report to the Convention on Biological Diversity. Putrajaya: Ministry of Natural Resources and Environment, Malaysia. Retrieved from <https://www.cbd.int/doc/world/my/my-nr-05-en.pdf>

3.3.3.3. Risk determination

Based on the assessment of existing locations of Limestone Forest and Peat Swamp Forest, the threats from forest management activities are not significant, as they would be identified in the EIA and protected accordingly.

Threats to HCV 3 are mainly from the conversion of natural forests into oil palm plantations (see also Section 4). Lowland dipterocarp forest has been and are being converted into, oil palm or rubber plantations (Rainforest Journal, 2011). A large amount of peatland in Malaysia has already been drained for large scale oil palm plantations and continues to be cleared for oil palm plantations (Wetlands International – Malaysia, 2010). A key area of management is in the buffer zones around plantations so that it does not negatively affect the value of the peat swamp forest remnant (Wetlands International – Malaysia, 2010). Unfortunately, one of the main contributing factors of riparian buffer zone destruction in Malaysia is the encroachment of river reserves by oil palm plantations, releasing pollutants such as fertilizers and pesticides (Zainudin, Ansari, & Baharudin, 2013).

Malaysia is a signatory to the Convention on Biological Diversity (CBD). Malaysia's Fifth National Report to the Convention on Biological Diversity states that the country's monitoring against CBD targets is weak: "The lack of cohesive and comprehensive monitoring mechanisms/indicators towards the National Policy on Biological Diversity has posed some challenges towards measuring actual progress in certain conservation areas. Malaysia recognises the need to step up efforts on awareness raising on the importance and significance of biodiversity conservation, protection and management across all levels of society in Malaysia" (Ministry of Natural Resources, Malaysia, 2014).

In conclusion, given the threats to HCV 3 are mainly caused by conversion of natural forests into oil palm plantations (see also Section 4) which results in habitat removal and fragmentation this indicator is considered Elevated risk.

3.3.3.4. Risk designation and specification

Elevated risk

3.3.3.5. Control measures and verifiers

Country Specific

- Corporate risk - Review the Zoological Society of London (ZSL)'s Sustainable Palm Oil Transparency Toolkit (SPOTT) tool to assess the palm oil producer's commitments to environmental and social best practice which is based on publicly available information on disclosure of their operations.
- Check palm oil producers' 'environmental management' and 'fragile, marginal and peat soils' scores: <http://www.sustainablepalmoil.org/companies/> and/or the company's latest annual report.

Control Measures:

- Completed and approved Environmental Impact Assessment for areas that require them (see section 3.1.3) (check list of approved EIAs on the DOE website: <http://www.doe.gov.my/eia/eia-reports/>) and verify that environmental controls are followed in the field through evidence of an audit. Ensure that any legal requirements relating to the protection of HCV 3 are met.
- Agricultural land title or lease to prove site location is on agricultural land.
- Evidence that comprehensive biodiversity surveys and/or a High Conservation Value (HCV) assessment that includes both the planted area itself and relevant wider landscape-level

considerations (such as wildlife corridors) to identify HCV 1- 3 have been undertaken. [<https://www.hcvnetwork.org/als/public-summaries>]

- Evidence of management plans for rare, threatened or endangered ecosystems include actions for their protection, survival, and prevention of poaching, are develop for the management area and surrounding landscape have been developed and are implemented.

3.3.4. Critical ecosystem services – HCV 4

Basic ecosystem services in critical situations, including protection of water catchments and control of erosion of vulnerable soils and slopes. Sub-categories:

- a) *protection from flooding;*
- b) *protection from erosion;*
- c) *barriers from destructive fire;*
- d) *clean water catchments*

3.3.4.1. HCV Occurrence

The following areas in Sabah are considered containing HCV 4 values (NEPCon 2016):

- Dam catchment areas and any forest area legally gazetted as a Protection Forest for water protection area under the Sabah Water Resources Enactment 1998 or Class I Protection Forest Reserve under the Sabah Forest Enactment 1968, forest management plan, and Forest Timber Licence, or areas gazetted for watershed protection under any other State or federal legislation.
- Forest areas that have been legally gazetted for soil protection or conservation under State laws including forest areas that lie on slopes greater than 25 degrees; forest management plan and riparian areas covered under the Department of Irrigation and Drainage (DID) Guidelines.
- Any specific areas that can act as barriers to provide forests with protection from fire, especially forests with high conservation values, in areas that are generally fire-prone and where the consequences are potentially severe.

The National Physical Plan (NPP) establishes Environmentally Sensitive Areas (ESAs) Ranking that corresponds to different allowances and restrictions on land use. ESA Rank 1 (no development, agriculture or logging shall be permitted except for ecotourism, research and education) consists of:

- Existing and proposed Protected Areas (PA).
- Important small habitats outside the PA system: turtle landing sites, salt licks, important plant areas, limestone outcrops and natural wetlands of high conservation value.
- Catchments of existing and proposed dams.
- Areas above 1,000m contour.

ESA Rank 2 (No development or agriculture. Sustainable logging and eco-tourism may be permitted subject to local constraints) consists of:

- All other forests and wetlands outside Protected Areas.
- 500m buffer zone around Rank 1 areas2.

- Areas between 300m-1,000m contour.

ESA Rank 3 (Controlled development whereby the type and intensity of the development shall be strictly controlled depending on the nature of the constraints) consists of:

- Marine park islands.
- 500m buffer zone around Rank 2 areas2.
- Catchments of water intake and groundwater recharge zones.
- Areas between 150m-300m contour, all areas with erosion risk above 150ton/ha/year, all areas experiencing critical or significant coastal erosion.

3.3.4.2. Sources of information

- Lim, T. W. (2013). Illegality in Forest Clearance for Large-scale Commercial Plantations. Forest Trends. Retrieved from http://www.forest-trends.org/publication_details.php?publicationID=4195
- Roundtable on Sustainable Palm Oil (RSPO). (2015, March 6). Malaysia National Interpretation of RSPO Principles and Criteria for Sustainable Palm Oil Production. Retrieved from <http://www.rspo.org/key-documents/certification/rspo-national-interpretations>
- Senathirajah, S. (2016, September 1).

3.3.4.3. Risk determination

In 2004 the Sabah Forestry Department approved the conversion of 109,600 ha of natural forest by one company inside Kalabakan Forest Reserve and Gunung Rara Forest Reserve for oil palm plantation, and in 2007, the Sabah Environmental Protection Department approved an environmental impact assessment (EIA) for planting oil palm on 10,389.62 ha inside Bonggaya Forest Reserve, Sandakan, Sabah (Lim, 2013).

In Sabah and Sarawak most forest conversion projects do produce EIAs (Lim, 2013). In Sabah, it is estimated that about 80% of oil palm plantations submit EIAs for new plantings and some companies apply for EIAs retrospectively (after the forest has been felled) (Lim, 2013). Around 90% of EIAs submitted are eventually approved with a number of mitigation measures prescribed (Lim, 2013).

However, in practice, there is considerable non-compliance with mitigation due to ambiguities regarding the implementation of these measures (Lim, 2013). Given a fixed plot of land with fixed sales prices and land premiums being payable, river reserves reduce the profit of the plantation company (Lim, 2013). Minor increases in the width of river reserves or the method of demarcation would cause a plantation company to forgo millions of ringgits in lost revenue from harvesting timber and harvesting future plantation crops (Lim, 2013).

Given there have been no major fire events linked to clearing land for oil palm plantation in past few years (see 4.2 for more details) fire linked to oil plantations threatening HCV 4 values is of Low risk. For HCV 4 water and soil values despite there being safeguards these safeguards are often breached leading to issues of soil erosion and excessive sedimentation in waterways etc. this indicator is considered Elevated risk.

3.3.4.4. Risk designation and specification

Elevated risk

3.3.4.5. Control measures and verifiers

Country Specific

Verifiers:

- Corporate risk - Review the Zoological Society of London (ZSL)'s Sustainable Palm Oil Transparency Toolkit (SPOTT) tool to assess the palm oil producer's commitments to environmental and social best practice which is based on publicly available information on disclosure of their operations.
- Check palm oil producers' 'environmental management' and 'fragile, marginal and peat soils' scores: <http://www.sustainablepalmoil.org/companies/> and/or the company's latest annual report.

Control Measures:

- Completed and approved Environmental Impact Assessment for areas that require them (see section 3.1.3) (check list of approved EIAs on the DOE website: <http://www.doe.gov.my/eia/eia-reports/>) and verify that environmental controls are followed in the field through evidence of an audit. Ensure that any legal requirements relating to the protection of HCV 3 are met.
- Agricultural land title or lease to prove site location is on agricultural land.
- Evidence that a High Conservation Value (HCV) and Environment Impact Assessment that includes both the planted area itself and relevant wider landscape-level considerations (such as wildlife corridors) to identify HCV 4 have been undertaken. [<https://www.hcvnetwork.org/als/public-summaries>]

3.3.5. Community needs – HCV 5

Sites and resources fundamental for satisfying the basic necessities of local communities or indigenous peoples (e. g.: for livelihoods, health, nutrition, water, etc.), identified through engagement with these communities or indigenous peoples. Sub-categories:

- a) Unique/main sources of water for drinking and other daily uses;*
- b) Unique/main sources of water for the irrigation of food crops;*
- c) Food, medicines or fuel etc. for local consumption.*

3.3.5.1. HCV Occurrence

The Sabah Land Ordinance of 1930 upholds the principle of the protection of natives' rights to their lands as well as the recognition that natives practised their own customs and laws. Administrators are required to give careful regard to those customs. Native Customary Rights land can be established through Customary Tenure, Native Title, Communal Title, and Native Reserves (Human Rights Commission of Malaysia (SUHAKAM), 2013).

The majority of the 39 indigenous groups in Sabah occupy rural areas and depend on subsistence farming and cultivation of cash crops (PACOS, 2008). Sabah government's policies on oil palm development have resulted in many concerns about land rights (Norwana, et al., 2011). This is due in large part to the wide gap between traditional rights as perceived by the

indigenous groups and the concept of 'Native Customary Rights' (NCR) as interpreted by the government (Norwana, et al., 2011).

3.3.5.2. Sources of information

- Norwana, A. A., Kunjappan, R., Chin, M., Schoneveld, G., Potter, L., & Andriani, R. (2011). The local impacts of oil palm expansion: An assessment based on a case study in Sabah State. Center for International Forestry Research. Retrieved from http://www.cifor.org/publications/pdf_files/WPapers/WP-78Andriani.pdf
- PACOS. (2008). Malaysia: securing indigenous peoples' rights in conservation. Reviewing and Promoting Progress in Sabah, Malaysia. Working draft. Forest Peoples Programme. Retrieved from <http://www.forestpeoples.org/>.
- Human Rights Commission of Malaysia (SUHAKAM). (2013). REPORT OF THE NATIONAL INQUIRY INTO THE LAND RIGHTS OF INDIGENOUS PEOPLES. Human Rights Commission of Malaysia (SUHAKAM). Retrieved from <http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/SUHAKAM%20BI%20FINAL.CD.pdf>
- Toh, S. M., & Grace, K. T. (2005). Case study: Sabah forest ownership. Food and Agriculture Organization. Retrieved from <http://www.fao.org/3/a-i0440s/j8167e10.pdf>
- Yong, C., SACCESS, & JKOASM. (2014). Deforestation Drivers and Human Rights in Malaysia. Forest Peoples Programme. Retrieved from <http://www.forestpeoples.org/topics/climate-forests/publication/2014/deforestation-drivers-and-human-rights-malaysia>

3.3.5.3. Risk determination

The traditional lands of indigenous communities in Sabah are often exploited or alienated to oil-palm development projects (Toh & Grace, 2005). Polluted water sources from nearby oil-palm plantations and mills is one of the major complaints of indigenous communities living in poverty (Toh & Grace, 2005).

There is a growing number of land dispute cases filed in courts by native landowners against oil palm plantation companies, state government and others in the industry (Yong, SACCESS, & JKOASM, 2014). Apart from loss of land, many community witnesses complained that the opening of plantations has resulted in destruction of graveyards and crops, and pollution of rivers and loss of livelihoods and traditional ways of life (Human Rights Commission of Malaysia (SUHAKAM), 2013).

The main risks related to traditional- and indigenous rights seem to be a legal framework incapable of adequately protecting indigene rights as well as State- and Federal governments, who have used this legal framework systematically to prioritize 'public purpose development' over customary land rights. Malaysia has not ratified ILO convention 169 on indigenous and tribal peoples and the national legal framework does not adequately cover all rights of indigenes. While a positive development is traceable in the Malaysian court system, this road to justice oftentimes requires vast amounts time and resources not in the possession of all indigenous communities.

Risk conclusion

The ambiguous legal framework coupled with the high presence of indigenous conflicts in Sabah warrants an Elevated Risk designation for HCV 5 (please also see Category 2.4)

3.3.5.4. Risk designation and specification

Elevated risk

3.3.5.5. Control measures and verifiers

Verifiers:

- Review the Zoological Society of London (ZSL)'s Sustainable Palm Oil Transparency Toolkit (SPOTT) tool to assess the palm oil producer's commitments to environmental and social best practice which is based on publicly available information on disclosure of their operations. For land tenure issues check palm oil producers' 'Landbank' and 'Environmental' scores – the latter which covers FPIC and IP rights:
<http://www.sustainablepalmoil.org/companies/>
- Conduct a search on latest news and NGO reports on disputes and developments on indigenous and traditional peoples' land claims and assurance of rights via websites and NGOs including:
 - NGO investigations and reports (Forest Peoples Programme <http://www.forestpeoples.org>, , Rainforest Action Network www.ran.org, <http://www.schusterinstituteinvestigations.org>, greenpeace.org, Friends of the Earth [foe.org](http://www.foe.org), Center for Orang Asli Concerns (COAC) (<http://www.coac.org.my/>), The Human Rights Commission of Malaysia (SUHAKAM) (<http://www.suhakam.org.my/>), Pusat Komang (komang.org), Cultural Survival (culturalsurvival.org))Media reports (Mongabay.com, greenomics.org, red-monitor.org, , eyesonthe forest.org, sarawakreport.org, malaysiakini.com)
 - Global Platform of Indigenous and Community lands: <http://www.landmarkmap.org/>

Control Measures:

It is important to remember that the appropriate way to maintain or enhance each value will depend on the value itself. There are a variety of possible options to maintain or enhance various HCVs, which include:

- Evidence that a High Conservation Value (HCV) assessment to identify HCV 5 have been undertaken - <https://www.hcvnetwork.org/als/public-summaries>
- Where HCV set-asides with existing rights of local communities have been identified, there is evidence of a negotiated agreement that optimally safeguards both the HCVs and these rights in accordance with internationally recognized FPIC standards, are not constrained by local legal frameworks (see Category 2.2 also for more details).
 - Documents or records of consultations with local communities for any land or rights dispute resolutions.

3.3.5. Cultural values – HCV 6

Sites, resources, habitats and landscapes of global or national cultural, archaeological or historical significance, and/or of critical cultural, ecological, economic or religious/sacred importance for the

traditional cultures of local communities or indigenous peoples, identified through engagement with these local communities or indigenous peoples. Sub-categories:

- a) Aesthetic values;*
- b) Historic values;*
- c) Scientific values;*
- d) Social (including economic) values;*
- e) Spiritual values.*

3.3.6.1. HCV Occurrence

The Sabah Land Ordinance of 1930 upholds the principle of the protection of natives' rights to their lands as well as the recognition that natives practised their own customs and laws. Administrators are required to give careful regard to those customs. Native Customary Rights land can be established through Customary Tenure, Native Title, Communal Title, and Native Reserves (Human Rights Commission of Malaysia (SUHAKAM), 2013).

In Sabah, there are significant cultural features recorded and most native chiefs will have knowledge of them (NEPCon, 2016). Some features are also documented. In addition, all those archaeological sites gazetted under Sabah Museum should be considered HCV 6 (NEPCon, 2016).

3.3.6.2. Sources of information

- Human Rights Commission of Malaysia (SUHAKAM). (2013). REPORT OF THE NATIONAL INQUIRY INTO THE LAND RIGHTS OF INDIGENOUS PEOPLES. Human Rights Commission of Malaysia (SUHAKAM). Retrieved from <http://nhri.ohchr.org/EN/Themes/BusinessHR/Business%20Womens%20and%20Childrens%20Rights/SUHAKAM%20BI%20FINAL.CD.pdf>
- Toh, S. M., & Grace, K. T. (2005). Case study: Sabah forest ownership. Food and Agriculture Organization. Retrieved from <http://www.fao.org/3/a-i0440s/j8167e10.pdf>
- Yong, C., SACCESS, & JKOASM. (2014). Deforestation Drivers and Human Rights in Malaysia. Forest Peoples Programme. Retrieved from <http://www.forestpeoples.org/topics/climate-forests/publication/2014/deforestation-drivers-and-human-rights-malaysia>

3.3.6.3. Risk determination

The traditional lands of indigenous communities in Sabah are often exploited or alienated to oil-palm development projects (Toh & Grace, 2005).

There is a growing number of land dispute cases filed in courts by native landowners against oil palm plantation companies, state government and others in the industry (Yong, SACCESS, & JKOASM, 2014). Apart from loss of land, many community witnesses complained that the opening of plantations has resulted in destruction of graveyards and crops, and pollution of rivers and loss of livelihoods and traditional ways of life (Human Rights Commission of Malaysia (SUHAKAM), 2013).

The main risks related to traditional- and indigenous rights seem to be a legal framework incapable of adequately protecting indigene rights as well as State- and Federal governments, who have used this legal framework systematically to prioritize 'public purpose development' over customary land rights. Malaysia has not ratified ILO convention 169 on indigenous and

tribal peoples and the national legal framework does not adequately cover all rights of indigenes. While a positive development is traceable in the Malaysian court system, this road to justice oftentimes requires vast amounts time and resources not in the possession of all indigenous communities.

Risk conclusion

The ambiguous legal framework coupled with the high presence of indigenous conflicts in Sabah warrants an Elevated Risk designation for HCV 6 (please also see Category 2.4)

3.3.6.4. Risk designation and specification

Elevated risk

3.3.6.5. Control measures and verifiers

Verifiers:

- Review the Zoological Society of London (ZSL)'s Sustainable Palm Oil Transparency Toolkit (SPOTT) tool to assess the palm oil producer's commitments to environmental and social best practice which is based on publicly available information on disclosure of their operations. For land tenure issues check palm oil producers' 'Landbank' and 'Environmental' scores – the latter which covers FPIC and IP rights:
<http://www.sustainablepalmoil.org/companies/>
- Conduct a search on latest news and NGO reports on disputes and developments on indigenous and traditional peoples' land claims and assurance of rights via websites and NGOs including:
 - NGO investigations and reports (Forest Peoples Programme <http://www.forestpeoples.org>, , Rainforest Action Network www.ran.org, <http://www.schusterinstituteinvestigations.org>, [greenpeace.org](http://www.greenpeace.org), Friends of the Earth [foe.org](http://www.foe.org), Center for Orang Asli Concerns (COAC) (<http://www.coac.org.my/>), The Human Rights Commission of Malaysia (SUHAKAM) (<http://www.suhakam.org.my/>), Pusat Komang (komang.org), Cultural Survival ([culturalsurvival.org](http://www.culturalsurvival.org)))Media reports (Mongabay.com, [greenomics.org](http://www.greenomics.org), [red-monitor.org](http://www.red-monitor.org), , [eyesontheforest.org](http://www.eyesontheforest.org), [sarawakreport.org](http://www.sarawakreport.org), [malaysiakini.com](http://www.malaysiakini.com))
 - Global Platform of Indigenous and Community lands: <http://www.landmarkmap.org/>

Control Measures:

It is important to remember that the appropriate way to maintain or enhance each value will depend on the value itself. There are a variety of possible options to maintain or enhance various HCVs, which include:

- Conservation set-asides (e.g. appropriately designed protected areas, buffer zones, habitat corridors)
- Restoration (e.g. remediation of previous damage to ecosystems, reintroduction of hunted species, creation of wildlife corridors between forest blocks)
- Community development and livelihoods projects (e.g. employment and healthcare)

- Local government and NGO support (e.g. extending or renewing leases, preventing inappropriate development, supporting company conservation initiatives).
- Evidence that a High Conservation Value (HCV) assessment to identify HCV 6 have been undertaken. [<https://www.hcvnetwork.org/als/public-summaries>]
- Where HCV set-asides with existing rights of local communities have been identified, there is evidence of a negotiated agreement that optimally safeguards both the HCVs and these rights in accordance with internationally recognized FPIC standards, are not constrained by local legal frameworks (see Category 2.2 also for more details).
 - Documents or records of consultations with local communities for any land or rights dispute resolutions.

CONVERSION

4.1. New plantations have not replaced natural forest or natural ecosystems since November 2005

November 2005 has been set as the baseline of natural forest and/or ecosystem conversion. Risk relates to plantation establishment on converted natural forest and/or ecosystem areas post November 2005. Note: The baseline of natural forests and ecosystem conversion has been set at November 2005 to be in aligned with other international benchmarks set through the Roundtable on Sustainable Palm Oil's deforestation 2005 baseline and to complement initiatives such as Amazon Soy Moratorium establishment in 2006.

Context

In Malaysia, the direct conversion as opposed to progressive degradation of forest to oil palm has been more common than in Indonesia, particularly in Sabah and Sarawak, but the conversion of other types of land use, such as rubber was more important in Peninsular Malaysia (Gunarso, Hartoyo, Agus, & Killeen, 2014).

4.1.1. Applicable laws and regulations

- National Physical Plan (NPP)
- Convention on Biological Diversity (CBD) - [link](#)
- The National Parks Ordinance 1962 - [link](#)
- Sabah Biodiversity Enactment 2000 - [link](#)
- Wildlife Conservation Enactment 1997 - [link](#)
- Environment Protection Enactment 2002 - [link](#)
- Environment Protection (Prescribed Activities)(Environmental Impact Assessment) Order 2005 - [link](#)
- Forest Enactment 1968 - [link](#)
- Sabah Water Resources Enactment 1998 - [link](#)
- Land Conservation Act 1960, revised 1989 - [link](#)
- Environmental Quality Act 1974 (amended 1985) - [link](#)
- Local Government Act No. 171 of 1976 - [link](#)
- Fisheries Act 1985 (Act 317) - [link](#)
- Wildlife Conservation Act 2010 - [link](#)

4.1.2. Legal authority

- Department of Town and Country Planning

4.1.3. Legally required documents or records

- EIA report

4.1.4. Sources of information

- Gunarso, P., Hartoyo, M. E., Agus, F., & Killeen, T. J. (2014). OIL PALM AND LAND USE CHANGE IN INDONESIA, MALAYSIA AND PAPUA NEW GUINE. Roundtable on Sustainable Palm Oil (RSPO). Retrieved from http://www.tropenbos.org/file.php/1343/4_oil_palm_and_land_use_change_gunarso_et_al.pdf
- Lim, T. W. (2013). Malaysia: Illegalities in Forest Clearance for Large-scale Commercial Plantations. Forest Trends. Retrieved from http://www.forest-trends.org/publication_details.php?publicationID=4195
- Miyamoto, M., Parid, M. M., Aini, Z. N., & Michinaka, T. (2014). Proximate and underlying causes of forest cover change in Peninsular Malaysia. Forest Policy and Economics. Retrieved from http://ac.els-cdn.com/S1389934114000768/1-s2.0-S1389934114000768-main.pdf?_tid=01863d62-70da-11e6-8107-00000aacb360&acdnat=1472799411_b7045641ac61a25dd4e1f5a42ce44ec2
- Toh, S. M. (2013). National Updates on Agribusiness Large Scale Land Acquisitions in Southeast Asia Brief #5 of 8: Federation of Malaysia. Forest Peoples Programme. Retrieved from <http://www.forestpeoples.org/sites/fpp/files/publication/2013/08/briefing-5-8-malaysia.pdf>
- Yong, C., SACCESS, & JKOASM. (2014). Deforestation Drivers and Human Rights in Malaysia. Forest Peoples Programme. Retrieved from <http://www.forestpeoples.org/topics/climate-forests/publication/2014/deforestation-drivers-and-human-rights-malaysia>

4.1.5. Risk determination

Overview of Legal Requirements

No law or binding public policy prohibits the conversion of natural forest or other ecosystem.

The National Physical Plan (NPP) establishes Environmentally Sensitive Areas (ESAs) Ranking that corresponds to different allowances and restrictions on land use. ESA Rank 1 (no development, agriculture or logging shall be permitted except for ecotourism, research and education) consists of:

- Existing and proposed Protected Areas (PA).
- Important small habitats outside the PA system: turtle landing sites, salt licks, important plant areas, limestone outcrops and natural wetlands of high conservation value.
- Catchments of existing and proposed dams.
- Areas above 1,000m contour.

ESA Rank 2 (No development or agriculture. Sustainable logging and eco-tourism may be permitted subject to local constraints) consists of:

- All other forests and wetlands outside Protected Areas.
- 500m buffer zone around Rank 1 areas2.
- Areas between 300m-1,000m contour.

ESA Rank 3 (Controlled development whereby the type and intensity of the development shall be strictly controlled depending on the nature of the constraints) consists of:

- Marine park islands.
- 500m buffer zone around Rank 2 areas2.
- Catchments of water intake and groundwater recharge zones.
- Areas between 150m-300m contour, all areas with erosion risk above 150ton/ha/year, all areas experiencing critical or significant coastal erosion.

Description of risk

The expansion of oil palm plantation agriculture in Sabah is driven by the State's master narrative on agricultural modernity and the States' legal devices support this. In the political economy of oil palm production, indigenous smallholders and landowners are important to agricultural expansion because most of their lands are assumed to be "idle" (left fallow or reserved under customary laws), indicating that these are available for conversion to plantation agriculture (Toh, 2013). The mechanisms for this are found in provisions of the Sarawak Land Code of 1958 and the Sabah Land Ordinance of 1930 (Toh, 2013).

The largest single source of new plantations in Sabah during 1990-2010 has been disturbed, presumably logged, upland forest (Gunarso, Hartoyo, Agus, & Killeen, 2014). During 2006-2010, the largest single source of young oil palm plantations was bare soil, which includes large areas of recently cleared forest in Sarawak and Sabah. If the forest conversion statistics for Sabah are modified to reflect the proportion of bare soils that originated from forest habitats and that were allocated to oil palm plantations during 1990-2010, then approximately 62% of all oil palm plantations, or 714,000 ha, have originated due to forest conversion (Gunarso, Hartoyo, Agus, & Killeen, 2014). The planting of oil palm inside the PFE has been approved in Sabah and Sarawak on a case-by-case and conditional basis (Lim, 2013). In 2004 the Sabah Forestry Department approved the conversion of 109,600 ha of natural forest by one company inside Kalabakan Forest Reserve and Gunung Rara Forest Reserve for oil palm plantation, and in 2007, the Sabah Environmental Protection Department approved an environmental impact assessment (EIA) for planting oil palm on 10,389.62 ha inside Bonggaya Forest Reserve, Sandakan, Sabah (Lim, 2013).

In Sabah and Sarawak most forest conversion projects do produce EIAs (Lim, 2013). In Sabah, it is estimated that about 80% of oil palm plantations submit EIAs for new plantings and some companies apply for EIAs retrospectively (after the forest has been felled) (Lim, 2013). Around 90% of EIAs submitted are eventually approved with a number of mitigation measures prescribed (Lim, 2013).

However, in practice, there is considerable non-compliance with mitigation due to ambiguities regarding the implementation of these measures (Lim, 2013). Given a fixed plot of land with fixed sales prices and land premiums being payable, river reserves reduce the profit of the plantation company (Lim, 2013). Minor increases in the width of river reserves or the method of demarcation would cause a plantation company to forgo millions of ringgit in lost revenue from harvesting timber and also harvesting future plantation crops (Lim, 2013).

Risk conclusion

Elevated risk: The agricultural commodity is driving direct impact of converting natural forest or ecosystems post November 2005. Data yield evidence that conversion is occurring on a widespread and/or systematic basis.

4.1.6. Risk designation and specification

Elevated risk

4.1.7. Control measures and verifiers

Verifiers:

- (1) geographic risk – examine time series tree cover (deforestation trends) by region/province/district (<http://commodities.globalforestwatch.org/>)
- (2) corporate risk – Corporate risk - Review the Zoological Society of London (ZSL)'s Sustainable Palm Oil Transparency Toolkit (SPOTT) tool to assess the palm oil producer's commitments to environmental and social best practice which is based on publicly available information on disclosure of their operations.
- Check palm oil producers' 'environmental management' and 'fragile, marginal and peat soils' scores: <http://www.sustainablepalmoil.org/companies/> and/or the company's latest annual report.

Control Measures:

- Obtain the shape file of the farm property's boundaries and compare/overlay with mapping data from the following initiative that are using satellite time series images to detect the land change cover: www.globalforestwatch.org
- Evidence that a comprehensive HCV assessment, including stakeholder consultation, was conducted prior to any conversion or new planting before November 2005. Evidence should include historical remote sensing imagery which demonstrates that there has been no conversion of primary forest or any area required to maintain or enhance one or more HCV.
- Evidence is provided of undeveloped areas of peat land (of any depth) are not developed or drained post November 2005. Evidence should include historical data which demonstrates that there has been no conversion of peatlands post November 2005. Evidence should include maps identifying marginal and fragile soils, including excessive gradients and peat soils and how the farm management plans has identified and protected peatlands.
- Evidence of management plans that demonstrates fires and road-building on peat soils are prohibited.
- Where peat land has been cleared since November 2005, and without a prior and adequate HCV and HCS assessment, exclusion of the palm oil farm(s) palm oil supply should be considered from the upstream buyer's supply chain.

4.2. Fire avoidance is being practiced

Assess the risk of fire use in plantation establishment and/or management activities. Risk relates to assessing the role of fire use driving natural ecosystem conversion.

4.2.1. Applicable laws and regulations

- Guidelines for implementation of ASEAN policy on zero-burning, 2003 - [link](#)
- Environment Quality (Declared Activities) (Open Burning) Order 2003 - [link](#)

4.2.2. Legal authority

- Department of Environment

4.2.3. Legally required documents or records

- EIA report

4.2.4. Sources of information

- Roundtable on Sustainable Palm Oil (RSPO). (2015, March 6). Malaysia National Interpretation of RSPO Principles and Criteria for Sustainable Palm Oil Production. Retrieved from <http://www.rspo.org/key-documents/certification/rspo-national-interpretations>
- Senathirajah, S. (2016, September 1).

4.2.5. Risk determination

Overview of Legal Requirements

At the 6th ASEAN Ministerial Meeting on Haze in April 1999, the ASEAN Environmental Ministers agreed to adopt the policy on zero burning and to promote its application by plantation companies and owners and timber concessionaires in the region. This was a response to the land and forest fires that affected south-east Asia in 1997 and 1998.

There shall be no land preparation for oil palm farm establishment by burning, other than in specific situations as identified in the 'Guidelines for the Implementation of the ASEAN Policy on Zero Burning' 2003 (Roundtable on Sustainable Palm Oil (RSPO), 2015). Where fire has been used for preparing land for replanting, there shall be evidence of prior approval of the controlled burning as specified in 'Guidelines for the Implementation of the ASEAN Policy on Zero Burning' 2003 (Roundtable on Sustainable Palm Oil (RSPO), 2015). Fire should be used only where an assessment has demonstrated that it is the most effective and least environmentally damaging option for minimising the risk of severe pest and disease outbreaks, and exceptional levels of caution should be required for use of fire on peat (Roundtable on Sustainable Palm Oil (RSPO), 2015). This is subject to regulatory provisions the Environment Quality (Declared Activities) (Open Burning) Order 2003 (Roundtable on Sustainable Palm Oil (RSPO), 2015).

Description of risk

Use of fire in land preparation for palm oil establishment has greatly reduced in Malaysia, however use of fire is still observed in the clearing of biomass waste and domestic waste (pers. comms. Senathirajah, 2016). According to a news article quoting Malaysia's Natural Resources and Environment Minister, Malaysia is proposing to amend its Environmental Protection Act to allow the government to seize control of land where big fires are discovered, as part of its long-term efforts to curb haze from slash-and-burn forest clearing techniques usually linked to palm oil plantations (Reuters, The Star/Asia News Network, 2016). This would indicate that while the majority of information about forest fires related to clearing for palm oil plantations is about Indonesia, the issue remains important in Malaysia as well.

Fire-prone areas – such as Peat Swamp Forest and frequent fire ‘hot spots’ – must be identified; but the only Peat Swamp Forest in Sabah is in the Klias Peninsula.

On the other hand, human-caused forest fires do occur but in Sabah these are isolated cases, with no major fire events occurring for the past few years.

Open burning is an offence, with the Sabah Forest Enactment 1968 also providing that legal action can be taken if anyone is found to have committed open burning.

No information has been found on the level of competence of plantation staff with respect to fire management, however it has been said that management staff typically attend very basic fire management training (pers. comms. Senathirajah, 2016).

Risk conclusion

Given there have been no major fire events linked to clearing land for oil palm plantation in past few years this indicator is designated as Low risk.

4.2.6. Risk designation and specification

Low risk

4.2.7. Control measures and verifiers

N/A

GENETICALLY MODIFIED ORGANISMS (GMOs)

5.1. There is no commercial use of genetically modified palm.

Plantations have not been planted with genetically modified commodities and/or GMO fertiliser is not being used. Risk relates to the use of GMO plants and/or fertiliser as a potential factor influencing upstream buyers purchasing decisions based on consumer preferences.

5.1.1. Applicable laws and regulations

- BIOSAFETY ACT 2007 - [link](#)
- The Biosafety (Approval and Notification) Regulations 2010

5.1.2. Legal authority

- Department of Biosafety, Ministry of Natural Resources and Environment Malaysia.

5.1.3. Legally required documents or records

N/A

5.1.4. Sources of information

- Department of Biosafety, Ministry of Natural Resources and Environment Malaysia. NO DATE. User's Guide to the Biosafety Act and Regulations. <http://ibc.um.edu.my/images/ibc/Download/Biosafety%20User%20Guide.pdf>
- Masani MYA, Noll GA, Parveez GKA, Sambanthamurthi R & Prüfer D. 2014. Efficient Transformation of Oil Palm Protoplasts by PEG-Mediated Transfection and DNA Microinjection. <http://dx.doi.org/10.1371/journal.pone.0096831>
- Parveez GKA, Rasid OA, Hashim AT, Ishak Z, Rosli SK & Sambanthamurthi R. 2015. Tissue Culture and Genetic Engineering of Oil Palm. In:
- Lai O-M, Tan CP & AkohePalm Oil: Production, Processing, Characterization, and Uses.

5.1.5. Risk determination

Overview of Legal Requirements

The Act follows the broad scheme laid down by the Cartagena Protocol on Biosafety (CPB). Just like the Protocol, Malaysia recognizes the twin aspects of modern biotechnology: the great potential offered by modern biotechnology, and, the need to protect human health and the environment from the possible adverse effects of the products of biotechnology (Ministry of Natural Resources and Environment (NRE) Malaysia, 2008).

The Biosafety Act of Malaysia establishes a process to vet all applications for direct release of living modified organisms (LMOs) into the environment to ensure that the LMO is safe (Ministry of Natural Resources and Environment (NRE) Malaysia, 2008). If it is safe, then it is approved. To arrive at this decision, a science-based risk assessment report submitted by the applicant is reviewed by the Genetic Modification Advisory Committee (GMAC), consisting almost entirely of scientists (Ministry of Natural Resources and Environment (NRE) Malaysia, 2008). The process is as suggested by the CPB and there is no a priori (preconceived) assumption against

biotechnology or the approval of the LMO (Ministry of Natural Resources and Environment (NRE) Malaysia, 2008).

Description of risk

The Malaysian Biosafety Act 2007 came into force on 1 December 2009, and the Biosafety (Approval and Notification) Regulations 2010 were passed and came into force on 1 November 2010 to implement it. Together they represent a new national scheme for the regulation of living modified organisms (LMOs (synonymous with GMO)) and products of LMO (Department of Biosafety, n.d.). There is no legislation that applies specifically to oil palm, or palm oil products.

The Malaysian Palm Oil Board (MPOB) initiated genetic engineering of oil palm in the late 1980s and breakthroughs made in the 1990's provided impetus for further ventures (Parveez et. Al, 2015). Many transgenic oil palm plantlets have been produced and are currently growing in MPOB screenhouses, in accordance with the Malaysian Biosafety Act – they are not allowed to be planted in open fields as their safety has not been fully assessed (Parveez et. Al, 2015).

The main objectives of this program are to produce transgenic oil palm with a higher content of oleic acid, modified oil quality (e.g. a higher content of stearic acid), and the ability to produce value-added oils such as palmitoleic and ricinoleic acid, as well as novel products such as biodegradable plastics (Masani et al 2014). Transgenic oil palms are being produced for niche markets such as the oleochemical industry, lubrication, and nutraceuticals, and not for use as commodity oil Parveez et. Al, 2015.

The current palm oil being produced in Malaysia is free from GMO source, and it is expected that this status will continue until at least 2030, due to the regeneration time required for yield testing and multiplying plants for commercialization (Parveez et. Al, 2015).

No information has been found regarding unauthorized use of GM palm oil in the country.

Risk conclusion

LOW RISK: There is no commercial use of GM species in the area under assessment, and other available evidence does not challenge 'low risk' designation.

5.1.6. Risk designation and specification

Low risk

5.1.7. Control measures and verifiers

N/A

Annex I: Palm oil plantation types

The table **Palm oil plantations Types in Malaysia - Sabah** identifies the different types of plantations in **Malaysia - Sabah** which supply palm oil to the market.

‘Palm oil plantation type’ is a term used to describe the different types of palm oil plantations in a country, to allow a more detailed specification of risk. The Palm oil plantation Type is used to clarify:

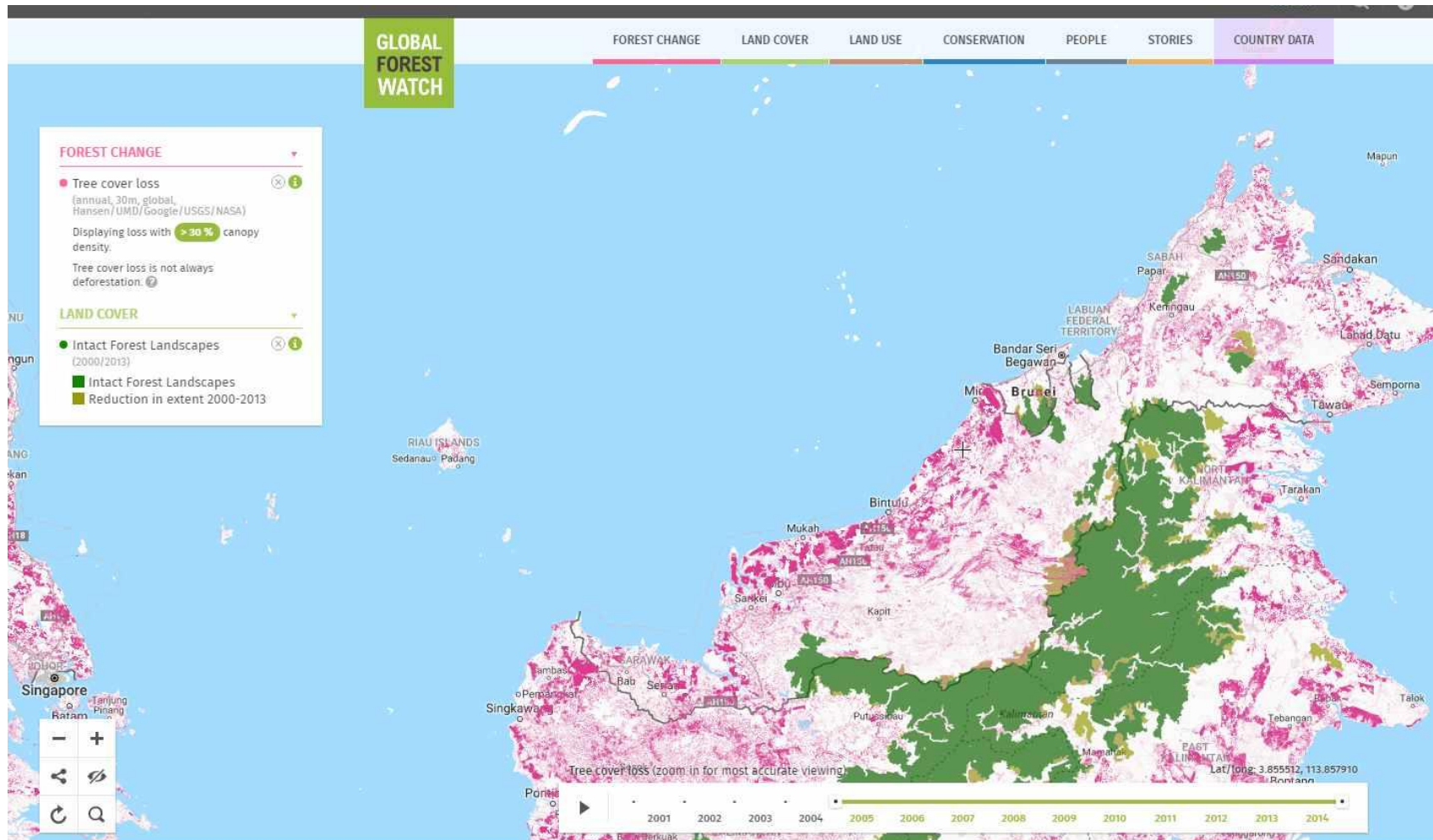
- which plantation types palm oil can be sourced from legally;
- what the legal requirements are for each plantation type, and
- if there are risks related to certain plantation types and not others.

Brief introduction to plantation types for Malaysia - Sabah.

PALM OIL SOURCE TYPES IN SABAH, MALAYSIA			
Region/Area	Ownership	Management regime	Description of plantation type
Government land development schemes	<p>Privately owned by smallholders on Native Customary Right land</p> <p>Native Titles or Communal Titles are obtained after completion of a 25-year agreement period.</p>	<p>Managed by the smallholders who carry out mono-Cropping on land between >100 to several thousand ha, for commercial purposes.</p> <p>The Sabah Land Development Board (SLDB) acts as the developer and smallholders contribute their Native Customary Right land either under individual Native Titles of Communal Titles.</p> <p>Smallholders share 60-70% of the profit and gain access to employment and experience in managing the plantation.</p>	<p>Palm oil from <i>Government Land Development Schemes</i>; these are privately owned by smallholders on Native Customary Right land. Native Titles or Communal Titles are obtained after completion of a 25-year agreement period.</p> <p>The farms are managed by the smallholders who carry out mono-Cropping on land between >100 to several thousand ha, for commercial purposes.</p> <p>The Sabah Land Development Board (SLDB) acts as the developer and smallholders contribute their Native Customary Right land either under individual Native Titles of Communal Titles.</p> <p>Smallholders share 60-70% of the profit and gain access to employment and experience in managing the plantation.</p>
Large-scale private plantation	<p>Privately owned plantations (large holder) on alienated land (formerly customarily owned land).</p> <p>The land is either held under a freehold Land title, or a Country Land</p>	<p>Managed by private companies who carry out mono-cropping on >40 - >100,000 ha of land, for commercial purposes.</p> <p>Private companies include Government-linked companies (GLC) and Non-government-linked companies (Non GLC).</p>	<p>Palm oil from large-scale private plantations on alienated land (formerly customarily owned land). The land is either held under a freehold Land title, or a Country Land title (CL) under a 99-year lease.</p> <p>Farms are managed by private companies who carry out mono-cropping on >40 - >100,000 ha of land, for commercial purposes.</p>

	title (CL) under a 99-year lease.	Many companies have integrated operations covering the entire production process (MPC, 2014). Licensing is required for planting, processing, and other business activities.	Private companies include Government-linked companies (GLC) and Non-government-linked companies (Non GLC). Many companies have integrated operations covering the entire production process (MPC, 2014). Licensing is required for planting, processing, and other business activities.
Small-scale private plantation	<p>Alienated Land (formerly customarily owned land). The land is held either as:</p> <ul style="list-style-type: none"> • Freehold Land title, • Country Land title (CL) under a 99-year lease; • Native Title (NT); or • Communal Title. <p>Native Titles consist of Malay reservation or Native Customary Right land for the indigenous peoples of Sabah</p>	<p>Managed by private independent smallholders (farmers) who carry out mono-cropping on land that is <40 ha. Farming is done both for subsistence and commercial purposes.</p> <p>The smallholdings are scattered and have minimal government assistance. They sell their FFB directly to local mills and traders.</p>	<p>Palm oil from small-scale private plantations on Alienated Land (formerly customarily owned land).</p> <p>The land is held either as: Freehold Land title, Country Land title (CL) under a 99-year lease; Native Title (NT); or Communal Title. Native Titles consist of Malay reservation or Native Customary Right land for the indigenous peoples of Sabah.</p> <p>The farms are managed by private independent smallholders (farmers) who carry out mono-cropping on land that is <40 ha. Farming is done both for subsistence and commercial purposes.</p> <p>The smallholdings are scattered and have minimal government assistance. They sell their FFB directly to local mills and traders.</p>

Annex II: Global Forest Watch Map of Tree Cover Loss (2005 -2014) and Intact Forest Landscapes (IFLs) Loss 2000-2013 in Sarawak and Sabah



As last seen on 3rd November 2016: http://www.globalforestwatch.org/map/7/3.86/113.86/ALL/grayscale/loss/607?tab=analysis-tab&begin=2005-01-01&end=2015-01-01&threshold=30&dont_analyze=true

About

Responsible Sourcing of Soy, Cattle and Palm Oil

Responsible Sourcing of Soy, Cattle and Palm Oil is a project aimed at creating awareness and capacity among Danish companies to minimise risks of social and environmental problems connected to sourcing palm oil, soy and cattle from developing countries. The project is run by NEPCon and SEGES and funded by DANIDA, Ministry of Foreign Affairs of Denmark.



NEPCon (Nature Economy and People Connected) is an international, non-profit organisation that builds commitment and capacity for mainstreaming sustainability. Together with our partners, we foster solutions for safeguarding our natural resources and protecting our climate.

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