

Free, Prior and Informed Consent and the RSPO

Are the companies keeping their promises?

Findings and recommendations from Southeast Asia and Africa

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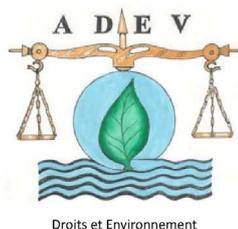
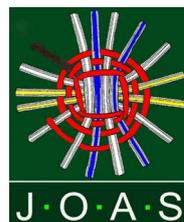
Cover Photo: Nimba Point surrounded by cleared land, taken from road cut through women's sacred forest, Grand Cape Mount County, Liberia.
Photo: Tom Lomax

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Based on case studies carried out in oil palm plantations in
Indonesia, Sarawak, Sabah, Philippines, Cameroon,
Liberia and Democratic Republic of Congo



The right to FPIC and the RSPO

The RSPO aims to divert the expanding palm oil frontier away from primary forests and areas of high conservation value and it proscribes land-grabbing, requiring member companies to respect the customary rights of local communities and indigenous peoples, including their right to give or withhold consent to land purchases or leases.¹

The RSPO standard requires companies to respect the right of indigenous peoples and local communities to play a decisive role in any new plantings or replanting that will affect their lands, territories and resources that they customarily own, occupy or otherwise use.² Free, Prior and Informed Consent (FPIC), anchored in international human rights law,³ has a central place in the RSPO's Principles and Criteria.

The right to FPIC in the RSPO P&C establishes the basis on which equitable agreements between local communities and companies (and governments) can be developed in ways that ensure that both the legal and customary rights of indigenous peoples and other local rights-holders are respected. It allows local communities to negotiate on a fairer basis to ensure they gain real benefits from proposed palm oil developments on their lands. Respect for the right to FPIC guides the way companies engage with local communities and indigenous peoples, including the provision of information, carrying out impact assessments, acquiring land, agreeing on payments and benefits, settling differences, resolving conflicts and paying compensation.⁴ Most importantly, FPIC is the right of indigenous peoples and local communities to give or withhold their consent to any project affecting their lands, territories and natural resources.

Free, Prior and Informed Consent in the RSPO Principles & Criteria

Criterion 1.1	Oil palm growers and millers provide adequate information to other stakeholders on environmental, social and legal issues relevant to RSPO Criteria, in appropriate languages & forms to allow for effective participation in decision making.
Criterion 1.2	Management documents are publicly available, except where this is prevented by commercial confidentiality or where disclosure of information would result in negative environmental or social outcomes.
Criterion 2.1	There is compliance with all applicable local, national and ratified international laws and regulations.
Criterion 2.2	The right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights.
Criterion 2.3	Use of the land for oil palm does not diminish the legal rights, or customary rights, of other users, without their free, prior and informed consent.
Criterion 6.3	There is a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties.
Criterion 6.4	Any negotiations concerning compensation for loss of legal or customary rights are dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions.
Criterion 7.5	No new plantings are established on local peoples' land without their free, prior and informed consent, dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their views through their own representative institutions.
Criterion 7.6	Local people are compensated for any agreed land acquisitions and relinquishment of rights, subject to their free, prior and informed consent and negotiated agreements.

FPIC on the ground

In 2012, coinciding with the RSPO Principles & Criteria Review, a broad consortium of NGOs led by Sawit Watch and Forest Peoples Programme⁵ undertook a series of fourteen independent studies on Free, Prior and Informed Consent in RSPO member/certified and non-RSPO oil palm plantations across Southeast Asia (Indonesia, Sabah, Sarawak, Philippines) and Africa (Cameroon, Liberia and Democratic Republic of Congo). Six studies were carried out in various regions of Indonesia: West, Central and East Kalimantan, and West Sumatra.

The purpose of these studies is to provide detailed field information on how and whether the right to FPIC is being applied adequately by companies, to expose any malpractice of palm oil companies and to argue for a strengthening of the RSPO procedures and standards where necessary. Through field research, irregularities were documented and the information made available to relevant parties in order to support redress.

Over ten day fieldwork periods, the research teams interviewed a wide range of stakeholders, including local communities, government bodies, plantation workers and the companies.

As far as possible, the views of women, the elderly and youth have been included, as well as those of formal village representatives, such as village heads and customary leaders. The views of other NGOs and civil society institutions active in the areas in question were also sought. On-site fieldwork has been complemented by analysis of primary and secondary sources, such as NGO publications, social and environmental impact assessments, Standard Operational Procedures, contracts, maps, land tenure studies, press coverage and company annual reports. The research teams have operated independently of the palm oil companies but reports of the studies are being shared for comments prior to publication, where requested by the company.

This briefing, launched on the occasion of the RT10, draws together the key findings of these studies based on the RSPO P&C and related Indicators and Guidance, and makes recommendations for reforms in the way palm oil companies honour the principle of FPIC and respect customary rights to land. The studies are also being used as inputs to the review process of the P&C through the RSPO's Working Groups and multi-stakeholder public consultations.⁶

What does the right to Free, Prior and Informed Consent mean?

Free: implies no coercion, intimidation or manipulation

Prior: implies consent has been sought sufficiently in advance of any authorisation or commencement of activities and respect of time requirements of indigenous consultation/ consensus processes

Informed: implies that information is provided that covers (at least) the following aspects:

- The nature, size, pace, duration, reversibility and scope of any proposed project
- The reason(s) or purpose of the project
- The location of areas that will be affected
- A preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits
- Personnel likely to be involved in the implementation of the project
- Procedures that the project may entail

Consent: consultation and participation are key elements of a consent process. Consultation must be undertaken in good faith. The parties must establish a dialogue allowing them to identify appropriate and workable solutions in an atmosphere of mutual respect, and full and equitable participation, with ample time to reach decisions. This process may include the option of withholding consent. Indigenous peoples and local communities must be able to participate through their own freely chosen representatives and customary or other institutions. The participation of women, youth and children are preferable where appropriate.

Source: UNPFII 2005

Key Findings

Signs of progress

- The RSPO P&C have encouraged companies to begin thinking of local communities and of oil palm development in terms of rights (both formal and informal), and to engage in dialogue with indigenous peoples and local communities as rights-holders in these developments.
- The notion of lands conceded being idle or vacant lands is gradually being dispelled as companies are increasingly recognising that the lands granted to them are in fact encumbered by customary rights and inhabited by local communities who depend on them primarily for their livelihoods.
- Many companies have committed to dialogue, negotiation and consultation as means of resolving disputes with, and remedying grievances of, local communities, which should pave the way for reaching mutually beneficial agreements, satisfactory to all parties.
- Compensation for land and resources lost by local communities due to oil palm development is being paid more systematically by some companies, and employment opportunities (sometimes in the form of smallholder schemes) are being offered to local communities as a means for them to benefit from this development.
- The provision of social welfare support, such as educational facilities, water supplies, medical health and infrastructure, is now part of a number of companies' commitments towards local communities, as part of a commitment to the improvement of their wellbeing and environment.
- Some companies have now developed conflict resolution mechanisms and Standard Operational Procedures in relation to customary land rights, conflict resolution, social development and information sharing, to guide their activities and interaction with local communities.
- There is some awareness of the relevance of international human rights instruments to the operations and obligations of the private sector and the State with regards to indigenous peoples and local communities, particularly in relation to land rights.

Shortcomings

- However, insufficient information is being provided to local communities regarding the social and environmental impacts of oil palm development on their livelihoods and their future access and use of land and natural resources therein. This includes lack of information on the nature of the development, its duration, the legal status of the company's rights to land, how the development affects local communities' rights, what happens after the expiry of their lease in terms of land rights and management rights, and details of the compensation and benefits offered to local communities. Where provided, this information tends to be given upon request of the communities rather than at the initiative of the company.
- In many cases, local communities are not informed that they have the right to information in the first place. Many communities had not been informed that by releasing lands for oil palm development, they would weaken or extinguish their future rights to their lands. Communities are also often the last to learn of the terms of the contracts between the government and the company.
- Local communities are not provided with sufficient legal information on their rights under provincial, national and particularly international law. This is particularly the case with regards to indigenous peoples' rights to customary land and natural resources that they traditionally own, occupy or otherwise use. Information on legal and other sources of redress are rarely provided to local communities, neither are they provided with, or enabled to hire, independent legal advice.

- Effective participation in decision-making for local communities is hampered by lack of adequate information shared sufficiently in advance (i.e. 'prior') to developments on their lands. Companies and government in some studies claimed that respect for the right to FPIC is not applicable until the net land area is identified and the initial (and sometimes) final concession agreements are concluded. This places local communities at a considerable disadvantage if their lands have been auctioned or licensed without their consent as their leverage in subsequent negotiations with the company is thereby substantially weakened. Governments frequently agree to allocate land to plantations without consulting communities.
- When negotiating contracts with government, the very terms of those contracts may place both parties in violation of international law and the RSPO P&C. An example is contractual terms where the government guarantees to provide a certain amount of land within a pre-defined gross-concession area free of encumbrances, or where the government promises to resettle communities if the company thinks this is in the interests of efficient concession management.
- Even where records of requests from communities and company or government responses are maintained by the company, these are not routinely shared with local communities involved. Where management documents are publicly available, the process to obtain or view them can be long and complex, especially where local communities are not informed who to address their requests to within the company. In some instances company staff appear to deliberately withhold such information.
- In most cases, the research found that local communities do not know of, or hold copies of, important documents such as Social and Environmental Impact Assessments, High Conservation Value Assessments, land tenure studies, concession maps, Standard Operational Procedures, conflict resolution mechanisms and the concession contract. Where village representatives hold copies, these are rarely shared with, or provided, to the wider community in suitable forms and languages.
- Insufficient information is provided to local communities regarding the RSPO itself as an institution, the requirements the RSPO P&C and the obligations of the member companies. In particular, the right of local communities and indigenous peoples to give or withhold their FPIC and what this entails is rarely explained in sufficient detail for them to exercise this right in practice.
- In many cases, the right to FPIC is understood by companies to be the same as 'socialisation' or consultation, often limited to the company informing the communities of the developments that will take place on their lands, rather than seeking their consent to these developments.
- Because communities tend not to be aware of their right to FPIC, they are reluctant and/or unable to argue for their right to withhold consent. The project is often 'sold' to the community at best – i.e. instead of FPIC, consultation become a marketing process, or the community is presented with the development as a foregone conclusion – a *fait accompli* decided by the government, over which they have no say.
- In many cases, information shared with local communities was partial and biased, with promised benefits and advantages of the development overriding potential negative aspects and risks for local communities' livelihoods, environment and land rights.
- Where carried out, consultations tend to be one-off rather than an iterative process of dialogue, discussion and negotiation, meaning that communities are not given sufficient time to take in, reflect upon, and make decisions collectively regarding the company's operations. In some cases, no consultation was carried out at all by the company.
- Communities are rarely informed of their right to choose how they wish to be represented, with companies tending to work exclusively through the local government administration or government-designated leaders. Consequently, companies can end up favouring community 'representatives' that they see as supportive of their own interests.

- The participation of certain individuals in consultation activities (such as village chiefs) is often construed by companies and governments as equivalent to consent on the part of the whole community. This is especially an issue where corruption is endemic. This often leads to conflict within communities over decisions made above their heads by local officials or representatives, who may have been selected by the company, without prior internal consultation and information sharing. Inducements may take many forms, including the company-led pursuit of land titles for groups or individuals willing to concede to plantations.
- Consultations and communications with local communities are rarely recorded, or where such records exist, these are not shared with the local communities. Community participation in consultations is sometimes treated as evidence of community consent to the development in question.
- Where there are several communities within a concession, the case of one particular community is often generalised to all other communities within the concession, regardless of differences in land tenure, land use, ethnicity and historical occupation of the land in question.
- Standard Operational Procedures on communication and consultation, as well as conflict resolution mechanisms, are rarely developed in collaboration with local communities or other affected parties, meaning they lack credibility in the eyes of these stakeholders.
- Women continue to be marginalised in consultations and their participation neglected, meaning they are not in a position to contribute to decision-making or negotiations over the use of the land. Where employed, they tend to earn less than men, or work without pay with their husbands, who receive a salary. In some cases, poor families from within a community are similarly excluded from decision-making and benefit sharing.
- Some local communities report having experienced intimidation and pressure from companies and company-hired security forces, as well as government entities, to accept the terms of the company, and are reluctant to voice their views for fear of reprisal. In some cases this has led to unlawful arrest and imprisonment by police of community members.
- Furthermore, companies sometimes reserve powers of arrest, stop & search and detention for their own private security staff over local communities, without vetting or adequate supervision or monitoring. These are powers that should only be held by national police, not by private security operations. The risks for civil rights abuses under such circumstances are grave.

National and international law

- Local and national laws tend to be respected by most companies, however land laws are often inconsistent, and changes in these laws can be difficult to keep up with and implement when there is no system in place by the company to track these in good time.
- Inconsistencies within and between local and national laws, such as in relation to land tenure and land-use rights in some countries, are used by companies to selectively implement these laws in ways that favour their interests.
- National laws and regulations in some countries only allow issuance of licenses for the development of oil palm over lands that are free of all existing use and ownership rights. In such cases, RSPO member companies wishing to develop an area for oil palm are unable to both respect community rights in land, and obtain a development license from the government, unless communities consent to relinquish all rights in land. In most cases companies are not informing communities about this fact, and communities are mistakenly under the impression that their lands will return to them after the lease period ends.

- Furthermore in such cases it is not being presented as an option to communities that the land could be leased from them, as opposed to alienation with the government assuming the role as landlord.
- The fact that national and local laws in some countries do not recognise or protect the right of indigenous peoples and local communities to own land and the resources therein, and to use customary law in the management of these lands and natural resources is being mis-used by companies to neglect this right, despite its recognition in international instruments signed and ratified by the country in question, and under the RSPO P&C.
- International laws and regulations are routinely treated as secondary in importance to national and local laws, particularly where national legal frameworks are inconsistent with a State's obligations under international law. Where legal contradictions exist, initiatives of the part of company and government to identify and remedy these through legal reform or other means, are often lacking.
- Lack of clarity over the roles, jurisdiction and responsibilities of governmental bodies (environment, land, agriculture, plantations, forestry, etc.) and that of the company, leads to confusion over who is responsible for the supervision, monitoring and sanctioning of company activities. In some cases, different government agencies and the company 'throw the ball back' to each other in terms of their respective responsibilities. Companies are reluctant to respect community rights in land if this challenges the authority of the State over land tenure.
- Local communities are not provided with sufficient information or material means to seek legal counsel in cases of conflict or unresolved land disputes with the company. Lack of knowledge of their legal rights under national laws undermines their position in formal court procedures, where they find themselves at a disadvantage. Many of these court cases are protracted and convoluted processes, or only allow for compensation, rather than restitution of lands.



Former ancestral gravesite destroyed by land clearing, Tanah Putih, Central Kalimantan. Photo: Sophie Chao

Knowledge of the RSPO

- The jurisdiction of the RSPO is ambiguous in cases of conflict over land and natural resources, and with regards to the rights of communities to accept the RSPO as a dispute resolution mechanism.

- Where initial acquisition of the lands took place before the RSPO was created, some companies are using this as a justification for why they are still not respecting community rights in land. The RSPO standard, however, makes clear that where there are disputes, companies have an obligation to develop and apply mechanisms to resolve the conflict and to respect the right of communities to their lands and to FPIC.

- There remains a lack of knowledge and understanding of the RSPO and its requirements by government bodies involved in the oil palm plantation sector, particularly the fact that FPIC under the RSPO P&C is something different from consultation, which, under certain national laws, is the highest level of requirement on the part of an oil palm company towards potentially affected local communities.

- Even where company policies and senior staff are well informed about the RSPO standards and procedures, companies have not adjusted their SOPs or adequately retrained to apply them.

Land rights

- Adequate and comprehensive documentation of both the history and contemporary practice of customary land tenure is generally lacking. Where these exist, local communities are either insufficiently consulted, or only certain communities are consulted, leading to inter-community disagreement over land use and ownership.

- Legal boundaries of the concession and customary land boundaries are either not clearly demarcated in maps, not developed or mapped with the participation of local communities themselves, or not explained to these communities, leading to confusion over the extent and overlap of these lands and rights over them.

- Often, communities are unclear about which concessions their customary lands overlap, particularly where there are several concessions in the same area (including subsidiaries of the same company), and are therefore unsure who to address their complaints and grievances to.

- There is a continued lack of respect for the communal basis of rights among many local communities, and a tendency by companies and the government to permanently individualise lands, in ways that are contrary to customary tenure and that contribute to intra-community tension.

- Participatory mapping of customary lands and disputed lands is often lacking. Where carried out, it tends to involve selected individuals rather than the wider community, and not all the villages within the concession area. Maps tend to be kept by the company but not shared with the communities, and even where these maps are made in a participatory manner, the ownership of the map by the community itself is rarely acknowledged.

- Land conflicts of varying degrees of gravity were ongoing in all study areas. While certain companies have developed mechanisms to resolve these conflicts, their focus on the establishment of a conflict resolution process, rather than on the outcomes of this process, is often resented by local communities. The development of conflict resolution SOPs on paper by the company was seen by some communities as a strategy to avoid actually dealing with the problems on the ground.



Community members explain compensation procedures for areas of land lost to the oil palm company, Mekar Jaya, West Kalimantan. Photo: Marcus Colchester

Compensation

- The process of providing compensation for lost land tends to be protracted and carried out on an individual basis, rather than based on the FPIC of the wider community, leading to intra-community disagreements where land is held collectively.
- Lack of prior identification of land use rights also leads to cases of opportunism and manipulation of land claims by certain community members or outsiders, leading to compensation being paid to the wrong

individuals. In other cases, compensation is being paid to village representatives who then fail to distribute it among community members.

- Where compensation is paid, this tends to be for land lost by the community but not inclusive of the crops and/or structures they own on these lands, or the economic benefits that could have been derived over many years from the crops and structures that are lost. Furthermore, compensation arrangements are rarely negotiated with communities *prior* to the investment or operation.



River in conservation area, Butut river, East Kalimantan. Photo: Sophie Chao

Environment and HCVs

- High levels of water pollution due to mill effluents was found in several plantations, putting at risk the livelihoods and health of the communities who depend on rivers for their water supplies. Negative impacts have been reported as a result of ill-regulated draining, damming, ditching and so forth.
- Local communities are rarely informed of what HCVs are and what their purpose is, leading to confusion and concern over how their access to these areas are secured, both during and after the company's lease on the land. Many local communities are not involved in the mapping and identification of HCVs by consultant teams hired by the company.

- Very few communities are aware of the difference between HCV categories, and tend to understand their environmental function (preserving biodiversity and protecting endangered species) without being informed of their *social* dimension (i.e. HCV 4, 5 and 6) and relevance to their livelihoods.
- There is a lack of HCV 5 areas being identified in HCV Assessments, meaning that areas fundamental to the basic needs of local communities are not being adequately secured. The definition of ‘basic needs’ is sometimes being manipulated by companies to argue that these areas are not critical to local communities, despite testimony from communities to the contrary, or lack of consultation with local communities over their ‘basic needs’ in the first place.
- Where national laws do not make provision to protect and/or secure HCVs or community rights in land, areas which are essential or critical to local livelihoods (HCV 5) and critical to cultural identity (HCV 6) are considered community lands and are vulnerable to reallocation to third parties. HCVs that revert to the State and not the community at the expiry of the lease are also not secure.
- While some RSPO certification audit teams provide in-depth and detailed reports on companies’ compliance with the RSPO P&C, there is a lack of consistency across them, some being brief and perfunctory, providing little evidence to back conclusions made regarding the extent of the FPIC process.
- The very short duration of audit investigations means it is nigh impossible for the teams to engage in meaningful consultation with all communities within the concession. Perfunctory audits also mean that more remote, and often more culturally distinct communities, are less likely to be reached by audit teams.

Community welfare

- Several companies were found to have planted out their whole concession, leaving little or no land for local communities to use for their own subsistence. In some cases, waterways and roads were blocked without community consent, restricting their access and mobility.
- Some communities are facing serious risks to their food and water security as a result of loss of access to land and loss of wetlands due to diverted, blocked or dammed streams and drained swamps.
- Benefits from oil palm in terms of local development (employment, social infrastructure, water supplies and educational facilities) are often promised by companies, but the timeline and terms their implementation were often not specified or the promises themselves were not put in writing, and there are often no independent monitoring structures to ensure proper and timely implementation.
- Many communities resent the fact that companies, despite promising them jobs, do not prioritise them in terms of training and/or employment in the plantations, preferring instead to bring in workers from outside, who, the companies state, are more qualified and experienced.

Certification auditing

- Although respect for land rights and FPIC are both ‘majors’ in the generic P&C, where non-conformances have been identified in RSPO audits, it is sometimes deemed sufficient for the company to promise that it will take action in the future to remedy the problems for it to receive certification. Again, the focus on process rather than actual *outcomes* means that companies can get away with drawing up SOPs and agreements, without their efficiency or application being taken into consideration in their certification.

Recommendations

- Evidence to demonstrate that all relevant information and documents are *received* by local parties in a national or sub-regional language(s) suited to the affected communities, should be mandatory to ensure transparency and genuine communication and information sharing.
- Palm oil operations should provide evidence that they are in compliance with rule of law, humane treatment and supporting a peaceful environment in agribusiness development areas. Companies should be obliged to show efforts to secure people affected by their operations from violence and arbitrary arrest and to not make use of mercenaries, privately contracted police and para-militaries.
- Companies should be aware that indigenous and tribal communities, whether they have written legal title or not, have a right to the lands and resources they have traditionally owned, occupied or otherwise used or acquired, under international human rights law.
- Companies should be aware that access to resources and rights over resources may be more significant to some communities than title to the land.
- Evidence of agreements with local residents ensuring access to adequate, clean water for drinking, cooking, bathing and cleaning purposes, should be mandatory to secure their livelihoods, health and basic needs.
- Effective provisions must be set in place to ensure the anonymity of complainants and whistleblowers where requested in cases of conflict, to avoid subsequent harassment, intimidation or abuse.
- Evidence should be provided that women workers are paid equally to men for equivalent work, and that the company prioritises local community members for employment opportunities, rather than labour brought in from outside. Women heads of families should have equal rights to be smallholders.
- Local communities should be given formal 'employment' with all the proper terms and conditions and labour rights complying with international best practice, instead of just day-labour/casual labour and contract work without any security.
- Day labourers should also have clear, agreed and written terms and conditions. All day labourers should have in their possession their own countersigned daily work record.
- Grievance and redress mechanisms should be developed by companies with the participation and inputs of local communities, and these should guarantee anonymity and the protection of complainants where requested. SOPs on social welfare, environment, conflict resolution, HCVs and others, should also be developed jointly by the company and the communities to create a sense of ownership of the process for communities as rights-holders.
- HCV assessments and management plans should demonstrate that credible measures have been taken to secure adequate areas for affected communities to meet their basic needs (e.g. food security, health, HCV5).
- Provisions for the food security of local communities by the company should be highlighted and evidence to demonstrate that the company is supporting and securing local communities' sustainable access to food, either through the allocation or provision of land for cultivation, material support or other means.
- Companies should support government officials and their staff in accessing information and training to better accommodate the RSPO approach. This training should extend from the level of central ministries, through the provincial and district authorities down to the village level. Planning agencies also need guidance on how to incorporate HCV zoning and consideration of community land rights into land use and economic planning processes.

- Clearer language should be provided on how respecting the right to FPIC of local communities is only achievable through a long-term, *iterative*, two-way process of consultation and negotiation, rather than one-off meetings. Evidence should also be sought from local communities that they have been given ample and sufficient time to digest information obtained and to make informed decisions among themselves.
- The information shared by the company with local communities should be subject to stricter and more regular monitoring by independent third parties, to avoid partial and biased information that fails to address tenure implications and other potential negative consequences of the development for local communities.
- Stronger language must be provided to ensure that information sharing is the responsibility of the company towards rights-holders involved, rather than a reactive action upon the request of rights-holders. All important documents, such as Environmental and Social Impact Assessments, HCV Assessments, land tenure studies, concession maps, Standard Operational Procedures and conflict resolution mechanisms, must all be translated into local languages and dialects and provided to local communities at the initiative of the company.
- In the case of New Plantings, the early stages of the process of respecting the right to FPIC of local communities should be initiated prior to the identification of the net land area and well prior to obtaining final permissions.
- Where plantations are developed through groups of small outgrowers, provisions must be made for adequate explanation of financing arrangements and any inherent risks to outgrowers prior to planting. After planting such groups should receive regular financial and management training which is also subject to an audit process.
- Where land conflicts are protracted and of a serious nature, a moratorium should be imposed on development of palm oil operations within the concession in question pending mutual agreement of an acceptable conflict resolution mechanism.
- More efficient and direct channels and procedures for communication between the company and local communities should be clarified and publicised, to ensure that communities are equipped with enough information to make use of these channels and address themselves to the right representatives when the need arises.
- Stronger requirements are required on the part of the company to train and provide information to local communities on the RSPO, the P&C, and their obligations and rights under them. Companies should also take the initiative to offer third party training workshops and meetings for local communities on their right to FPIC.
- Concession contracts should themselves be compliant with the RSPO P&C and International law. Contracts with the government *must not* give companies a *carte blanche* to take land without terms and conditions that comply with these international laws and standards, such as respecting the right to FPIC.
- Stronger and clearer language is needed on the nature of FPIC as a *right* of indigenous peoples and local communities, as opposed to it being a form of consultation or ‘socialisation’, which are part of, but not tantamount, to FPIC. Human rights training at the level of the company, government and local communities can be instrumental to this end. In particular, the participation of local community members in consultation activities should be clarified to these participants as *not* equivalent to their giving consent to the issues discussed.

- Companies should be aware of the activities of elites and local officials with vested interests in ensuring the concession goes ahead. They may be acting behind the scenes in a way that will compromise and undermine an otherwise ostensibly good faith process of observing the right to FPIC on the part of the company.
- Clearer and more ample information must be provided to local communities regarding the purpose of HCVs, in particular HCVs 4, 5 and 6. Their participation in HCV identification activities and mapping is critical. Likewise, the security of access of local communities to HCVs both during and after the company's lease on the land must be clarified, and any changes to their access to the land explained fully prior to the identification of these areas.
- Companies should incorporate within their work plans, structured and repeated training on the RSPO P&C and FPIC to staff operating at all levels, from the grassroots upwards, in order to ensure that all staff are accountable to, and responsible for, abiding by the standards contained therein.
- In consultations and during the consent-seeking process, companies should develop with the local communities a time-scale for projected developments and how these developments will impact on them. For example, if a community is being promised jobs, how many will go to locals? When will those jobs emerge? How long will the community need to be able to survive without land before it gets a job to feed itself with? Can it sustain itself for this period?
- The hiring of armed security forces by the company to operate within oil palm concessions should be avoided as far as possible and, where absolutely necessary, must be subject to strict monitoring and third party supervision, to ensure that the hiring of these forces is legal and proportionate, and that their activities in no way infringe on human rights or the general wellbeing of local communities.
- The duration of RSPO certification audits must be sufficient to allow all communities within the concession to participate in the audit in a constructive and sufficiently detailed manner. Stricter standards for audit reporting should also be established to ensure that audits contain sufficient information and evidence to support identified conformances and non-conformances to the RSPO P&C.
- Clearer requirements should be developed for audits to be shared with local communities prior to certification in forms and languages accessible to them, in order to cross-check information contained therein.
- Companies should be responsible for keeping full and detailed records of past and ongoing complaints and conflicts within their concessions to help companies and communities identify recurrent causes of conflict and mitigate future conflicts.
- There should be written records of meetings and visits of the company and government to communities available to the communities and third parties.
- Wherever possible, local national laws should be interpreted to fit international law, where the national can bear this interpretation. For example, some laws can be interpreted as providing minimum standards, such that it would not place the company in breach of the national law to improve on those minimum standards, and thus comply with international law and RSPO P&C.
- The RSPO must engage with national governments to revise laws and regulations so that RSPO members can respect the rights of communities to their customary lands and to FPIC.

Conclusions

The proliferation of conflicts over land in numerous oil palm plantations across the globe is a vivid manifestation and outcome of the violations of local communities' rights.⁷ The rapid expansion of oil palm plantations across the wet tropics only strengthens the need for robust standards and ground-level monitoring, to ensure that the rights of local communities are respected and their needs met.⁸

Many of the companies that were studied are failing to follow the RSPO procedures by not taking the requisite steps to recognise customary rights. Many companies are running highly abbreviated processes to secure consent, which are far from being 'free', 'prior' and 'informed'. Certification bodies are accepting procedures and situations that are not respecting the right of affected communities to FPIC. However, some signs of progress are visible. The RSPO is playing an important role in pushing for companies to recognise the rights of local communities and the importance of dialogue, consultation and respect for FPIC as the basis of sustainable development.

Designing and putting into practice a full and effective process to respect the right of indigenous peoples and local communities to FPIC in relationship to oil palm plantation development is not an easy task. It requires significant commitments of time, material and human resources, and is often far beyond what is required under national law. It requires wide and iterative participation of all key stakeholders and rights-holders. It requires thinking about what consent means, who gives it, who represents the interests of the communities, and how it can be verified.⁹

Most importantly, it requires on the part of companies a recognition that even where a comprehensive process has been undertaken, before signing an agreement, communities still have the right to say 'no' to oil palm development on their lands. Independent monitoring and robust verification by third

parties remains critical to ascertaining the degree to which community decisions are being respected on the ground.

Failing to respect the rights of local communities to the full extent of their lands and to FPIC is the root cause of protracted and at times violent conflict between and within communities, with companies and with the State. Such conflicts present serious risks to the communities, but also to plantation companies, investors and to the RSPO itself.

Initiatives to revise national laws which are contrary to international human rights standards and the right to FPIC is also in the State's best interests, placing them in a better position to gain the benefits from investments, to avoid reputational risks of being found in breach of international human rights law, to avoid civil conflict and to avoid investors choosing instead to invest in other countries where they feel their investments are more secure.

Even where companies seek to acquire lands in fair ways, current statutory laws and administrative procedures with respect to land rights, land acquisition, legal personality and representation, sometimes make it hard or even impossible for companies to comply. The findings of the studies expose the gulf that exists between the law and the RSPO standard. To close this gap, the RSPO must press governments to carry out tenurial reforms in favour of local communities.¹⁰

Widespread and effective compliance with the RSPO standard depends on respect for human rights, good governance, transparency, accountability, rule of law and access to justice. If land allocations are made in ways contrary to these principles, there are bound to be serious obstacles to the RSPO approach.

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Endnotes

- ¹ Forest Peoples Programme 2008.
- ² Forest Peoples Programme 2008.
- ³ Respect for the right to FPIC is an obligation (or legal duty) of governments that have committed themselves as members of intergovernmental bodies through their ratification or endorsement of one or more of the following instruments: *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*; *International Covenant on Civil and Political Rights (ICCPR)*; *International Covenant on Economic, Social and Cultural Rights (ICESCR)*; *International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)*; *Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention: C169)*; *African Charter on Human and Peoples' Rights (ACHPR)* and the Conference of Parties' decisions relating to the implementation of the *Convention on Biological Diversity (CBD)*.
- ⁴ See Colchester M 2010.
- ⁵ SawitWatch, HuMa, Gemawan Institute, Walhi Kalteng, Walhi Kaltim, Walhi Kalbar, Pusaka, Jaringan Orang Asal SeMalaysia (JOAS), Green Advocates, Centre pour l'Environnement et le Développement (CED), Association OKANI and Actions pour les Droits, l'Environnement et la Vie (ADEV).
- ⁶ The case studies will be published as an edited volume during the course of 2012 as *Conflict or consent? The palm oil sector at a crossroads*. FPP & SawitWatch.
- ⁷ See Colchester et al. 2011.
- ⁸ See Colchester & Chao 2011; Carrere 2010; Kongsager & Reenberg 2012.
- ⁹ Colchester M 2010.
- ¹⁰ See FPP 2012.



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