

## **Free, Prior and Informed Consent and Oil Palm Expansion in Southeast Asia From Principles to Practice**

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### **Introduction**

As global market demand for palm oil grows, vast swathes of land are being acquired by palm oil companies across Southeast Asia for conversion to plantations at an unprecedented speed and scale. Where land acquisition is poorly regulated and governance weak, the rights and livelihoods of local communities who inhabit and depend directly on targeted lands are jeopardised. Where national legal frameworks do not provide protection customary land rights, and where international law is inadequately applied, communities also have little knowledge of their rights, or of recourse to remedy. At the root of many conflicts in oil palm plantations today is a lack of respect for the rights of indigenous peoples and local communities to their lands and to Free, Prior and Informed Consent (FPIC).

The Roundtable on Sustainable Palm Oil (RSPO) is playing an important role in providing a forum through which communities and NGO can push companies to recognise respect for FPIC as the basis of sustainable development. However, many companies are still failing to follow the RSPO procedures and running highly abbreviated processes to secure consent, which are far from being ‘free’, ‘prior’ and ‘informed’. This points to the need for ongoing grassroots-level monitoring by third party organisations to ensure that FPIC is genuinely respected on the ground. It also highlights how RSPO companies now need to play a role in bridging the gulf that exists between national laws and the RSPO standard, and to push for national tenure reform in favour of local communities and anchored in the right to FPIC.

### **Oil palm expansion in Southeast Asia: figures and forecasts**

With the surge in global demand for palm oil as food, ingredient and bio-fuel feedstock for an ever-growing global population with an even more rapidly expanding consumer class, palm oil production has more than doubled in the last decade and now dominates the international market for vegetable oil.<sup>2</sup> The perceived ready availability and low cost of labour and cultivable land in Southeast Asia have made the region a prime target for large-scale land conversion to plantations by both domestic and foreign investors. Economic gains wrought by the palm oil business in Indonesia and Malaysia have prompted expansion in neighbouring countries who are keen to catch up and reap similar benefits.<sup>3</sup> Government policies on edible oil import substitution and bio-fuel promotion are also stimulating this expansion.<sup>4</sup> With global palm oil consumption predicted to triple by 2050,<sup>5</sup> the trend of rapid large-scale oil palm expansion is set to continue.

Asia has been the predominant palm oil producing region since the 1980s. In 2009 Asia processed 88% of the world’s palm oil.<sup>6</sup> Indonesia and Malaysia alone account for over 85% of global palm oil production, with a combined plantation area of 14 million hectares.<sup>7</sup> In Malaysia, around 87% of the total land cultivated in Sabah was under oil palm by 2003<sup>8</sup> and by the late 2000s, oil palm covered around 1.36 million ha.<sup>9</sup> Sarawak’s plantation area

increased to 920,000 ha in 2010, 840,000 ha more than 2009, and a target has been set for a total of 2 million ha by 2020.<sup>10</sup>

Indonesia overtook Malaysia as the world's largest palm oil producer in 2006, producing 48% of global palm oil supplies in 2010 – 2011.<sup>11</sup> Conversion of primary forests to oil palm plantations accounted for more than 10% of deforestation in both countries between 1990 and 2010.<sup>12</sup> Around 600,000 to one million hectares of forest are converted to oil palm plantations each year in Indonesia with the current 8 million hectares<sup>13</sup> expected to increase to 13 million hectares by 2020.<sup>14</sup> Both these countries (particularly Malaysia) are quickly running out of suitable space for more plantations,<sup>15</sup> offering the possibility of increased competition from other countries of Southeast Asia, and also Africa and Latin America.<sup>16</sup>

The crop is now expanding across neighbouring Southeast Asian countries, such as Papua New Guinea, the Philippines, Thailand and Cambodia.<sup>17</sup> In Papua New Guinea, oil palm plantations cover around 500,000 ha, a near five-fold increase since 2007.<sup>18</sup> Over 5.6 million ha of customary lands have been set aside for further plantations (including oil palm) through the granting of 'special agricultural business leases'.<sup>19</sup> In the Philippines, oil palm plantations occupy just under 47,000 ha, a small figure compared to Indonesia and Malaysia, but representing a 160% increase within the last four years, with further expansion projected in different parts of the country.<sup>20</sup>

In Thailand, oil palm plantations occupy around 644,000 ha and increasing by 80,000 ha each year, with bio-diesel production from palm oil expected to double over the next 10 years.<sup>21</sup> In contrast to Indonesia and Malaysia, however, large-scale estates are rare in Thailand and smallholder farmers owning less than 50 ha manage approximately 70% of the total area planted with oil palm.<sup>22</sup> In Cambodia, around 118,000 ha of oil palm have been planted in former forest land through the issuance of Economic Land Concessions. In Vietnam, the palm oil industry is still in its experimental stages (around 650 ha in total) although the 2007 bio-fuel policy of the Vietnamese government for 2015 to 2025 targets a total of 70,000 to 100,000 ha of plantations by 2015.

### **Social implications of large-scale oil palm expansion**

The risks and opportunities that large-scale land acquisition and conversion can generate for developing countries in Southeast Asia and elsewhere has been the subject of heated debate over the last decade. While earlier appraisals maintained that macro-level benefits would be achieved and economic development and livelihood improvement realised in rural areas, findings from the field have shown the great vulnerability of rural communities to human rights abuses when faced with large-scale development without prior consultation or respect for their right to refuse 'development' under the terms dictated by private sector investors and governments. Weak democratic, economic and land governance in many Southeast Asian countries has led to abuses of the rights of the rural poor and a lack of initiative to ensure that greater trade and investment translate into inclusive, sustainable development and poverty reduction for these stakeholders.<sup>23</sup>

Large-scale land acquisitions carried out without consulting, informing and involving local communities who own the land in accordance with customary law and depend primarily on it for their livelihoods places them at risk of food insecurity, impoverishment and dispossession.<sup>24</sup> Weak legal protection and/or recognition of customary tenure under national law make them particularly vulnerable to forced displacement and evictions, with little

recourse to legal remedy or recognised grounds to claim compensation.<sup>25</sup> All too often, land deals are made behind closed doors, and local communities faced with a *fait accompli* when their lands are cleared and planted without prior warning. Coercion, harassment and intimidation have been the plight of many who oppose the developments on their lands, whilst elite co-optation and manipulation has contributed to the erosion of customary village decision-making processes and of legitimate representation. 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.<sup>26</sup>

### **The right to Free, Prior and Informed Consent**

Early attention to FPIC issues can avoid significant costs during implementation...Even as we refine what this principle means in operation, there is no question that as a principle and as a practice, free, prior, informed consent is a key part of legitimacy. And if you wonder if that is true, simply ask this question: *Is your company better off having the people in the communities where you operate with you or against you?* It is just plain common sense.<sup>27</sup> (emphasis added)

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Extensive media coverage and international civil society outcry over human rights abuses in oil palm plantations, compounded by sustained civil society advocacy and lobbying, a growing consumer consciousness, the global discourse on environmental and social sustainability, and a substantial degree of initiative and greater openness to multi-stakeholder dialogue by the palm oil sector, have together led to a growing awareness and recognition of the fundamental human rights of local communities affected by large-scale land acquisitions for oil palm development.

The Roundtable on Sustainable Palm Oil (RSPO), discussed in the next section, requires as part of its Principles & Criteria for sustainable palm oil certification that palm oil companies respect the right of indigenous peoples and local communities to give or withhold their consent to any new plantings or replanting that will affect their lands, territories and resources they customarily own, occupy or otherwise (i.e. the right to Free, Prior and Informed Consent).<sup>28</sup> On paper, the RSPO is probably among the most advanced of existing global commodity standards with respect to the right to FPIC, although several key elements of guidance as to its actual implementation have not yet made their way into the Principles & Criteria against which companies are assessed for certification.<sup>29</sup>

### FPIC in international law

Indigenous peoples have for decades (if not centuries) suffered from discrimination, marginalisation and the loss of their lands and natural resources, as a result of colonial domination, private sector exploitation and discriminatory government laws and policies.<sup>30</sup> Recognition of the plight of indigenous peoples the world over, largely pushed forward by civil society organisations and United Nations human rights bodies (e.g. Committee on the Elimination of Racial Discrimination, Committee on Economic, Social and Cultural Rights, United Nations Commission on Human Rights, Inter-American Commission on Human Rights) led to recognition of the right to FPIC of indigenous peoples in the *United Nations Declaration of the Rights of Indigenous Peoples* (UNDRIP) in 2007.<sup>31</sup>

Free, Prior and Informed Consent is now a well established right under international human rights law and an obligation (or legal duty) of all States who, as members of inter-governmental bodies, have ratified or endorsed international instruments which refer to this right, or which jurisprudence has interpreted as supporting this right. The right of indigenous peoples to give or withhold their Free, Prior and Informed Consent to measures that may affect them is most usefully seen as an expression of the right to self-determination of all peoples,<sup>32</sup> in line with common article 1 of the *United Nations Covenant of Civil and Political Rights* and the *United Nations Covenant on Economic, Social and Cultural Rights*.

UNDRIP notes in relation to self-determination:

*Article 3*

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

*Article 4*

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

On the right to FPIC, the Declaration notes:

*Article 10*

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the *free, prior and informed consent* of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return. (emphasis added)

*Article 19*

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them. (emphasis added)

*Article 32*

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their *free and informed consent prior to* the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. (emphasis added)

Further articles of the Declaration clearly articulate further rights of indigenous peoples which relate to the right to FPIC, including: the right of ownership of lands, territories and natural resources that indigenous peoples traditionally own or otherwise occupy or use (Articles 26 & 27); the right to redress (Article 28); the right to self-representation (Article 19); the right to cultural traditions and customs (Article 11); the right to development (Article 23) and; the right to environment (Article 29).

While the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) do not explicitly mention the right to FPIC, the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have frequently interpreted the Covenants as recognising this right as an expression of self-determination. The *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention: C169) prohibits the removal and/or relocation of indigenous and tribal populations from their territories without their free and informed consent. The standard of ‘approval and involvement’ in the *Convention on Biological Diversity* (CBD) has also been equated with the right to FPIC, and affirmed in the CBD’s *Akwé: Kon voluntary guidelines*. The *Voluntary Guidelines on the Tenure of Land Fisheries and Forests in the context of National Food Security*, adopted in 2012, provide practical guidance to States, civil society and the private sector on responsible governance of tenure, and support the right to FPIC of indigenous peoples.<sup>33</sup>

*Key international instruments signed and/or affirmed by Southeast Asian UN member States*

	<b>UNDRIP<sup>34</sup></b>	<b>ICCPR</b>	<b>ICESCR</b>	<b>ILO 169</b>	<b>ICERD</b>
<b>Indonesia</b>	✓	✓	✓	✗	✓
<b>Malaysia</b>	✓	✗	✗	✗	✗
<b>Philippines</b>	✓	✓	✓	✗	✓
<b>Cambodia</b>	✓	✓	✓	✗	✓
<b>Vietnam</b>	✓	✓	✓	✗	✓
<b>Laos</b>	✓	✓	✓	✗	✓
<b>Thailand</b>	✓	✓	✓	✗	✓

Whereas international law is relatively clear on the rights of indigenous peoples, it is much less clear about the land and resource rights of other people or groups, who may not recognise themselves as ‘tribal’ or ‘indigenous’ but who nevertheless gain access to lands and resources through customary law, traditional inheritance or other informal processes. Jurisprudential interpretation by human rights bodies and the increasing inclusion of FPIC as a right of indigenous peoples *and other local communities* in the operational policies of international financial institutions and non-state entities more generally supports the expanding reach of the right to FPIC to other peoples with customary or informal rights in land.

FPIC in national law

While respect for FPIC is an obligation under international human rights law, few States in Southeast Asia (and elsewhere) have yet adopted or amended national laws to explicitly recognise and protect this right. In some cases, reference is made to (indigenous) peoples’ right to consultation or participation. A notable exception in the region is the Philippines, where the *Indigenous Peoples’ Rights Act* (IPRA) requires FPIC for any activity that may affect indigenous peoples’ lands and resource rights.<sup>35</sup> In other cases, rights similar to that of FPIC are seen to exist within national legal systems pre-dating UNDRIP. An example of this is the principle of ‘consultation and consensus’ (*musyawarah dan mufakat*) in Indonesia. The third amendment to the Indonesian Constitution recognises indigenous peoples’ rights in Article 18b-2. In more recent legislation, there is implicit, though conditional, recognition of some rights of peoples referred to as *masyarakat adat* or *masyarakat hukum adat*, such as Act No. 5/1960 on Basic Agrarian Regulation, Act No. 39/1999 on Human Rights and MPR Decree No X/2001 on Agrarian Reform.<sup>36</sup>

In relation to indigenous peoples' land rights, the Federal Constitution of Malaysia accords special rights and privileges to the indigenous peoples or 'natives' of Sabah and Sarawak to provide for the reservation of land for indigenous peoples or to give preferential treatment to indigenous peoples in cases of appropriation of land by the State.<sup>37</sup> Although no law in Cambodia makes explicit mention of the right to FPIC, the Constitution does provide a measure of legal recognition for the international legal foundations of FPIC, and some laws protect to some extent and in theory the rights of Cambodian people to be involved in the decision-making processes that govern what happens to the land they live on.<sup>38</sup> In Vietnam and Thailand, provisions on the right to FPIC have not been domesticated in national law to date. There is no specific legislation in Laos with regard to indigenous peoples.

### The private sector

While international law places obligations on States, the right to FPIC has also gained prominence in recent years in the policies and commitments of the private sector. For example, the recent *UN Framework on Human Rights and Business* highlights how the realisation of human rights entails the responsibility of businesses to respect human rights, a responsibility which exists independently of States' abilities and/or willingness to fulfil their own human rights obligations.<sup>39</sup> The *Bali Declaration on Human Rights and Agribusiness in Southeast Asia* reminds companies of their legal obligation to fulfil their responsibilities to respect human rights.<sup>40</sup> The UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.<sup>41</sup>

The convergence of concerns over climate change and biodiversity loss, coupled with improving labour practices and food safety, ensuring the economic sustainability of commodity production for producers and other stakeholders, and protecting the rights to land and natural resources of affected rural communities, has also prompted the development of private sector voluntary standards suggesting how certain norms and procedures should be respected by investors.

A number of international financial institutions have now incorporated into their operational policies certain aspects relating to the need to obtain the FPIC of indigenous peoples for financial projects that may impact their lands and resources.<sup>42</sup> While such policies are not always legally binding, they are often included as conditions in loan agreements with companies and governments and guide financial institutions in the conduct of their lending activities. Several commodity standards also recognise the importance of protecting customary rights in land and other natural resources and the right to (FPIC), have now been developed for *inter alia* dams, mines, protected areas, forestry, timber estates, palm oil, soya, sugar, aquaculture, biofuels and carbon sequestration.<sup>43</sup> Of relevance to this paper is the Roundtable on Sustainable Palm Oil, to which I now turn.

### **FPIC and the RSPO**

The Roundtable on Sustainable Palm Oil (RSPO), founded in 2004, is a not-for-profit association that unites stakeholders from seven sectors of the palm oil industry - oil palm producers, palm oil processors or traders, consumer goods manufacturers, retailers, banks and investors, environmental or nature conservation NGOs and social or developmental NGOs - to develop and implement global standards for sustainable palm oil.<sup>44</sup> With a vision of transforming markets to make sustainable palm oil the norm, the RSPO's mission is:

- To advance the production, procurement, finance and use of sustainable palm oil products
- To develop, implement, verify, assure and periodically review credible global standards for the entire supply chain of sustainable palm oil
- To monitor and evaluate the economic, environmental and social impacts of the uptake of sustainable palm oil in the market and;
- To engage and commit all stakeholders throughout the supply chain, including governments and consumers.<sup>45</sup>

The RSPO aims to divert the palm oil frontier away from primary forests and areas of high conservation value and it proscribes land-grabbing, insisting that all lands must only be acquired with respect for the customary rights of local communities and indigenous peoples, including respect for their right to give or withhold consent to land purchases or leases.<sup>46</sup> The RSPO Principles & Criteria (P&C)<sup>47</sup> consists of 8 principles and 39 criteria with 123 specific national indicators, which form the performance indicators for RSPO certification. While indicators are specific pieces of objective evidence that must be in place to demonstrate or verify that the criterion is being met, guidance helps the grower/miller and auditor understand what the criterion means in practice.

Membership to the RSPO of palm oil processors/traders and oil palm growers in Southeast Asia is dominated by Indonesia (28 and 44 respectively, totalling 82 companies) and Malaysia (40 and 23 respectively, totalling 63 companies) followed by Singapore (14 and 6 respectively, totalling 20 companies) and Thailand (17 and 6 respectively, totalling 23 companies). Membership is minimal in Papua New Guinea (2 oil palm growers), Philippines (2 palm oil processor/trader), Cambodia (1 oil palm grower) and Vietnam (1 palm oil processor/trader).<sup>48</sup>

The right to FPIC has a central place in the Roundtable on Sustainable Palm Oil'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 the legal and customary rights of indigenous peoples and other local rights-holders are respected and ensures that they can negotiate on a fair 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 deal with local communities and indigenous peoples, provide information, carry out impact assessments, acquire land, agree payments and benefits, settle differences and resolve conflicts and pay compensation.<sup>49</sup>

*FPIC 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 and 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: From principles to practice**

The RSPO P&C has gone further than most commodity standards in recognising the right to FPIC as a right under international law and a basic requirement for product certification. A considerable amount of information is also provided to companies on how respect for the right should be implemented, although most remains at the level of guidance. But to what extent are these principles being implemented in practice? How free, prior and informed is the consent sought (and obtained) from local communities affected by oil palm developments? And are certification audits accurately reporting instances where FPIC is not being respected?

It is these questions which motivated a broad consortium of NGOs, led by UK-based human rights organisation Forest Peoples Programme and Indonesian palm oil watchdog Sawit Watch to undertake a series of independent studies on FPIC in RSPO member/certified and non-RSPO oil palm plantations across Southeast Asia (Indonesia, Sabah, Sarawak and the Philippines).<sup>50</sup> Coinciding with the RSPO P&C Review in 2012, 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.<sup>51</sup>

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 were 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 was 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 operated independently of the palm oil companies but reports of the studies were shared for comments prior to publication where requested by the company.

*FPIC studies: locations and operating company*

<b>Philippines (Palawan)</b>	AGUMIL
<b>Indonesia (West Kalimantan)</b>	PT Agrowiratama (Musim Mas)
<b>Indonesia (Central Kalimantan)</b>	PT Mustika Sembuluh (Wilmar)
<b>Indonesia (Central Kalimantan)</b>	PT Surya Sawit Sejati
<b>Indonesia (East Kalimantan)</b>	PT REA Kaltim Plantations (REA Holdings)
<b>Indonesia (West Kalimantan)</b>	PT Bangun Nusa Mandiri
<b>Indonesia (West Sumatra)</b>	PT Permata Hijau Pasaman (Wilmar)
<b>Indonesia (Sumatra)</b>	PT Asiatic Persada (Wilmar)
<b>Malaysia (Sarawak)</b>	IOI Pelita Plantations
<b>Malaysia (Sabah)</b>	Genting Tanjung Bahagian Sdn Bhd

**Findings from the field**

The overall findings of the studies on FPIC in oil palm plantations across Southeast Asia show that the RSPO P&C have indeed 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. 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. 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. 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.

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. Compensation for land and resources lost by local communities due to oil palm development is being paid more systematically by 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 village infrastructure, is now part of several companies' commitments towards local communities, as part of a broader commitment to the improvement of their wellbeing and environment.

However, many challenges to the realisation of the right to FPIC of local communities remain unaddressed. An overwhelming majority of these relate to lack of transparency and information-sharing by the company to the affected communities prior to oil palm development taking place. *Consent, where sought, is generally given on the basis on inadequate and partial information.* Across the studies, it was found that insufficient information is being provided to local communities regarding the social and environmental impacts of oil palm development on their livelihoods and on their access and use of land. 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.

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, land tenure studies, concession maps, Standard Operational Procedures and conflict resolution mechanisms. Where village representatives hold copies, these are rarely shared with, or provided, to the wider community. In many cases, local communities are not informed that they have the right to this 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 those lands.

Where provided, information tends to be given upon request of the communities rather than at the initiative of the company or partial and biased, with promised benefits and advantages of the development overriding potential negative aspects on local communities' livelihoods, environment and land rights. 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.

Finally, 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.

#### *'Consent' versus 'consultation'*

In many cases, *the right to FPIC is understood by companies as synonymous with consultation*, which itself is 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. Company 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.

In addition, 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 an initial concession agreement is 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.

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.

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 their representatives, who may have been selected by the company, without prior internal consultation and information sharing.

Where, as is often the case in large-scale plantations, there are several communities living within a concession, the case of one particularly 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. 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. In some cases, poor and/or landless families from within a community are similarly excluded from decision-making and benefit sharing.

Benefits from oil palm in terms of local development (employment, social infrastructure, water supplies and educational facilities) are often promised by companies, and the reason for which communities give their consent to the oil palm development. In practice however, it is often the case that the timeline and terms their implementation are not specified or the promises themselves not put in writing. Many communities resent the fact that companies, despite promising them jobs, upon which basis they agreed to the oil palm development, 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.

Finally, 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 reprisals. This sheds *doubt over the degree to which consent where obtained, is obtained free from coercion and intimidation*, either explicit or implicit.

#### *FPIC and land rights*

FPIC is the right of local communities to give or without their consent to any project that may affect the lands, territories and resources they own, occupy or otherwise use. However, findings from the field show that adequate and comprehensive documentation by the company 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. Furthermore, where initial acquisition of the lands took place before the RSPO was created, some companies are using this as a justification for why they were 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 FPIC.

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. 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.

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. This is particularly the case where there are several concessions in the same area, including subsidiaries of different companies. There is also 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.

Compensation arrangements for land lost by communities to the companies are rarely negotiated with communities *prior* to the investment or operation. 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.

As a result of the lack of respect for local communities' right to FPIC, *land conflicts of varying degrees of gravity are ongoing in most plantations*, ranging from minor disputes over land, to village-wide protests, demonstrations, blockades and protracted court cases. While certain companies had developed mechanisms to resolve these conflicts, their focus on the establishment of a conflict resolution process itself, rather than on the *efficiency* of this process in actually resolving conflict. The development of conflict resolution SOPs on paper by the company is seen by some communities as a strategy to avoid actually dealing with the problems on the ground.

#### *Knowledge and respect for international and national law*

Findings show that while local and national laws tend to be respected by most companies, inconsistencies within and between local and national laws, such as in relation to land tenure and land-use rights in some countries, can be both confusing, but also sometimes used by companies to selectively implement the law in ways that favour their interests. Changes in national and local 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. The fact that national and local laws in some countries do not recognise or protect the right of indigenous peoples and local

communities to use customary law in the management of their lands and natural resources allows 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.

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.

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.

In some countries, 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.

Finally, 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. 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.

## **Conclusions**

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'. 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. 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. These achievements on the part of the palm oil sector are encouraging. They have the potential to stimulate further efforts by the sector, with the support of civil society organisations, to build stronger foundations and genuine respect for FPIC at the grassroots level. They also point to the need for broader lesson-sharing across the palm oil sector in Southeast Asia to spread best practices from lessons learned.

Designing and putting into practice a full and effective process to respect the right of indigenous peoples and local communities to FPIC is not an easy or one-off 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.<sup>52</sup> It also requires local communities themselves to think about how they want to be represented, by whom, and what to do when their representatives fail to support and communicate their needs due to self-interested motivations.

Most importantly, respect for the right to FPIC 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. This is particularly important where, as in several cases studied, RSPO certification auditors are accepting procedures and situations that are not respecting the right of affected communities to FPIC.

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.

However, 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, 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. The RSPO can play a key role to close this gap, by pressing governments to carry out tenurial reforms in favour of local communities,<sup>53</sup> encouraging the domestication of international law, and enhancing the position of the right to FPIC within national laws and land policies.

Widespread and effective compliance with the RSPO standard depends on respect in the country in which oil palm plantations are developed for human rights, good governance, transparency, accountability, rule of law, access to justice and respect for the right to FPIC of indigenous peoples and local communities. If land allocations are made in ways contrary to these principles, there are bound to be serious obstacles to the RSPO approach, and serious threats to the rights and livelihoods of those communities directly affected by the expansion of the palm oil sector across Southeast Asia. It is to be hoped that the expansion of plantations in Southeast Asia will be accompanied, or even better, *preceded by*, a sharing of lessons learned by established RSPO member companies on respect for human rights and the right to FPIC, with the burgeoning palm oil sectors in the rest of Southeast Asia. In this way, mistakes made are less likely to be repeated, best practice cases more likely to be emulated, and conflict, resulting from violation of the right to FPIC, most effectively avoided.

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## Endnotes

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- <sup>2</sup> FAO 2011; UNEP 2011; Kongsager & Reenberg 2012.
- <sup>3</sup> Colchester & Chao (eds) 2011.
- <sup>4</sup> See Schott 2009; Thoenes 2006; USAID Asia 2007.
- <sup>5</sup> Greenpeace UK (nd).
- <sup>6</sup> Kongsager & Reenberg 2012.
- <sup>7</sup> World Rainforest Movement 2006.
- <sup>8</sup> Toh & Grace 2006.
- <sup>9</sup> Wahid 2010; Norwana et alii 2011.
- <sup>10</sup> Mongabay 2010.
- <sup>11</sup> Union of Concerned Scientists 2011.
- <sup>12</sup> Koh et alii 2011: 5127-5132.
- <sup>13</sup> Figures provided for areas of planted oil palm in Southeast Asia are from 2011 (see Colchester & Chao 2011).
- <sup>14</sup> PWC 2012.
- <sup>15</sup> Global Forecasting Service 2011; Fold & Hansen 2004.
- <sup>16</sup> Kongsager & Reenberg 2012. On Africa see Carrere 2010; on Latin America see Pacheco 2012.
- <sup>17</sup> Colchester & Chao (eds) 2011.
- <sup>18</sup> Hance 2011.
- <sup>19</sup> Hance 2011.
- <sup>20</sup> Villanueva 2011.
- <sup>21</sup> Salvatore & Damen 2011.
- <sup>22</sup> Dallinger 2011.
- <sup>23</sup> Anseeuw et alii 2011:5.
- <sup>24</sup> See *inter alia* Colchester & Chao 2012a; Oxfam 2011; High Level Panel of Experts 2011; Anseeuw et alii 2012; United Nations Office of the High Commissioner 2012; de Schutter 2009; de Schutter 2012.
- <sup>25</sup> See *inter alia* Colchester & Jiwan 2006a; Colchester et alii 2006b; Colchester & Fay 2007; Colchester et alii 2007; Colchester 2008; Colchester 2011; Colchester et alii 2011; Tiominar 2011; Down to Earth 2011; Wakker 2005.
- <sup>26</sup> See Colchester et alii 2011; Jiwan 2012; Colchester & Chao 2012b (forthcoming)
- <sup>27</sup> Sohn 2007.
- <sup>28</sup> Forest Peoples Programme 2008.
- <sup>29</sup> The RSPO Principles & Criteria were subject to review in 2012. Several civil society organisations contributed to the public consultation and made recommendations to improve the treatment of the right to FPIC within the Principles & Criteria. See Colchester & Chao 2012 (eds) (forthcoming).
- <sup>30</sup> UNCHR 2001, para 67.
- <sup>31</sup> Colchester 2010:6 – 10.
- <sup>32</sup> United Nations Development Group 2008.
- <sup>33</sup> *Voluntary Guidelines on the Tenure of Land Fisheries and Forests in the context of National Food Security*.
- <sup>34</sup> Voted for in General Assembly.
- <sup>35</sup> But see Asian Legal Resource Centre 2012 on obstacles concerning access to justice and protection for indigenous peoples under IPRA.
- <sup>36</sup> See Colchester & Chao 2012 (eds) (forthcoming), *Indonesia: The National Context*; International Work Group for Indigenous Affairs (nd) *Indigenous Peoples in Indonesia*.
- <sup>37</sup> Lasimbang 2012 and see Bulan 2011 and Doolittle 2011.
- <sup>38</sup> Kavenagh et alii 2012. While elements of Cambodian law, if followed, could provide some measure of recognition of the right to FPIC of indigenous peoples, the approval process for the allocation of Economic Land Concessions (ELC) disregards these elements of FPIC in practice.

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<sup>39</sup> United Nations Guiding Principles on Business and Human Rights 2011; Ruggie 2008.

<sup>40</sup> Chao & Colchester 2012.

<sup>41</sup> See [www.unglobalcompact.org](http://www.unglobalcompact.org).

<sup>42</sup> Examples include the International Finance Corporation, the Equator Principles banks, the European Bank for Reconstruction and Development (EBRD), the Asian Development Bank (ADB), the Inter-American Development Bank (IADB) and the International Fund for Agricultural Development (IFAD). Note: The World Bank's current *Operational Policy on Indigenous Peoples* does not explicitly uphold the right of indigenous peoples to free, prior and informed consent, but refers to the need for a borrower to engage in a process of 'free, prior, and informed consultation' which should lead to the indigenous people's 'broad support [for] the project'. Widespread criticism of the failure to include FPIC has led the Bank to embark on a two-year process of updating and consolidating its environmental and social safeguard policies into an integrated environmental and social policy framework.

<sup>43</sup> Examples of such commodity standards include the Forest Stewardship Council (RSB), the Roundtable on Sustainable Soy (RTRS), the Roundtable on Sustainable Biofuels (RSB), Bon Sucro, the Shrimp Aquaculture Dialogue Standards, and the UN-REDD Guidelines on Free, Prior and Informed Consent. For a recent review see Colchester 2010.

<sup>44</sup> See [http://www.rspo.org/en/who\\_is\\_rspo](http://www.rspo.org/en/who_is_rspo).

<sup>45</sup> See [http://www.rspo.org/en/vision\\_and\\_mission](http://www.rspo.org/en/vision_and_mission).

<sup>46</sup> Forest Peoples Programme 2008.

<sup>47</sup> The 8 RSPO Principles are:

Principle 1. Commitment to transparency.

Principle 2. Compliance with applicable laws and regulations.

Principle 3. Commitment to long-term economic and financial viability.

Principle 4. Use of appropriate best practices by growers and millers.

Principle 5. Environmental responsibility and conservation of natural resources and biodiversity.

Principle 6. Responsible consideration of employees and of individuals and communities affected by growers and mills.

Principle 7. Responsible development of new plantings.

Principle 8. Commitment to continuous improvement in key areas of activity.

For the complete RSPO Principles & Criteria (with indicators and guidance) see

[http://www.rspo.org/files/resource\\_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf](http://www.rspo.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf).

<sup>48</sup> See [http://www.rspo.org/en/rspo\\_members](http://www.rspo.org/en/rspo_members).

<sup>49</sup> See Colchester 2010.

<sup>50</sup> Four additional studies were also carried out in Africa (Cameroon, Liberia and Democratic Republic of Congo).

<sup>51</sup> The case studies will be published as an edited volume during the course of 2012 with the provisional title *Conflict or consent? The palm oil sector at a crossroads*. Forest Peoples Programme & SawitWatch.

<sup>52</sup> Colchester 2010.

<sup>53</sup> See FPP 2012.