PRE-CONFERENCE DRAFT AS ELECTRONIC REPORT

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Securing rights through commodity roundtables?

A comparative review

Forest Peoples Programme

RIGHTS + RESOURCES

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Forest Peoples Programme & Rights and Resources Initiative

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Cover photo: Participants of the Technical Workshop to Review Commodity Roundtables Standards on Free, Prior and Informed Consent, Customary Land, Conflict Resolution and High Conservation Values, 16th – 18th October 2012, RECOFTC, Bangkok/Sophie Chao

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Introduction

Commodities dominate agricultural production, land use and acquisition, and economic livelihoods across the developing world.[4] Yet commodity production remains one of the greatest challenges for sustainable and equitable economic development, poverty reduction and global environmental stewardship, whether in terms of preventing biodiversity loss, reducing environmental pollution, addressing climate change, promoting rural development, or strengthening governance, land tenure and law enforcement.[5]

A more conducive business environment for the development of voluntary standards has more recently emerged through the international debate about Corporate Social Responsibility (CSR) and associated initiatives, such as the United Nations Global Compact, a strategic policy initiative for businesses that are committed to aligning their operations and strategies in the areas of human rights, labour, environment and anti-corruption.[6] The UN Framework on Human Rights and Business, unanimously accepted by the UN Human Rights Council in 2005, states the responsibility of transnational corporations and other business enterprises to respect human rights and to provide effective remedy to stakeholders, independent of States' abilities and/or willingness to fulfil their own human rights obligations.[7]

Growing recognition of the responsibilities and role that the private sector can play in regulating and improving practices related to human rights has given rise to standard-setting by the private sector to regulate commodity production and processing, so that it takes place in a way that respects rights, secures favourable and sustainable livelihoods and diverts pressure away from areas crucial to local livelihoods and of high conservation value. Such standards, which recognise the importance of protecting customary rights in land and other natural resources and the right to Free, Prior and Informed Consent (FPIC), have now been developed for *inter alia* forestry, timber estates, palm oil, soya, sugar, aquaculture, biofuels and carbon sequestration.[8] Similar standards for dams, mines, (including specifically for aluminium) and protected areas have also been advanced but are at earlier stages of development.

Operating relatively independently of one another, the commodity roundtables have each developed, through multi-stakeholder processes, their own standards against which member companies are audited and certified. While these processes of text negotiation among stakeholders have encouraged an important degree of shared 'ownership' of the standards, a result of their separate evolution is that the various schemes have developed disparate and sometimes even contradictory approaches to the way they address critical issues such as human rights, land tenure, legality and permitting, livelihood security, risk avoidance and dispute resolution.

[4] IISD 2008:2.
[5] ibid.
[6] See http://www.unglobalcompact.org/.
[7] Ruggie 2008.
[8] For a recent review see Colchester 2010.

This paper is a comparative review of rights across a number of existing voluntary standards draws from a technical workshop in Bangkok in October 2012 organised by UK-based human rights organisation Forest Peoples Programme with the support of RECOFTC – The Center for People and Forests and the Rights and Resources Initiative. The *Technical Workshop to Review Commodity Roundtables Standards on Free, Prior and Informed Consent, Customary Land, Conflict Resolution and High Conservation Values* brought together the representatives of six commodity roundtable standards (the Roundtable on Sustainable Palm Oil, the Forest Stewardship Council, the Roundtable on Responsible Soy, the Roundtable on Sustainable Biofuels, BonSucro and the Shrimp Aquaculture Dialogue) as well as NGOs with long-standing experience working with, and knowledge of, various voluntary commodity standards (Sawit Watch, WWF, Oxfam and ProForest).

The workshop focused on four issues: 1) the right to Free, Prior and Informed Consent (FPIC) 2) recognition of legal and customary rights (particularly in regards to land and natural resources) 3) conflict resolution mechanisms and 4) protection and management of areas containing high conservation values including areas crucial for environmental services, livelihoods and cultural identity.[9] The purpose of the workshop was to compare, benchmark and stimulate review and discussion of the various commodity systems and operational procedures to identify their strengths and weaknesses with the aim of drawing out the key lessons from them all. By clarifying current operational standards and proposing ways of making the standards more effective, the workshop aimed to encourage the harmonisation of existing voluntary standards with each other and with international law. While the focus of discussions was the standards on paper, lessons learned and challenges in their implementation were critical to evaluating their effectiveness and potential areas of improvement.

Customary land rights

In many rural areas, rights to land and natural resource use, management and ownership by rural communities are governed by customary law, a set of usually unwritten rules that derive their authority from 'tradition'. Customary land tenure refers to the systems that most rural communities operate to express and regulate ownership management, use, access and transfer of land and natural resources therein. Customary tenure is often intricately bound with local conceptions of kinship ties, generational descent and broader social definitions of the role and rights of individuals and groups within the community. Customary laws and rights derive from the community rather than the State (statutory law) and although on the ground both systems frequently overlap, customary rights are not always recognised or given equal weight by the State. Customary rights may be informal (without formal State recognition) or formal, where they are given the force of law by ratified international treaties, by national constitutions and / or by statutory laws and ordinances.

[9] It appears to be the first time that voluntary standards come together to discuss these particular issues. The workshop also coincided with the review processes of the RSPO, BonSucro and RSB standards, and the process to define the indicators of the FSC following the recent revision of the FSC P&C.

Much of the so-called marginalised land targeted for large scale agricultural projects is rural land occupied and used by local communities under customary laws. They are relatively easily allocated by the State to investors because of the immense area they physically encompass and because the States may not consider these lands to be owned by their customary users[10] but rather as 'common pool resources'.[11] The perception of customary lands as empty, idle, degraded or un-owned further facilitates their allocation to investors in the public or national interest and as a channel for the development of rural areas.

In international law, the United Nations Declaration on Indigenous Peoples gives prominent place to indigenous peoples'[12] rights to lands and resources. The Declaration recognises and protects in Article 25 the 'distinctive spiritual relationship' indigenous peoples have with their land; Article 26 protects indigenous peoples' right 'to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired'. This protection includes 'the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired'. To realise this protection, states are under a duty 'to give legal recognition and protection to these lands, territories and resources … with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.'

However, where national laws do not give full recognition to rights under international law, or restrict the applicability of these rights to certain segments of the population, or where the principle of eminent domain[13] persists, neglect and violation of customary rights to land can ensure. Where national legislation takes precedence over international law in the hierarchy of legal instruments signed and/or ratified by a State (e.g. Constitutions) the risk of customary rights being ignored increases. Furthermore, whereas international law may protect the rights of indigenous peoples to land, the rights of local communities more generally is much less explicit.

Customary land rights in the voluntary standards

All the standards examined contain mandatory requirements for respect for national laws and land rights therein, and in most respect for international law applicable in the country in question has pre-eminence over, or is on a par with, national law. Customary rights must be recognised, documented and respected in all standards, and in Appendix II of the ShAD on the mandatory Social Impact Assessment. The RTRS' reference to traditional land users is a lesser requirement. The absence of legitimate dispute over land is condition for certification

[10] Wily 2011.

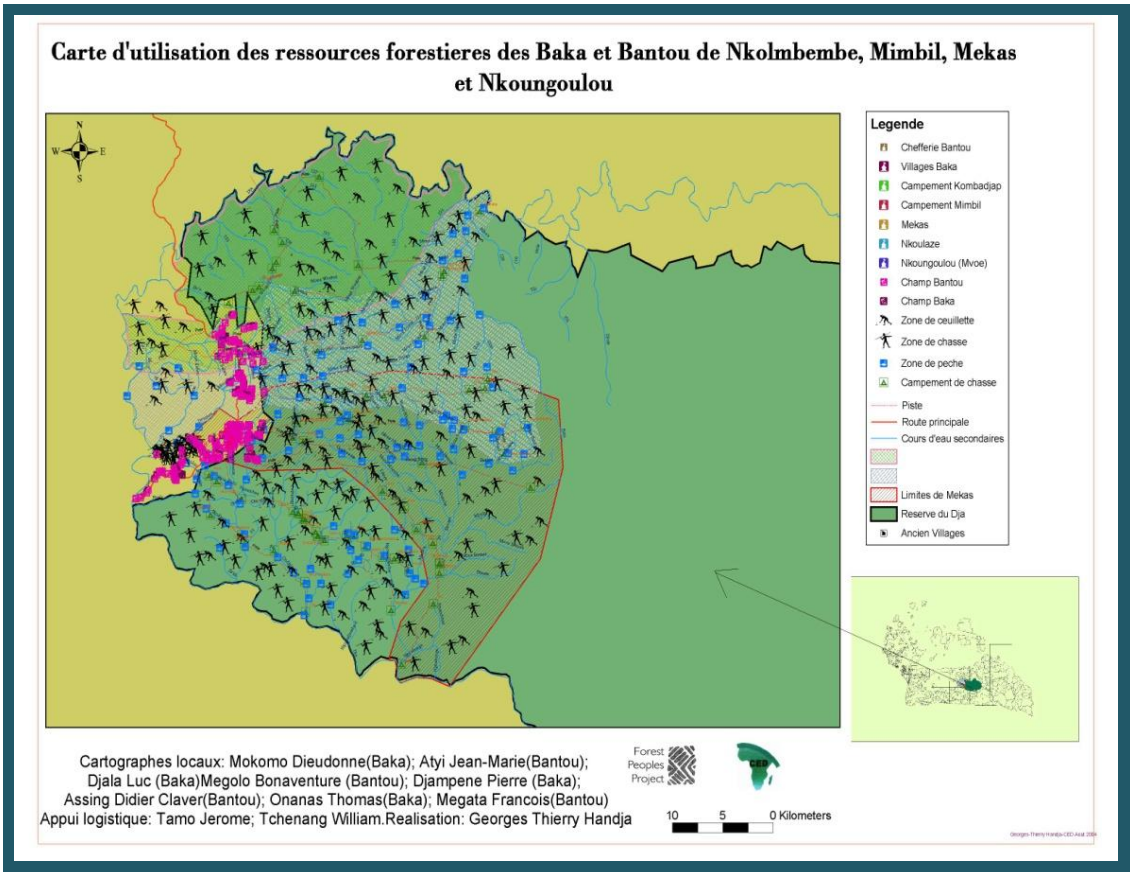
[11] Nelson 2004:67.

[12] Although there is no universal definition of "indigenous peoples" either, certain factors have been identified as relevant including: priority in time with respect to the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness, which may include aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and an experience of subjugation, exclusion or discrimination, whether or not these conditions persist (Daes 1996).

[13] The principle of eminent domain implies the power of the state to seize private property without the owner's consent where such acquisition is seen to be in the national interest.

in all standards, and Appendix II of the ShAD. Identification of demonstrable rights to land is required in BonSucro and the RSPO, while the RTRS specifies the need to document these rights. The FSC contains guidance on demonstrable rights, as does the ShAD in its Appendix II. The FSC appears to be the only standard that does not explicitly mention demonstrable rights as such. Users' rights are mentioned in the RSB and the RSPO and 'traditional users' are mentioned in the RTRS. The ShAD refers only to 'ecosystem users'. Food security is only mentioned in the RSB and in Appendix II of the ShAD, but could also be implicit in the identification of HCV5 areas. Finally, water rights are referred to in the RSB, the ShAD's Appendix II and the RSPO. Water quality is referred to in BonSucro's standard.

In terms of specific text, the RSB requires that 'biofuel operations shall respect land rights and land use rights' (Principle 12). Furthermore, 'existing land rights and land use rights, both formal and informal, shall be assessed, documented, and established' (Criterion 12a). In accordance with the minimum requirements of Criterion 12b.1, 'no involuntary resettlement shall be allowed for biofuel operations' and 'where land rights and land use rights are voluntarily relinquished and/or acquired on a willing seller-willing buyer basis, local people shall be fairly, equitably and timely compensated.' The RTRS requires that 'legal use rights to the land must be clearly defined and demonstrable' (Principle 1.2) and 'in areas with traditional land users, conflicting land uses are avoided or resolved' (Principle 3.2). Where rights to land are disputed, 'a comprehensive, participatory and documented community rights assessment is carried out' (Principle 3.2.1).



Participatory mapping of customary lands with indigenous peoples and local communities can help clarify existing land uses and tenure systems

The FSC requires that 'long-term tenure and use rights to the land and forest resources shall be clearly defined, documented and legally established' (Principle 2). Principle 3 requires that 'the legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected'. Criteria related to this Principle state that 'indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies (Criterion 3.1); 'forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples' (Criterion 3.2); and 'sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers' (Criterion 3.3).

The ShAD requires that 'all impacts on surrounding communities, ecosystem users and land owners are accounted for' (Criterion 3.1) and that farm owners must commission or undertake a participatory Social Impact Assessment, part of which involves finding out who lives in or makes use of these areas, or has (legal or customary) entitlements in these areas (Indicator 3.1.1). Finally, BonSucro's Criterion 1.2 requires demonstration of 'clear title to land in accordance with national practice and law', an Indicator of this being that 'the right to use the land can be demonstrated and is not legitimately contested by local communities with demonstrable rights'. The standard notes that those rights 'can be related either to legal ownership or lease of the land or to customary rights', for which guidance is provided in the form of reference to ILO conventions 169 and 117.

The RSPO requires that 'the right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights' (Criterion 2.2) and that '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 2.3). Indicators for this include documents showing legal ownership or lease, history of land tenure and the actual legal use of the land, and the identification of relevant customary land use rights or disputes identified in line with national interpretations, and 'Maps of an appropriate scale showing extent of recognised customary rights'. Any negotiations concerning 'compensation for loss of legal or customary rights must be dealt with through a documented system that enables indigenous peoples, local communities and other stakeholders to express their view through their own representative institutions' (Criterion 6.4). An Indicator for this is the establishment of a 'procedure for identifying legal and customary rights and a procedure for identifying people entitled to compensation'.

While customary or traditional users are frequently referred to across the standards, the rights of other (sub)categories of users, such as seasonal users, squatters, labourers, migrants, the landless and women, are much less clearly defined. Land, and the related issues of food and water security, may feature in some of the standards, but are not always treated in terms of rights per se but rather in terms of security, access, management and so forth. There remains lack of clarity over how 'legitimate land disputes' are understood and defined, as opposed to spurious claims, and the criteria to identify 'demonstrable rights' remain under-developed. No mention is made of how companies should deal with existing land conflicts resulting from the operations of previous companies on the same land and what their responsibilities in this respect are.

Finally, in terms of legal frameworks, national laws on land often make it difficult for companies to comply with international law where these are not harmonised. The challenge (but also the raison d'être) of the standards is to go *beyond* national laws in respecting land rights, but without going *against* them. Rather than asking at which point CSR ends and the responsibility of the government begins (or the reverse), it is more useful to ask how the two systems can interact and mutually enhance each other such that better harmonisation with international law is achieved.

Free, Prior and Informed Consent

Free, Prior and Informed Consent, or FPIC, is the right of indigenous peoples (and increasingly of local communities more generally) to give or withhold their free, prior and informed consent to proposed developments that will affect them.[14] The right to FPIC is most clearly stated in the United Nations Declaration on the Rights of Indigenous Peoples and several other international human rights instruments have frequently been interpreted as requiring the recognition and protection of this right. Both the *International Covenant on Civil and Political Rights* and the *International Convention on the Elimination of all Forms of Racial Discrimination* protect peoples' right to self-determination. While these universally binding instruments 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 Committee on the Elimination of Racial Discrimination has also been vocal in relation to indigenous peoples' rights to lands and has repeatedly called upon states to recognise and protect indigenous peoples' right to land and their right to FPIC. ILO 169 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 CBD has also been equated with the right to FPIC, and affirmed in the CBD's *Akwé: Kon voluntary guidelines.*

However, international law 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. When understood as an expression of the right of all peoples to self-determination, the right to FPIC can best be interpreted as the right of all peoples who have a customary relationship with their land and natural resources. 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. In this light, it can be argued that all communities should have a meaningful role in making decisions about development projects that directly affect them.

[14] Colchester 2010.

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The right to Free, Prior and Informed Consent, anchored in international human rights law, establishes the basis on which equitable agreements between local communities and companies (and government) 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 developments on their lands.[15] In practice, respect for the right to FPIC implies informed, non-coercive negotiations between investors and companies or the government and indigenous peoples / customary law communities prior to oil palm estates, timber plantations or other enterprises being established and developed on their customary lands. It is accepted as necessary to create a more level playing field between communities and the government or companies and, where it results in negotiated agreements, provides companies with greater security and less risky investments. FPIC also implies careful and participatory impact assessments, project design and benefit-sharing agreements.

FPIC in the voluntary standards

Explicit reference to the need to respect the right to FPIC of local communities (and/or indigenous peoples) is made in the FSC, RSB and RSPO standard, the guidance and appendix of BonSucro, RTRS and ShAD. Specific mention of the right to FPIC as 'the right to say no' of local communities to a project going ahead is far less explicit: it is unclear in BonSucro,

[15] Ibid.

not present in the RTRS, while the ShAD only requires that the views of local communities be 'considered'. Reference to FPIC as 'the right to say no' is present in the non-compulsory guidance of the FSC and RSB. 'Informed' consent of local communities as a prerequisite for certification is mandatory in the FSC, RSB, RSPO and RTRS, as well as the ShAD through the Social Impact Assessment requirement. The need for consent to be 'informed' is less explicit in BonSucro. A clear definition of 'prior' is still lacking across the standards: elaboration on the notion is available in the guidance of the FSC, RSPO and the RSB (the latter of which specifies that consent should be sought before the issuance of permits), and in the requirements of the Social Impact Assessment of the ShAD. No clear definition is available in BonSucro or the RTRS.

In terms of specific text, the RSB requires that 'Free, Prior, and Informed Consent shall form the basis for all negotiated agreements for any compensation, acquisition, or voluntary relinquishment of rights by land users or owners for biofuel operations' (Criterion 2b) and 'shall form the basis for all negotiated agreements for any compensation, acquisition, or voluntary relinquishment of rights by land users or owners for biofuel operations' (Criterion 12b). Principle 3.2.2 of the RTRS requires that 'where rights have been relinquished by traditional land users there is documented evidence that the affected communities are compensated subject to their free, prior, informed and documented consent.'[16] The FSC requires that 'indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.' (Criterion 3.4) Local communities also maintain control over forest operations 'unless they delegate control with free and informed consent to other agencies' (Criterion 3.1).[17]

While the ShAD requires that 'all impacts on surrounding communities, ecosystem users and land owners are accounted for and are, or will be, negotiated in an open and accountable manner' (Criterion 3.1), and its Social Impact Assessment Rationale states that 'where the UN agreement on ethnic minorities and indigenous peoples (United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)) applies, the concept of 'free and prior informed consent' shall form the basis of the dialogue and negotiations' the right to FPIC is not specifically mentioned. Similarly, the BonSucro standard requires compliance with relevant applicable laws (including international treaties listed in Appendix 2 which refer to the right to FPIC such as UNDRIP), there is no mention of the right within the standard itself. Criterion 5.8, however, does require companies to 'ensure active engagement and transparent, consultative and participatory processes with all relevant stakeholders.'

The RSPO contains several criteria that refer to the right to FPIC of indigenous peoples and local communities. For example, Criterion 2.3 requires that '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'. For all new plantings established since 2005, local people are 'compensated for any agreed land acquisitions and relinquishment of rights, subject to their free, prior and informed consent and negotiated agreements' (Criterion 7.6). The non-

[16] See also *RSB Guidance for Principles and Criteria*; *RSB Land Rights Guidance; RSB Rural and Social Development Guidelines.*

[17] See also *FSC Interpretation of Principle 2 and Principle 3.*

compulsory Guidance for the P&C provides further information on how the right to FPIC should be respected, and a Guide has also been developed with more detailed procedures for negotiation and consent-seeking.[18]

'Free' consent, understood as consent given free of coercion or manipulation, is not explicitly stated in any of the standards, and only referred to in the guidance of the FSC and the RSB. The importance of self-representation for local communities in decision-making processes and the process of obtaining their consent is specified in the RSB, FSC and RSPO. Reference to 'eminent domain' and how the principles should be dealt with by the standards in countries where it persists is only explicitly mentioned in the RSB. Clarity on who has the right to FPIC is not consistent across the standards: some specify this as a right of indigenous peoples alone (BonSucro, ShAD), others a right of indigenous peoples and local communities (FSC and RSPO), a right of land owners, users and stakeholders (RSB) and a right of traditional owners (RTRS). None of the standards (apart from the RSB guidance) provide information on the need to prevent security forces, police, private militias and armed forces from being involved or present in processes to respect the right to FPIC.

An inherent tension also exists between the very definition of self-determination and the development of operational procedures in the standards to support communities in exercising their right to FPIC as an expression of this right. The right to FPIC is only too rarely explicitly stated as the 'right to say no', or to *withhold* consent, of local communities. The right to FPIC and methodologies to respect this right are elaborated in the guidance of number of standards, albeit not in the mandatory principles, criteria and indicators themselves.

However, certain ambiguities remain. For example, how can consent be defined and verified? What are the differences between consent and consultation? Who has the right to consent when there are plural stakeholders involved, including different communities and sub-groups within communities whose opinions differ? Can consent be partial, full, temporary, conditional and/or partial? Once given, can it be renegotiated and if so, when and under what conditions? What is consent given over? How 'prior' should consent be sought and what timelines for seeking consent should or should not be set? Where FPIC is sought after contracts have been signed, local communities are placed a considerable disadvantage as their leverage in subsequent negotiations with the company is thereby substantially weakened. And how much and what kind of information should be imparted to communities, bearing in mind confidentiality clauses? And when does pushing for consent effectively become coercive? Is free consent in the absolute sense realistic in the light of the existing power dynamics and imbalances between corporations (often back by States) and rural local communities? What about the veto power and strength of the individual versus the collectivity? While the right to FPIC is a collective right of all peoples, to what extent should the process take into consideration different local contexts and ways in which local communities themselves understand their right to FPIC? And in this light, should we be advocating for a single methodology in the first place?

[18] FPP 2008. See also *RSPO Detailed Process and Action Steps for RSPO New Planting Procedure.*

'Nested rights' over land need to be taken into consideration in the consent-seeking process

The extent to which the right to FPIC can be exercised fully by indigenous peoples and local communities will largely depend on the degree to which they are aware of this right in the first place. Where companies have committed to respecting this right in their operations, it falls within their responsibility to inform them of the right to FPIC where necessary. Full participation of local communities in Environmental and Social Impact Assessments (including in the mapping of lands) is critical to ensure that they are involved meaningfully in follow-up negotiations and decisions. Even then, communities are not homogeneous and decisions to give or withhold consent will also differ across and within communities: 'nested rights' over land are also critical to take into consideration in the consent-seeking process. Finally, information-sharing as a critical dimension of the right to FPIC should be seen as a two-way process: companies need to impart objective and complete information to communities on the project, but also need to seek from the communities information on how they make use of the land and to what ends, and thus how the project will affect their livelihoods.

Conflict resolution

Large-scale enterprises can come into conflict with indigenous peoples and local communities and with their workers, due to a range of factors including lack of regulatory enforcement, frequently compounded by a lack of clarity in regulation; lack of respect for the right to FPIC of local communities; lack of coherence between international, statutory and customary law; and poor communication or a lack of understanding between industry, government, community and civil society actors. A major conflict issue for many is that of recognising and negotiating rights to land and resources. Conflicts also arise between companies and communities or civil society organisations over conservation priorities, environmental pollution and benefit sharing. In many cases the way in which land concessions are allocated (i.e., involving corruption or lack of transparency) sits at the heart of conflict situations. Conflicts frequently arise where the customary rights of existing land users are unclear or are not recognised, and land rights are reallocated without due consultation with all affected parties.[19]

In the absence of effective conflict resolution mechanisms and negotiations, competing claims to land and natural resources have been contested through protest, resistance and violence, or in some cases via the enforced displacement of communities.[20] Under international law, violation of a human right gives rise to a right of reparation for the victim(s). Reparation is intended to relieve the suffering of and afford justice to victims 'by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations.' In human rights law, the availability of effective remedies is a right in and of itself that complements other recognized rights. Remedies include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[21] Company grievance mechanisms are explicitly called for in the third report of Professor John Ruggie, the Special Representative of the UN Secretary-General on Business and Human Rights, as part of his Protect, Respect and Remedy framework.[22]

Conflict resolution in the voluntary standards

The need to resolve existing conflicts in order to obtain certification is required by all standards to varying degrees. The absence of legitimate disputes must be proven for BonSucro, FSC, RSB and RSPO, while this is required for traditional land users specifically in the RTRS and information on disputes must be shared in the ShAD. Litigation is not referred to specifically in any standard, although the RTRS does not certify operations where court cases are ongoing. The degree of conflict resolution needed for certification varies across the standards, but generally this process must be consensual and underway, and negotiations and agreements should respect the right to FPIC. Mechanisms for conflict resolution are mandatory across all standards, with the ShAD requiring the less explicit establishment of a 'verifiable policy' for conflict resolution. The development of complaints process is needed for BonSucro, FSC and the ShAD. The RSPO has a Complaints Panel to deal with grievances and the RTRS a Grievance Committee. The RSB does not refer to a

[19] Wilson 2009.
[20] Ibid.
[21] MacKay 2002.
[22] Ruggie 2008.

complaints process specifically. Providing mediation facilities is required by the FSC and through the Dispute Settlement Facility of the RSPO, while the RSB is considering developing this out of house, and the RTRS and ShAD at a later stage. The FSC and the RSPO also link conflict resolution to the payment of compensation. Only the RSB's guidance provides for the inclusion of protections (e.g. anonymity) for whistleblowers in cases of conflict.

In terms of specific text, the RSB requires that 'if there are disputes about the tenure agreements of the land among stakeholders, biofuel operations shall not be approved' (Criterion 12b.1). Furthermore, 'land under legitimate dispute shall not be used for biofuel operations until any legitimate disputes have been settled through Free, Prior and Informed Consent and negotiated agreements with affected land users' (Criterion 12a.1). Criterion 12b.1 requires that 'where the rule of law is not adequately applied, international and regional legal bodies shall be consulted for rulings and information on disputes.' Under Criterion 9a, a minimum requirement is that 'water resources under legitimate dispute shall not be used for biofuel operations until any legitimate disputes have been settled through negotiated agreements with affected stakeholders following a free, prior and informed consent (as described in 2a and its guidance) enabling process.'[23]

The development of mutually satisfactory conflict resolution mechanisms is an integral dimension of several commodity standards

[23] See also *RSB Land Rights Guidelines; RSB Food Security Guidelines; RSB Guidelines on Water Rights and Social Impacts.*

The RTRS requires that 'in areas with traditional land users, conflicting land uses are avoided or resolved (Principle 3) and that 'in the case of disputed use rights, a comprehensive, participatory and documented community rights assessment is carried out' (Principle 3.2.1). Furthermore, 'a mechanism for resolving complaints and grievances' must be 'implemented and available to local communities and traditional land users' (Principle 3.3). Principle 3.3.1 – 3.3.3 also require that 'the complaints and grievances mechanism has been made known and is accessible to the communities'; that 'documented evidence of complaints and grievances received is maintained'; and that 'any complaints and grievances received are dealt with in a timely manner'. Furthermore, Principle 4.4.2 requires that 'there is no conversion of land where there is an unresolved land use claim by traditional land users under litigation, without the agreement of both parties'.[24]

The FSC states that 'appropriate mechanisms shall be employed to resolve disputes over tenure claims and use rights. The circumstances and status of any outstanding disputes will be explicitly considered in the certification evaluation. Disputes of substantial magnitude involving a significant number of interests will normally disqualify an operation from being certified' (Criterion 2.3). Criterion 4.5 further requires that 'appropriate mechanisms shall be employed for resolving grievances and for providing fair compensation in the case of loss or damage affecting the legal or customary rights, property, resources, or livelihoods of local peoples. Measures shall be taken to avoid such loss or damage.'[25]

The ShAD requires, as part of Principle 3 ('To develop and operate farms with consideration for surrounding communities') that 'complaints by affected stakeholders are being resolved' (Criterion 3.2) and that a 'verifiable conflict resolution policy for local communities' is developed and applied by farm owners (Indicator 3.2.1). This policy should 'state how conflicts identified in the p-SIA and new complaints will be tracked transparently, how third party mediation can be part of the process and explain how to respond to all received complaints' (Indicator 3.2.1). A timeline for conflict resolution is also provided: 'At least 50% of the conflicts shall be resolved within one year from the date of being filed, and a total of 75% in the period between two successive audits' (Indicator 3.2.2).

BonSucro's Indicator for Criterion 5.8 states the 'existence of a recognized grievance and dispute resolution mechanism for all stakeholders' as a requirement to 'ensure active engagement and transparent, consultative and participatory processes with all relevant stakeholders'.[26] The guidance for Criterion 5.8 states that dispute resolution mechanisms must be developed 'through open and consensual agreements with relevant affected parties. Complaints may be dealt with by mechanisms such as Joint Consultative Committees (JCC), with gender representation. Last but not least, the RSPO requires that 'there is a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties' (Criterion 6.3). Indicators for this include: evidence that 'the system resolves disputes in an effective, timely and appropriate manner'; 'documentation of both the process by which a dispute was resolved and the outcome'; and that the 'system is open to any affected parties'.[27]

[24] See also *RTRS Grievance Procedure.*
[25] See also *FSC Dispute Resolution System.*
[26] See also *BonSucro Complaint Resolution Process.*
[27] See also *RSPO Complaints System; RSPO Dispute Settlement Facility Protocol.*

The inherent purpose of conflict resolution is to give people justice. While conflict resolution is part of all the standards examined to varying degrees, a number of ambiguities remain. First, the very definition of conflict is unclear – how is it differentiated from a problem, a dispute, an issue, a concern, a complaint and a grievance? How is a 'legitimate dispute' identified? How are different levels of conflict (latent, emerging, manifest, escalating, violent) accommodated by the standards in terms of required responses on the part of the company? And to what extent are local definitions of conflict taken into consideration, as well as customary conflict resolution mechanisms? Secondly, the overwhelming tendency across the standards is for steps towards resolution to be considered as a sufficient basis for certification, but not necessarily full resolution. None of the standards have addressed the possibility of imposing a moratorium on operations where land conflicts are protracted and of a serious nature.

The meaning of 'resolution' itself varies, ranging from a situation where both parties in the negotiation process have agreed to take it off the agenda regardless of whether the mediator or legal decision has been made, to a documented assessment of community rights in cases of conflict. The risk involved here is that companies can easily rely on developing conflict resolution processes alone while continuing their operations as usual, without guaranteeing that a solution is reached that is mutually satisfactory to all parties involved. In this sense, the standards tend towards conflict management (i.e. conflicts are complex and can never be entirely resolved but can be controlled) rather than conflict resolution or conflict transformation, the latter implying that conflict can be a catalyst for positive social change. In this light, the conflict resolution mechanisms developed under the standards appear to be offering a compromise rather than genuine respect for the right of individuals to remedy under international law.[28]

Finally, the issue of the jurisdiction of voluntary standards over communities as grieved parties, when they are not members of the standards themselves, remains to be addressed adequately. This includes clarifying at what stage communities are submitting themselves to the jurisdiction of standards in conflict resolution, the extent to which they are aware of this, and the degree to which this is carried out with respect for their FPIC.

High Conservation Values

Sustainable land use management requires that commodity production is balanced with effective conservation measures. As much of the world's biodiversity does not fall within legally protected areas, the private sector, through voluntary standards, can play a key role in identifying and safeguarding areas of biodiversity importance, irrespective of their legal status.[29] The identification, management and protection of areas of High Conservation Value

[28] 'Under international law, violation of a human right gives rise to a right of reparation for the victim(s). Reparation is intended to relieve the suffering of and afford justice to victims 'by removing or redressing to the extent possible the consequences of the wrongful acts and by preventing and deterring violations'. In human rights law, the availability of effective remedies is a right in and of itself that complements other recognized rights. Remedies include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.' (MacKay 2002)

[29] UNEP-WCMC 2012.

(HCV) is one approach designed to this end. High Conservation Value Areas (HCVAs) are habitats which are of outstanding significance or critical importance due to their high environmental, socioeconomic, biodiversity or landscape values.

There are six HCVs, based on the definition originally developed by the FSC for the identification and management of the High Conservation Value Forests (HCVFs). Of particular concern in terms of human rights and the conservation of culturally and socially important areas are criteria 4, 5 and 6 as follow:

> HCV 4 - Critical ecosystem services. Basic *ecosystem services** in critical situations, including protection of water catchments and control of erosion of vulnerable soils and slopes.
> HCV 5 - Community needs. Sites and resources fundamental for satisfying the basic necessities of *local communities** or *indigenous peoples** (for livelihoods, health, nutrition, water, etc.), identified through engagement with these communities or indigenous peoples.
> HCV 6 - Cultural values. Sites, resources, habitats and *landscapes** of global or national cultural, archaeological or historical significance, and/or of critical cultural, ecological, economic or religious/sacred importance for the traditional cultures of local communities or indigenous peoples, identified through engagement with these local communities or indigenous peoples.[30]

Applications of the HCV approach within the context of certification incorporate a number of critical safeguards, e.g. requirements to comply with national law, to protect endangered species, to respect indigenous peoples' traditional tenure and use rights; and an ongoing mechanism to check that the management plans developed to maintain or enhance the values are being implemented.[31] The HCVRN Charter also requires that these issues are safeguarded where the HCV approach is applied outside the certification context. HCV tool kits all emphasise the importance of participation to ensure that HCVs are properly identified, managed and monitored. This is especially important for HCV4, HCV5 and HCV6. While the HCV system has not been developed as part of a 'rights-based approach', it provides scope for communities to exercise their rights, especially their procedural rights.

[30] *FSC Principles & Criteria FSC-STD-01-001 (V5-0) EN.*
[31] Stewart et alii 2008.

High Conservation Value Areas (HCVAs) are habitats which are of outstanding significance or critical importance due to their high environmental, socioeconomic, biodiversity or landscape values

HCVs in the voluntary standards

All the standards examined contain requirements relating to the protection and enhancement of HCVs, if not always using the definition developed above. For example, these areas are referred to as 'conservation values' in the RSB and 'biodiversity and ecosystem services' in BonSucro. However, the extent to which areas of social and economic importance to local communities are included in these categories is less clear. None of the standards address what happens to HCVs once a company's lease on land expires, and on whom the responsibility to manage falls. Participation in the HCV Assessment of local communities is not always explicit, meaning that the identification of these sites may be carried out with consultation and consideration for what communities themselves value and wish to preserve.

In terms of specific text, the RSB's Principle 7 on Conservation requires that 'biofuel operations shall avoid negative impacts on biodiversity, ecosystems, and conservation values' – Criterion 7.a states that 'conservation values of local, regional or global importance within the potential or existing area of operation shall be maintained or enhanced.' Minimum requirements for this Criterion include: 'participating Operators shall identify the conservation value(s) within the area of a potential or existing operation during the screening exercise of the RSB impact assessment process (Principle 2)'; 'conversion or use of new areas for biofuel operations shall not occur prior to the screening exercise'; and 'where conservation values of local, regional or global importance have been identified, Participating

Operators shall carry out a specialized impact assessment in accordance with the Conservation Impact Assessment Guidelines (RSB-GUI-01-007-01).[32]

According to Principle 4.4.1 of the RTRS, 'after May 2009, expansion for soy cultivation has not taken place on land cleared of native habitat except under if it is in line with an RTRS-approved map and system.' Criterion 4.4.1.2 of the RTRS states that 'where no RTRS-approved map and system is available: b) There is no expansion in native forests c) In areas that are not native forest, expansion into native habitat only occurs according to one of the following two options: 1) official land-use maps such as ecological-economic zoning are used and expansion only occurs in areas designated for expansion by the zoning. If there are no official land use maps then maps produced by the government under the Convention on Biological Diversity (CBD) are used, and expansion only occurs outside priority areas for conservation shown on these maps. 2) an HCVA assessment must be undertaken 'prior to clearing' and 'there is no conversion of HCV'.

The FSC requires that 'forest conversion to plantations or non-forest land uses shall not occur, except in circumstances where conversion b) does not occur on high conservation value forest areas' (Criterion 6.10). Principle 9 on 'Maintenance of high conservation value forests' requires that 'management activities in high conservation value forests shall maintain or enhance the attributes which define such forests'. Under this Principle, assessments are necessary to determine the presence of the attributes consistent with High Conservation Value Forests, and the company's 'management plan shall include and implement specific measures that ensure the maintenance and/or enhancement of the applicable conservation attributes consistent with the precautionary approach'.

Principle 2 of the ShAD requires that farms are sited 'in environmentally suitable locations while conserving biodiversity and important natural ecosystems'. A related Criterion is that 'Participatory Biodiversity Environmental Impact Assessment (B-EIA) [are] carried out to determine suitability of site, taking into consideration, inter alia, protected areas, critical habitats, endangered species, ecological buffers and so forth (Criterion 2.1). However, it notes that while the ShAD Standards 'considered the possibility of including High Conservation Value Area assessments and systematic conservation planning […] HCVA methods are not sufficiently developed for freshwater and marine aquaculture systems at the current time. Future versions of the Standards will revisit these ideas, and it is expected that the identification of HCVAs will be required by the Standards in the future'.

Principle 4 of BonSucro requires companies to 'actively manage biodiversity and ecosystem services'. One related criterion is an assessment of the 'impacts of sugarcane enterprises on biodiversity and ecosystems services', an indicator of which is the 'percent of areas defined internationally or nationally as legally protected or classified as High Conservation Value areas planted to sugarcane after the cut off date of 1 January 2008.' The Principle also notes that, in order to 'prevent expansion or new sugarcane development into areas of critical biodiversity (including HCVA categories 1-4). National definitions of HCVA take precedence over international where both exist. In the absence of national HCVA maps or data base, credible documentary evidence required that no HCVA converted after 1 Jan 2008'.

[32] See also *RSB Conservation Impact Assessment Guidelines; RSB Environmental and Social Management Plan Guidelines.*

Criterion 6.2 further requires protection of 'land with high biodiversity value, land with high carbon stock and peatlands'.

Finally, the RSPO refers to HCVs in two Principles and their associated Criteria and Guidance. Principle 5 on Environmental responsibility and conservation of natural resources and biodiversity requires that 'the status of rare, threatened or endangered species and high conservation value habitats, if any, that exist in the plantation or that could be affected by plantation or mill management, shall be identified and their conservation taken into account in management plans and operations' (Criterion 5.2). Principle 7 on Responsible development of new plantings requires that 'new plantings since November 2005 have not replaced primary forest or any area containing one or more High Conservation Values'.

While requirements for the identification of HCVs are explicit across the standards, guidance on their monitoring and management are far less clear. The need for participation of local communities in these processes remains largely implicit, with little qualification on who should take part (e.g. different types of land users such as permanent, seasonal, nomadic users, and women) Compensation (in cash or in kind) for communities for loss of access to lands under HCV classification is not elaborated sufficiently. The status of HCVs where they are not recognised under national laws further complicates the picture: does responsibility for their identification and management fall outside that of the State completely, and what does this mean when a company then leaves an area in terms of who takes over the management of HCVs? Where following national laws on conservation areas goes against the standards' requirements for HCVs, companies find that they cannot in practice fulfil both requirements, and thus cannot be certified.

Furthermore, the importance of co-management of HCVs by companies and local communities is not addressed, nor the extent to which traditional knowledge and customary practices of natural resource management treated as an essential dimension of HCV management. Even if co-management were undertaken, it is always possible that local communities would want to see these areas under their own ownership: does co-management not go far enough in respecting their customary land rights? And do communities have the capacity to manage HCV areas in line with HCV requirements under the standards, if they are not informed of these requirements in the first place? Finally, sanctions for lack of proper identification and enhancement of HCVs by the companies remains to be addressed, as is the issue of who is responsible for imposing these sanctions.

To conclude, a triangular dilemma is at play, involving on the one hand the environmental imperatives that HCVs seek to address, on the other the importance of food security and basic needs of local communities, and finally development interests, including those of the communities. Until broader information sharing, awareness-raising and training on HCVs by and for companies and local communities are undertaken, the legitimacy of these areas and their enhancement and protection will remain problematic.

Conclusions

Standard-setting processes have encouraged companies to begin thinking of local communities and of commodity production 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. 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. There is growing 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.

However, the separate evolution of commodity standards has led to discrepancies and a lack of harmonisation in the way they address fundamental issues such as FPIC, legal and customary land tenure, conflict resolution and HCVs. These discrepancies are confusing for companies operating in the various commodity supply chains, and also problematic for communities and local government agencies. Much greater clarity is also needed on which aspects of the standards are mandatory and which are merely guidance, and the indicators for compliance need serious thinking through to ensure that audits do not act as bottlenecks in the certification process.

Divergencies between the systems also make it that much harder to use them as first steps in proposing them as the bases for legal reforms. Furthermore, 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 harmonisation of standards could play a critical role in pressing governments to carry out tenurial reforms in favour of local communities, and to push for the recognition of their rights in practice. Voluntary standards 'raise the ceiling' in terms of requirements to respect human rights, but will only be effective if efforts to 'raise the floor' complement them, namely, working towards policy and legal reform in order to harmonise them with the requirements of voluntary standards.

Finally, the relevance and effectiveness of a standard ultimately depends on who participates in its development. Multi-stakeholderism versus the ownership of standards remains a thorny issue as well. Where local communities are not sufficiently involved, this is reflected in the standards' treatment of rights and of the immediate concerns to these stakeholders. The standards to date are increasingly phrased in terms of rights, but further improvements are needed, especially where land, water and food are only treated in terms of security, access and management. What emerges from the comparison is that all four issues examined are intrinsically inter-connected, and essentially anchored in the right of local communities to FPIC.

An issue that none of the systems have really thought through is that of their jurisdiction. Thus whereas companies by joining these schemes have made commitments to uphold these voluntary standards and thus submit to the Roundtables standards and certification requirements, communities are not members of the Roundtables and have no obligation to conform to the approach that the schemes seek to impose. Yet companies, HCV consultancies, certification bodies and dispute mediators sometimes engage with the communities as if they

were bound to follow these voluntary standards. There is a need to rethink how the Roundtables get a mandate to operate in respect of non-members especially communities.

The practicality of implementing the standards should not be under-estimated either. High cost and complex processes to fulfil their requirements may act as a disincentive for companies to join the schemes, particularly where those that do commit to doing so find themselves subject to greater criticism and scrutiny than companies that do not. At the same time, the tendency to use a 'check-list' approach or a highly simplified version of standards presents the risk of a reductionist approach to rights. How can we reconcile a rights-based approach and market economies, to keep encouraging companies to join voluntary standards but also point out inadequacies in their practices without discouraging them completely? The fine balance between pushing for improvement of the standards on paper and in practice, and making fulfilment of these standards both possible and cost-effective for companies remains a challenge.

Sources cited

BonSucro Complaint Resolution Process.

BonSucro Production Standard.

Colchester M 2010 *Free, Prior and Informed Consent: Making FPIC Work for Forests and Peoples.* The Forests Dialogue, Research Paper Number 11, Yale, New Haven.

Daes I 1996 *Supplementary Report of the Special Rapporteur on the Protection of the Heritage of Indigenous Peoples*, UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities. 48th Session. E/CN.4.Sub.2/1996/22.

Detailed Process and Action Steps for RSPO New Plantings Procedure.

Draft Standards for Responsible Shrimp Aquaculture.

Forest Peoples Programme 2008 *Free, Prior and Informed Consent and the Roundtable on Sustainable Palm Oil: A Guide for Companies.* Forest Peoples Programme, Moreton-in-Marsh.

FSC Dispute Resolution System.

FSC International Standard: FSC Principles and Criteria for Forest Stewardship.

FSC Interpretation of Principle 2 and Principle 3.

FSC Principles & Criteria for Forest Stewardship FSC-STD-01-001 V5-0 D5-0 EN.

IISD 2008 *The Sustainable Commodity Initiative – SCI Rationale and Road-map: 2008 – 2011.* International Institute for Sustainable Development, United Nations Conference on Trade and Development, AIDEnvironment and International Institute for Environment and Development, Manitoba.

MacKay F 2002 *Addressing Past Wrongs: Indigenous Peoples and Protected Areas: the right to restitution of lands and resources*. Forest Peoples Programme, Moreton-in-Marsh.

Nelson J 2004 'A Survey of Indigenous Land Tenure in Sub-Saharan Africa' in *Land Reform: Land Settlement and Cooperatives.* FAO Bulletin 2004/1, FAO, Rome.

RSB Conservation Impact Assessment Guidelines.

RSB Environmental and Social Management Plan Guidelines.

RSB Food Security Guidelines.

RSB Guidance for Principles and Criteria for Sustainable Biofuel Production.

RSB Guidelines for Land Rights: Respecting Rights, Identifying Risks, Avoiding and Resolving Disputes and Acquiring Lands through Free, Prior and Informed Consent.

RSB Guidelines on Water Rights and Social Impacts.

RSB Indicators of Compliance for the RSB Principles & Criteria.

RSB Principles & Criteria for Sustainable Biofuel Production.

RSB Rural and Social Development Guidelines.

RSPO Complaints System.

RSPO Dispute Settlement Facility Protocol.

RSPO New Planting Procedure: Ensuring Responsible Expansion by Palm Oil Producers.

RSPO Principles & Criteria for Sustainable Palm Oil Production (including indicators and guidance).

RSPO Procedures for New Oil Palm Plantings: Guidance Document.

RTRS Grievance Procedure.

RTRS Standard for Responsible Soy Production.

Ruggie J 2008 *Protect, Respect and Remedy: a Framework for Business and Human Rights.* Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. UN Doc A/HRC/8/5.

Stewart C, P George, T Rayden & R Nussbaum 2008 *Good Practice Guidelines for High Conservation Value Assessments: A Practical Guide for Practitioners and Auditors.* ProForest, Oxford.

UNEP-WCMC 2012 *The Inclusion of Biodiversity in Voluntary Performance: Standards for Businesses.* Plattform Nachhaltig Wirtschaften.

Wilson E 2009 *Company-Led Approaches to Conflict Resolution in the Forest Sector.* The Forests Dialogue.

Wily L 2011 *The Tragedy of Public Lands: The Fate of the Commons under Global Commercial Pressure.* International Land Coalition, Rome.

Zrust M, L D'Arcy, S Persey & D Priatna 2011 *Discussion Paper: Standardising the Monitoring of HCV Values in Palm Oil Landscapes.* Zoological Society of London, Bogor.

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