

# Free, Prior and Informed Consent

and the

## Roundtable on Sustainable Palm Oil



### A Guide for Companies



## Forest Peoples Programme

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## 1. Introduction:

'Free, Prior and Informed Consent' (FPIC) has emerged as a key principle in international law and jurisprudence related to indigenous peoples and has been widely accepted in private sector policies of 'corporate social responsibility' in sectors like dam building, extractive industries, forestry, plantations, conservation, bio-prospecting and environmental impact assessment. It has also been endorsed by the Roundtable on Sustainable Palm Oil (RSPO) as a key principle in its Principles and Criteria (P&C). Likewise, 'free and informed consent' is a requirement of the Forest Stewardship Council.

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 ensure a 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.

In line with international human rights law, in the Roundtable on Sustainable Palm Oil's Principles and Criteria, the principle of 'Free, Prior and Informed Consent' (FPIC) has a central place. It 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 palm oil developments on their lands.

With funding from the RSPO, this guide for companies has thus been developed to raise awareness about the concept of 'free, prior and informed consent' and its importance in social performance. The texts was elaborated through series of four three-day workshops held during 2008 in Pekanbaru, Palankaraya and Jayapura in Indonesia and Miri in Malaysia, which provided training to both communities and companies, and also local government, about how successful procedures can be carried out in line with the principle of FPIC.

The workshops included training on how to set-up and organise a documented system for negotiations that enables indigenous peoples, local communities and other stakeholders to express their views in negotiations and for these views and wishes to be included in decision-making.

The workshop started with two separate one-day training sessions first with local community representatives and then with company personnel. The workshops shared information derived from how FPIC procedures have been carried out in other countries and explored how these approaches could be adapted to local legal and social realities. On the final day, there was a dialogue between community and company representatives and local government together to discuss inter-actively how they can move forwards to make FPIC effective. The aim was to explore best practice and not to carry out any specific negotiations.

## 2. Free, Prior and Informed Consent in international human rights law:

Consolidating a body of pre-existing international law and jurisprudence, in September 2007 the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration was adopted by vote with 144 countries in favour, including the governments of both Malaysia and Indonesia, and 4 against (with 11 abstentions). The Declaration clearly, and in several places, refers to the right to Free, Prior and Informed Consent and in itself provides considerable guidance on how such a right shall be effectively recognised. Some of the key articles in the Declaration are summarised below.

### *Free Prior and Informed Consent:*

In Article 32, the Declaration states:

#### *Article 32*

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
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.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

### *Lands and Territories:*

#### *Article 20*

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.
2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

#### *Article 26*

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have 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.

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3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

### *No removal and right to restitution and redress:*

#### *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.

#### *Article 28*

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

### *Representation:*

#### *Article 5*

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

#### *Article 18*

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

#### *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.

### *Consent based on custom:*

#### *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.

*Article 5*

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

*Article 33*

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

*Article 34*

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

*Other laws:*

Other pieces of international law that also affirm this right include:

- 👍 International Covenant on Civil and Political Rights
- 👍 International Covenant on Economic, Social and Cultural Rights
- 👍 Convention on the Elimination of All Forms of Racial Discrimination
- 👉 The International Labour Organisation’s Convention No. 169 on Indigenous and Tribal Peoples of 1989 requires governments to carry out good faith consultations with a view to securing consent. The Convention is also helpful because it explains that indigenous peoples’ own institutions should be respected in decision-making and makes provisions for the exercise of customary law.
- 👍 The Convention on Biological Diversity has also been interpreted by governments as requiring Free, Prior and Informed Consent for the use of indigenous peoples’ knowledge and that international laws be respected in setting up protected areas.

**Table 1: Ratifications of Relevant International Laws**

International Law	Indonesia	Malaysia
Int’l Covenant of Civil and Political Rights	Yes	No
Int’l Cov’t on Economic, Social and Cultural Rights	Yes	No
Convention on the Elimination of All Forms of Racial Discrimination	Yes	No
ILO Convention 169 on Indigenous and Tribal Peoples	No	No
Convention on Biological Diversity	Yes	Yes

### 3. Free, Prior and Informed Consent in the plantations sector:

The establishment of plantations can imply major changes for local communities and indigenous peoples. Plantations require large areas of land and often this land is owned and used by local communities who have prior rights to these areas.

International human rights laws and business best practices, recognise that – even where national legal frameworks may provide weak or absent protections of customary rights to land – plantations should not be established on indigenous peoples' lands without recognition of their prior rights to the land and of their right to control what happens on that land. The principle which encapsulates these rights is 'Free, Prior and Informed Consent'.

The principle that best practice goes beyond the minimum requirements of (sometimes deficient) national laws is fundamental to the RSPO.

Although the UN Declaration on the Rights of Indigenous Peoples, as a declaration and not a convention, is not directly binding on UN Member States, the obligation to respect the right of Indigenous Peoples to give or withhold their Free, Prior and Informed Consent to activities planned on their lands is upheld by other international laws, including the Convention on the Elimination of All Forms of Racial Discrimination, which many governments have ratified.

While Indonesia has ratified this Convention, Malaysia has not. In response to an urgent action appeal about the social implications of expanding palm oil plantations in the heart of Borneo, in August 2007, the UN Committee on the Elimination of Racial Discrimination issued the following recommendations to the Indonesian government about what it needs to do to ensure compliance with the Convention.

The State party should amend its domestic laws ... to ensure that the concept of national interest ... [is] not used as a justification to override the rights of indigenous peoples... [and] recommends that the State party secure the possession and ownership rights of local communities before proceeding with the Kalimantan Border Oil Palm Mega-project... [and] ensure meaningful consultations are undertaken with concerned communities with a view to obtaining their consent and participation in the Plan.<sup>1</sup>

#### *The RSPO Principles and Criteria.*

The RSPO standard accords with international laws and makes requirements of companies that go beyond the minimum standards required by national statutory law and ratified international treaties. The principle of Free, Prior and Informed Consent is central to the RSPO's Principles and Criteria and guides the way companies deal with local communities (including indigenous peoples), provide information, carry out impact assessments, acquire land, agree payments and benefits, settle differences and resolve conflicts and pay compensation .

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<sup>1</sup> CERD/C/IDN/CO/3 15 August 2007 paragraphs 16 and 17

Key RSPO Principles & Criteria state:

<p>Criterion 2.2</p>	<p>The right to use the land can be demonstrated, and is not legitimately contested by local communities with demonstrable rights.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• Documents showing legal ownership or lease, history of land tenure and the actual legal use of the land.</li> <li>• Evidence that legal boundaries are clearly demarcated and visibly maintained.</li> <li>• Where there are, or have been, disputes, additional proof of legal acquisition of title and that fair compensation has been made to previous owners and occupants; and that these have been accepted with free prior and informed consent.</li> <li>• Absence of significant land conflict, unless requirements for acceptable conflict resolution processes (criteria 6.3 and 6.4) are implemented and accepted by the parties involved.</li> </ul> <p><i>Guidance:</i></p> <ul style="list-style-type: none"> <li>• For any conflict or dispute over the land, the extent of the disputed area should be mapped out in a participatory way.</li> <li>• Where there is a conflict on the condition of land use as per land title, growers should show evidence that necessary action has been taken to resolve the conflict with relevant parties.</li> <li>• Ensure a mechanism to solve the conflict (Criteria 6.3 and 6.4)</li> <li>• All operations should cease on land planted beyond the legal boundary.</li> </ul>
<p>Criterion 2.3</p>	<p>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.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• Maps of an appropriate scale showing extent of recognised customary rights (criteria 2.3, 7.5 and 7.6)</li> <li>• Copies of negotiated agreements detailing process of consent (criteria 2.3, 7.5 and 7.6)</li> </ul> <p><i>Guidance:</i></p> <p>Where lands are encumbered by legal or customary rights, the grower must demonstrate that these rights are understood and are not being threatened or reduced. This criterion should be considered in conjunction with criteria 6.4, 7.5 and 7.6 . Where customary rights areas are unclear these are best established through participatory mapping exercises involving affected and neighbouring communities. This criterion allows for sales and negotiated agreements to compensate other users for lost benefits and/or relinquished rights. Negotiated agreements should be non-coercive and entered into voluntarily, carried out prior to new investments or operations and based on and open sharing of all relevant information in appropriate forms and languages, including assessments of impacts, proposed</p>



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	<p>benefit sharing and legal arrangements. Communities must be permitted to seek legal counsel if they so choose. Communities must be represented through institutions or representatives of their own choosing, operating transparently and in open communication with other community members. Adequate time must be given for customary decision-making and iterative negotiations allowed for, where requested. Negotiated agreements should be binding on all parties and enforceable in the courts. Establishing certainty in land negotiations is of long-term benefit for all parties.</p>
<p>Criterion 7.5</p>	<p>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.</p> <p><i>Indicators:</i> Refer to criteria 2.2, 2.3, 6.2, 6.4 and 7.6 for indicators and guidance on compliance.</p> <p><i>Guidance:</i> This activity should be integrated with the SEIA required by 7.1. Where new plantings are considered to be acceptable, management plans and operations should maintain sacred sites. Agreements with indigenous peoples, local communities and other stakeholders should be made without coercion or other undue influence (see guidance for 2.3). Relevant stakeholders include those affected by or concerned with the new plantings.</p>
<p>Criterion 7.6</p>	<p>Local people are compensated for any agreed land acquisitions and relinquishment of rights, subject to their free, prior and informed consent and negotiated agreements.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• Documented identification and assessment of legal and customary rights.</li> <li>• Establishment of a system for identifying people entitled to compensation.</li> <li>• Establishment of a system for calculating and distributing fair compensation (monetary or otherwise).</li> <li>• Communities that have lost access and rights to land for plantation expansion are given opportunities to benefit from plantation development.</li> <li>• The process and outcome of any compensation claims should be documented and made publicly available.</li> <li>• This activity should be integrated with the SEIA required by 7.1.</li> </ul> <p><i>Guidance:</i> Refer also to 2.2, 2.3 and 6.4 and associated guidance. This requirement includes indigenous peoples (see Annex 1).</p>

#### 4. Making FPIC work:

The phrase ‘the right to Free, Prior and Informed Consent’ is a shorthand expression. More fully expressed what it means is that indigenous peoples (commonly referred to as *masyarakat adat* in Indonesia or as *Orang Asal* in Malaysia<sup>2</sup>) have the right to give or to withhold consent to activities planned on their lands and territories or which will affect their cultures and traditional knowledge and other rights. As such the right to Free, Prior and Informed Consent explicitly implies the right of such communities to refuse proposed operations on their lands.

Companies engaging in good faith negotiations with communities based on respect for their rights thus have to accept that the communities concerned are the owners of the lands in question, have the right to control what happens on this land and have the right to agree to, or to refuse, planned operations.

In short the communities have the right to say ‘no’ and, moreover, in deciding to say ‘yes’, they can negotiate the terms under which they may agree to a proposed development on their lands.

Securing Free, Prior and Informed Consent is thus not a one-off box-ticking exercise. It implies a process of good faith engagement whereby a company agrees to respect communities’ rights, engages in dialogue, explores options and provides information, acts respectfully, agrees to back off where requested, enters into negotiations where this is agreed to and accepts and abides by decisions that are reached.

#### *The Inter-relatedness of the RSPO P&C*

The RSPO standard can be seen as a good faith effort to put these principles into practice in relation to the development of palm oil plantations. In the RSPO Principles and Criteria, Free, Prior and Informed Consent is lodged as an integral part of a logical procedure of engagement between companies and communities set out in the RSPO P&C which includes considerations including:

- Land acquisition
- Conflict resolution
- Information and Participation
- Carry out participatory social and environmental impact assessments
- Allowing adequate community representation
- Negotiation
- Reaching binding agreements

We will unpick these connections between the various criteria of the RSPO standard in the following sections. However, it is important to appreciate that an adequately carried out process resulting in verifiable compliance with the principle of Free, Prior and Informed Consent will also contribute substantially to companies’ compliance with other major requirements of the RSPO Principles and Criteria such as 1.1 and 1.2

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<sup>2</sup> The term *Orang Asal* includes the Orang Asli (Aboriginal Peoples) of Peninsula Malaysia and the native peoples of Borneo, including the Dayaks of Sarawak and the Kadazan-Dusun of Sabah.

on transparency, 2.2 and 2.3 on land acquisition, 6.1, 7.1 and 7.3 on participatory social impact and HCV assessments, 6.2 and 6.4 on adequate participation and negotiated agreements, and 6.3 on dispute resolution.

## 5. Identifying customary land:

A crucial first step for companies seeking to acquire lands for plantations is to ascertain which areas are subject to legal and customary rights. Given that Indonesian and Malaysian land titling systems and land cadastres usually do not register areas subject to the collective land rights of customary law communities, known as 'native customary rights' in Sarawak and Sabah and as *hak ulayat* in Indonesia, it falls on the company to find out which lands belong to the local communities by direct and open communication with the people themselves.

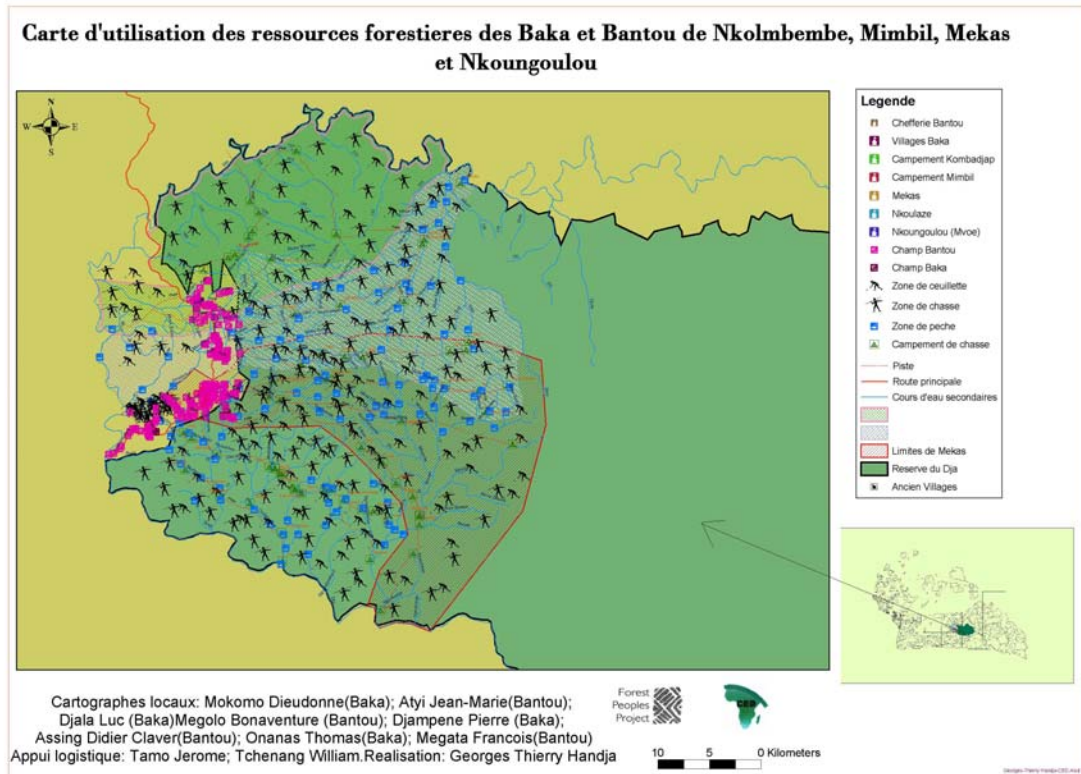
As noted in the Guidance for Criterion 2.3:

Where lands are encumbered by legal or customary rights, the grower must demonstrate that these rights are understood and are not being threatened or reduced. This criterion should be considered in conjunction with criteria 6.4, 7.5 and 7.6. Where customary rights areas are unclear these are best established through participatory mapping exercises involving affected and neighbouring communities.

One of the best ways of clarifying the extent of customary rights is through participatory mapping. Using geomatic technologies, like GPS, it is now relatively cheap, quick and simple to work with community members and map the boundaries of indigenous lands and the forms of customary land use within these areas. For example, here (see next page) is a map made by some Baka and Bantu communities in Cameroon to show how their rights overlap a national park.

A first step may be to select a joint team of community representatives (see below) who will oversee community involvement in the mapping and who may be accompanied by company observers. The team can then use the GPS devices to survey the boundaries of community lands and establish where there is overlap between these lands and the areas where the company is interested in establishing its operations. More detailed mapping can then be undertaken of the areas of overlap to establish exactly who are the rights-holders in these areas and what are the current and historical land uses and cultural values of the areas.

These maps are themselves important indicators of compliance with criterion 2.3 and this information can then be used further in impact assessments (5.1, 6.1 and 7.1), in negotiated agreements (6.4 and 7.5).



### *Lessons from mapping indigenous lands*

Participatory mapping using GPS and GIS has been widely applied in indigenous peoples' areas since the late 1980s and Indonesia and Malaysia have an extensive network of experienced NGOs who are practised in the use of this technology. A lot of lessons have been learned as a result of these experiences. Among the most important are:

- Ensure that the maps are made with the full awareness and agreement, and under the control of, the communities involved
- Involve members of the communities at all stages of the mapping from deciding what information is relevant, through gathering the information in the field, to recording and displaying the information on the base maps.
- Record both land uses and boundaries, wherever possible. Put the indigenous peoples' own location names, land use categories and terms for vegetation types onto the maps
- Make sure that all generations are involved. Elders are often the most knowledgeable about sites of historical and cultural importance.
- Involve both men and women in mapping. Men and women tend to use lands and resources differently – both systems are valid and need protection
- Where two or more ethnic groups use the same area, involve both in the mapping. Both have rights. Asserting the rights of only one group is likely to lead to conflict.
- Involve neighbouring communities in mapping boundaries that run alongside their lands. If boundaries are later disputed by neighbours, further conflicts may arise.

- Neighbouring communities may share an open boundary, whereby certain land use activities of one community are permitted on territory otherwise controlled by the other community and visa versa. In many cases, detailed boundaries have not been established. Mapping efforts should not force a fixed boundary between community lands where one does not exist.
- Ensure that draft maps are carefully checked over by community members and neighbouring groups, and revised if necessary, before being used in Free, Prior and Informed Consent negotiations.
- Take measures to protect the use of the information, so it is not misrepresented or distorted by other interests.

**Exercise:** Think about the plantation where you work. Has management made an assessment of overlapping customary rights? Has participatory mapping been carried out with the direct involvement of the local communities? Have agreements been reached with the local communities about the extent and boundaries of indigenous rights areas? Do these areas overlap with the areas being held by the company?

## 6. Engaging with representative organisations:

Free, Prior and Informed Consent means that communities or peoples should be represented by institutions of their own choosing. These institutions may be:



the people's own customary institutions,



institutions that have been imposed by the State but later accepted by the people,



or novel institutions set up by the people themselves to deal with outsiders.

There is no rule to say which is the best – circumstances vary too much. The important thing is that the people should themselves choose how they want to be represented – they don't have to accept the institutions chosen or imposed by others. They can also choose to be represented through several institutions, not just one.

Compliance with the RSPO P&C explicitly requires that companies allow communities to choose for themselves how they represent themselves in negotiations.

The Guidance for Criterion 2.3 notes that:

Communities must be permitted to seek legal counsel if they so choose.  
Communities must be represented through institutions or representatives of their own choosing, operating transparently and in open communication with other community members.

In Indonesia and Malaysia identifying community representatives is a complex matter, as customary systems of decision-making have been only partially incorporated into local systems of administration. Communities may thus be presented by a multiplicity of institutions. The companies must respect the choice of the communities to decide who represents them and should not assume that the Government recognised village spokesman (*kepala desa, tuah kampong* etc.) are the only legitimate representatives for negotiations.

Establishing with whom to have dealings in negotiations about land is thus a challenge for companies operating in both Malaysia and Indonesia. To avoid misunderstandings and / or entering into agreements that do not secure the consensus of the communities and thus result in conflict, companies should first work with the communities in an open way to identify who the communities choose to represent them in negotiations. Where there are doubts or mixed messages the best advice is to include more parties rather than unilaterally select fewer. The more time that is invested in establishing good communications at the beginning of a negotiation process, the more likely it is that negotiations can proceed in an agreed way thereafter.

**Exercise:** Think about the plantation where you work. With which community institutions are you in communication? How did you identify which persons or institutions should represent the communities? Did the communities have the freedom to choose for themselves their representative organisations or were these nominated by the government, or chosen by intermediaries or by the company? Are you aware of which other institutions the communities may have apart from the village head to represent them in dealings with the company?

## **7. Providing information to allow fair participation and informed consent:**

The provision of adequate information to interested parties is a core aspect of Free, Prior and **Informed** Consent. Before communities can make fairly based and informed decisions about proposed developments on their lands they need to understand the long and short term implications of plantations including their:

- Potential impacts and costs
- Potential benefits and gains
- Legal implications

Transparency, information sharing and communications are core considerations of the RSPO Principles and Criteria. The Guidance for Criterion 2.3 notes that all relevant information should be provided:

- openly
- in appropriate forms and languages
- including assessments of impacts,
- proposed benefit sharing and

- legal arrangements

*Other relevant Principles and Criteria:*

Many other RSPO Principles and Criteria reinforce the need for good information sharing between companies and communities. Criterion 1.1 notes the requirement for information to be shared in appropriate languages and forms, while the indicators for Criterion 1.2 include the need for disclosure of information about land titles, user rights and negotiation procedures.

Of major importance for informed decision-making are the participatory social and environmental impact assessments which are required under Criteria 5.1, 6.1 and 7.1. These participatory assessments are critical to ensuring that communities can make an informed judgement about whether a plantation would be likely to benefit them or not. Assessments should be participatory not just to ensure that communities are informed of the likely impacts and benefits but also so the assessments looks into the issues of concern to the communities. Is the 'baseline' against which impacts are being assessed accurate?

Often external assessors are unaware of the valuable resources and landscape features which are important to local livelihoods and cultures and which may be affected by plantations. These include forest fallows, hunting grounds, fishing areas, areas important for arts and crafts and other 'non-timber forest products', and areas of spiritual importance, like burial grounds, sacred sites and historical monuments. Since men and women use resources differently it is important that assessments and baseline studies ensure the participation of both.

Most impact assessments will also include mitigation plans, benefit sharing arrangements and compensation provisions. Where communities are persuaded to accept plantations on their lands, these are likely to be important elements of the negotiations required under Principles and Criteria 2.3, 6.4 and 7.6 (and see section 12 below). Information must also be provided about financial arrangements, profitability of production, pricing mechanisms, loans and debt repayments, and risks.

Participatory impact assessments are also required to ensure that plantations do not affect areas of High Conservation Value. Remember that HCVs include areas that are 'fundamental to meeting basic needs' (HCV5) and 'critical to local communities' traditional cultural identity'. These values and areas can only be identified by involving community members in assessments. So, good participatory impact assessments, which are required for ensuring Free, Prior and Informed Consent, are also required for meeting Criterion 7.3.

*Legal assessment*

An oft-omitted aspect of impact assessments is an assessment of the legal status of the land. Assessments should ascertain:

- the current status of the land;

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- whether or not the rights of the local communities are officially recognised;
- the status of the land and the status of community rights during the lease;
- the possible length of the lease and;
- the legal status of the land and the status of community rights after the expiry of the lease.

Some of the most relevant of the RSPO Principles and Criteria detailing information sharing requirements and participation are the following:

Criterion 1.1	Oil palm growers and millers provide adequate information to other stakeholders on environmental, social and legal issues relevant to RSPO Criteria, in appropriate languages & forms to allow for effective participation in decision making.
Criterion 1.2	Management documents are publicly available, except where this is prevented by commercial confidentiality or where disclosure of information would result in negative environmental or social outcomes.
Criterion 6.1	<p>Aspects of plantation and mill management including replanting that have social impacts are identified in a participatory way, and plans to mitigate the negative impacts and promote the positive ones are made, implemented and monitored, to demonstrate continuous improvement.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• A documented social impact assessment including records of meetings.</li> <li>• Evidence that the assessment has been done with the participation of affected parties. Participation in this context means that affected parties are able to express their views through their own representative institutions or freely chosen spokespersons during the identification of impacts, reviewing findings and plans for mitigation, and monitoring the success of implemented plans.</li> <li>• A timetable with responsibilities for mitigation and monitoring, reviewed and updated as necessary, in those cases where the assessment has concluded that changes should be made to current practices.</li> <li>• Particular attention paid to the impacts of outgrower schemes (where the plantation includes such a scheme).</li> </ul> <p><i>Guidance:</i></p> <p>Identification of social impacts should be carried out by the grower with the participation of affected parties as appropriate to the situation. The involvement of independent experts should be sought where this is considered necessary to ensure that all impacts (both positive and negative) are identified.</p> <p>Potential social impacts may result from activities such as: building new roads, processing mills or other infrastructure; replanting with different crops or expansion of planting area; disposal of mill effluents; clearing of remaining natural vegetation; changes in employee numbers or employment terms.</p> <p>Plantation and mill management may have social impacts (positive</p>



	<p>or negative) on factors such as:</p> <ul style="list-style-type: none"> <li>• Access and use rights.</li> <li>• Economic livelihoods (e.g. paid employment) and working conditions.</li> <li>• Subsistence activities.</li> <li>• Cultural and religious values.</li> <li>• Health and education facilities.</li> <li>• Other community values, resulting from changes such as improved transport /communication or arrival of substantial migrant labour force.</li> </ul>
<p>Criterion 6.2</p>	<p>There are open and transparent methods for communication and consultation between growers and/or millers, local communities and other affected or interested parties.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• Documented consultation and communication procedures.</li> <li>• A nominated manager responsible for these issues.</li> <li>• Maintenance of a list of stakeholders, records of all communication and records of actions taken in response to input from stakeholders.</li> </ul> <p><i>Guidance:</i></p> <p>Decisions that the growers or mills are planning to make should be made clear, so that local communities and other interested parties understand the purpose of the communication and/or consultation. Communication and consultation mechanisms should be designed in collaboration with local communities and other affected or interested parties. These should consider the use of existing local mechanisms and languages. Consideration should be given to the existence/formation of a multi-stakeholder forum. Communications should take into account differential access to information of women as compared to men, village leaders as compared to day labourers, new versus established community groups, and different ethnic groups. Consideration should be given to involving third parties, such as disinterested community groups, NGOs, or government (or a combination of these), to facilitate smallholder schemes and communities, and others as appropriate, in these communications.</p>
<p>Criterion 7.1</p>	<p>A comprehensive and participatory independent social and environmental impact assessment is undertaken prior to establishing new plantings or operations, or expanding existing ones, and the results incorporated into planning, management and operations.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• Independent impact assessment, undertaken through a participatory methodology including external stakeholder groups.</li> <li>• Appropriate management planning and operational procedures.</li> <li>• Where the development includes an outgrower scheme, the impacts of the scheme and the implications of the way it is managed should be given particular attention.</li> </ul>

	<p><i>Guidance:</i> See also criteria 5.1 and 6.1. The terms of reference should be defined and impact assessment should be carried out by accredited independent experts, in order to ensure an objective process. Both should not be done by the same body. A participatory methodology including external stakeholder groups is essential to the identification of impacts, particularly social impacts. Stakeholders such as local communities, government departments and NGOs should be involved, through the use of interviews and meetings, and by reviewing findings and plans for mitigation. The potential impacts of all major proposed activities should be assessed prior to development. The assessment should include, in no order of preference, as a minimum:</p> <ul style="list-style-type: none"> <li>• Assessment of the impacts of all major planned activities, including planting, mill operations, roads and other infrastructure.</li> <li>• Assessment, including stakeholder consultation, of High Conservation Values (see criterion 7.3) that could be negatively affected.</li> <li>• Assessment of potential effects on adjacent natural ecosystems of planned developments, including whether development or expansion will increase pressure on nearby natural ecosystems.</li> <li>• Identification of watercourses and assessment of potential effects on hydrology by planned developments. Measures should be planned and implemented to maintain the quantity and quality of water resources.</li> <li>• Baseline soil surveys and topographic information, including the identification of marginal and fragile soils, areas prone to erosion and slopes unsuitable for planting.</li> <li>• Analysis of type of land to be used (forest, degraded forest, cleared land).</li> <li>• Analysis of land ownership and user rights.</li> <li>• Analysis of current land use patterns.</li> <li>• Assessment of potential social impact on surrounding communities of a plantation, including an analysis of differential effect on women versus men, ethnic communities, migrant versus long-term residents.</li> </ul> <p>Assessment of above and below ground carbon storage is important but beyond the scope of an EIA. Note: This aspect will be considered by an RSPO Greenhouse Gas Working Group (See Preamble). Plans and field operations should be developed and implemented to incorporate the results of the assessment. One potential outcome of the assessment process is that the development should not proceed, because of the magnitude of potential impacts.</p>
<p>Criterion 7.3</p>	<p>New plantings since November 2005, have not replaced primary forest or any area required to maintain or enhance one or more High Conservation Values.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• An HCV assessment, including stakeholder consultation, is conducted prior to any conversion.</li> <li>• Dates of land preparation and commencement are recorded.</li> </ul>

	<p><i>Guidance:</i></p> <p>This activity could be integrated with the SEIA required by 7.1. This criterion applies to forests and other vegetation types. This applies irrespective of any changes in land ownership or farm management that have taken place after this date. High Conservation Values (HCVs) may be identified in restricted areas of a landholding, and in such cases new plantings can be planned to allow the HCVs to be maintained or enhanced.</p> <p>The HCV assessment process requires appropriate training and expertise, and must include consultation with local communities, particularly for identifying social HCVs. HCV assessments should be conducted according to the National Interpretation of the HCV criteria, or according to the Global HCV Toolkit if a National Interpretation is not available [see Definitions].</p> <p>Development should actively seek to utilise previously cleared and/or degraded land. Plantation development should not put indirect pressure on forests through the use of all available agricultural land in an area. Where landscape level HCV maps have been developed, these should be taken into account in project planning, whether or not such maps form part of government land use plans.</p>
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**Exercise:** Think about the plantation where you work. What information has been made available to the community members? Is it in languages and forms appropriate for the local people to understand? Did community members actually participate in carrying out the impact assessments or were they merely consulted by assessors? What kinds of information were collected about local livelihoods, systems of resource use and other areas of value to the local people? Were there discussions with the local communities about mitigation, monitoring, benefit sharing and compensation arrangements? Were any valued areas excised from the plantation area at the request of the community? Does the impact assessment make clear what changes may result in the legal status of lands during the lease, the possible length of the lease and the legal status after the expiry of the lease?

## 8. Ensuring Consent is Freely Given:

A critical aspect of a proper **Free, Prior and Informed Consent** process is that the decision-making by the communities - about whether or not to accept a plantation on their lands and if so on what terms - should be non-coercive and free from other forms of manipulation, intimidation or duress. As we note also below, adequate time must also be given to communities to consider proposals on their own in their own ways (and see section 10 below).

Case studies of Free, Prior and Informed Consent processes show that companies regularly abuse this principle, forcing or obliging communities to accede to their plans through various means including:

- shows of force or even the direct use of coercion, including violence and other human rights abuses
- recruitment of military or police forces to enter into and control village meetings and other activities
- prevention of communities receiving counsel or visits from lawyers, NGOs or other advisers
- bribery and corruption of community leaders
- un-transparent offers of benefits to selected (often senior) community elements
- gerrymandering of community election procedures and plebiscites
- convening of meetings in ways and at times that will exclude elements known to oppose proposed developments
- falsified statements of consent (including the use of attendance lists at meetings as fake lists of signatures affirming consent)
- establishment of fake or new community organisations to 'represent' communities in negotiations
- indirect pressure to remove critical persons from communities
- non-acceptance by the companies of clear decisions, against proposed developments or for the excision of certain areas, followed by repeated insistence on further negotiations and consideration of development options, even when communities have made clear that they want no further negotiations.

**Exercise:** Think about the plantation where you work. What measures are in place to ensure that communities can consider proposed developments on their lands without coercion? What proofs can the company show to auditors that consent was indeed freely given and not given under duress? Have you adopted measures to ensure that negotiations take place in an atmosphere free from the presence of security forces and militias?

## 9. Ensuring Consent is Prior:

A critical aspect of Free, **Prior** and Informed Consent is that communities are asked to make decisions well prior to investments, land acquisition or development plans being put in place. Communities must be informed and consulted about proposed plantations long before developments are decided on by the companies.

For their part companies must enter into planning with the ‘no project option’ as one possible outcome. This may come about for a number of reasons including because assessments show the planned plantations will harm areas of High Conservation Value (see Criterion 7.3), because assessments show mitigation costs will outweigh any potential benefits (see Criterion 7.1) or because communities refuse sale of their lands or relinquishment of their rights (see Criterion 2.3 and 7.5).

To ensure that decisions about planned plantations can be made in informed ways prior to developments going ahead, the RSPO requires that participatory impact assessments be carried out (Criteria 5.1, 6.1 and 7.1).

Processes of Free, Prior and Informed Consent should thus be iterative, that is say they imply an ongoing relationship between the developer and the community. Typically a company would first scope out an area of potential land for development, then identify the communities there and scope out their representative institutions and then negotiate with the communities to carry out a participatory impact assessment. During the assessment the exact extent of community lands, their systems of land use and systems of representation could then be determined. If the first phase of the impact assessment suggests that the area is viable from a company point of view for planting, the community can be asked if it wants the company to develop the area or not: a decision it can make based on its own inclinations and the information from the assessment.

If the community is not interested in a plantation the company should back off. If the community agrees to open negotiations, the company should still not assume that planting can go ahead. What is then required is that the communities and the company enter into a dialogue to explore in more detail the conditions under which the investment can be accepted both by the company and by the community.

**Exercise:** Think about the plantation where you work. Were communities asked whether or not they agreed with a development prior to the company making a decision to invest and acquiring permits from the government? Given that lands are often allocated to the company by the government and not directly by the community, how could decision-making be re-sequenced to allow communities the chance to assess and decide on plantations before investments and planting are decided on by the company?

## 10. Ensuring there is Consent:

If all the above conditions have been satisfied, then there is a good chance that a decision based on Free, Prior and Informed Consent can now be reached. The potential overlap between community lands and proposed plantations should have been clarified, for example by participatory mapping. The community will have chosen and explained which institutions will directly represent the community in negotiations with the company and the company will have accepted these arrangements. If the communities had agreed to such a step, then in order to generate adequate information for informed decision-making, participatory impact assessments will have been carried out which will make clear to the communities what they stand to lose and gain and what the legal implications of the plantations are for their lands. Community members will have been free to get counsel and discuss their options with advisers of their choosing and time will have been afforded to the community to give consideration to their options prior to any final decisions being made. These participatory assessments will also have shown which areas should be excluded because of their role in maintaining High Conservation Values.

A key aspect of the negotiation and decision-making that will ensue is that the communities' representative institutions are given space, time and opportunity to freely consult and discuss their options among themselves and with other interested parties. Customary decision-making often requires lengthy debates in the longhouse or other community forums between community representatives and the wider society. Such meetings are often interspersed with periods when decision-making is paused while further consultations and informal discussions are carried out at home and in council with other parties. Moreover, community representatives may enter negotiations with companies with mandates which require them not to make precipitous decisions but to bring interim offers and options back for wider discussion to allow communities to consider their options based on more detailed information. It is vital that companies respect these processes if they want to ensure that amicable and consensus-based decisions are reached among the community.

However, it should not be assumed that communities are homogeneous. It is possible, even likely, that some rights-holders and landowners may agree to their lands being used for plantations while others may disagree. Customary law may or may not permit leases or sales of parts of communal lands and time and scope must be given to resolve such issues through normal community decision-making processes. In line with international law (see section 2), the RSPO Principles and Criteria make some clear stipulations about what a due negotiation process should entail:

Criterion 6.4	<p>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.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• Establishment of a procedure for identifying legal and customary rights and a procedure for identifying people entitled to compensation.</li> <li>• A procedure for calculating and distributing fair compensation</li> </ul>
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	<p>(monetary or otherwise) is established and implemented. This takes into account gender differences in the power to claim rights, ownership and access to land; differences of transmigrants and long-established communities; differences in ethnic groups' proof of legal versus communal ownership of land.</p> <ul style="list-style-type: none"> <li>• The process and outcome of any negotiated agreements and compensation claims is documented and made publicly available.</li> </ul> <p><i>Guidance:</i> This criterion should be considered in conjunction with Criterion 2.3 and associated guidance</p>
<p>Criterion 7.5</p>	<p>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.</p> <p><i>Indicators:</i> Refer to criteria 2.2, 2.3, 6.2, 6.4 and 7.6 for indicators and guidance on compliance.</p> <p><i>Guidance:</i> This activity should be integrated with the SEIA required by 7.1. Where new plantings are considered to be acceptable, management plans and operations should maintain sacred sites. Agreements with indigenous peoples, local communities and other stakeholders should be made without coercion or other undue influence (see guidance for 2.3). Relevant stakeholders include those affected by or concerned with the new plantings.</p>
<p>Criterion 7.6</p>	<p>Local people are compensated for any agreed land acquisitions and relinquishment of rights, subject to their free, prior and informed consent and negotiated agreements.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• Documented identification and assessment of legal and customary rights.</li> <li>• Establishment of a system for identifying people entitled to compensation.</li> <li>• Establishment of a system for calculating and distributing fair compensation (monetary or otherwise).</li> <li>• Communities that have lost access and rights to land for plantation expansion are given opportunities to benefit from plantation development.</li> <li>• The process and outcome of any compensation claims should be documented and made publicly available.</li> <li>• This activity should be integrated with the SEIA required by 7.1.</li> </ul> <p><i>Guidance:</i> Refer also to 2.2, 2.3 and 6.4 and associated guidance. This requirement includes indigenous peoples.</p>

Assuming that the community has been reassured by the information provided that the plantation can bring them benefits, the stage is thus set for negotiations. Such negotiation processes should, again, not be one-off procedures. Detailed discussions may be needed on such issues as:

- exactly which lands, properties, crops, resources or what rights will be ceded and how will payments or rewards for the relinquishment of such rights be allocated to the correct rights-holders;
- what other benefits will be afforded to the communities for cession of their lands, rights and resources;
- what measures will be taken to mitigate identified impacts and what compensation payable and to whom for any agreed losses or damages;
- what protections will be put in place to protect community interests;
- what debts or costs will be loaded on community members seeking smallholdings and what arrangements will be made to ensure repayments are manageable;
- what obligations will the company give to ensure: fair payment for smallholder crops; adequate infrastructure and transport to get crops to the mill; fair pay and; conditions for any promised jobs;
- what monitoring will be undertaken to ensure compliance with the agreement;
- what access to grievance procedures and legal redress will the communities and the company have in the case of non-compliance;
- what arrangements will be made to ensure that the negotiated agreement is upheld by any companies which take over the operation because of buy out and /or for the renegotiation of the whole arrangement in the event of management transfer or proposed sale to another company;
- what arrangements will be made to restore community rights in land after the expiry of the lease.

The details of these negotiations then need to be written down and agreed by the company and the communities involved in a formal agreement that is notarised as a legal agreement binding on both parties. Preferably such agreements should also be endorsed by the local government or relevant authority.

**Exercise:** Think about the plantation where you work. In negotiations with the community for the establishment of the plantation, was time and scope given for the community representatives to make decisions in accordance with their own preferred or customary systems of decision-making? Were they free to consult about the details with the community members to ensure consensus could be achieved? Did a legally binding negotiated agreement result?



## 11. Resolving Conflict:

Many existing oil palm plantations have been established on communities' lands without respect for their customary and legal rights in land and without communities' free, prior and informed consent. This is one of the main reasons for the extensive conflicts over land between palm oil companies and indigenous peoples and local communities.

Plantations which have not respected communities' land rights, which have not respected the right to Free, Prior and Informed Consent and where there are ongoing conflicts are not certifiable under the RSPO standard.

How can this be sorted out?

In line with international law (see section 2), in such a situation indigenous peoples have rights to redress, to restitution of their lands and to compensation for damages.

Likewise the RSPO standard requires

Criterion 6.3	<p>There is a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties.</p> <p><i>Indicators:</i></p> <ul style="list-style-type: none"> <li>• The system resolves disputes in an effective, timely and appropriate manner.</li> <li>• Documentation of both the process by which a dispute was resolved and the outcome.</li> <li>• The system is open to any affected parties.</li> </ul> <p><i>Guidance:</i></p> <p>Dispute resolution mechanisms should be established 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. Grievances may be internal (employees) or external.</p> <p>For smallholder schemes, the company or associations will be responsible for this.</p>
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Many of the procedures noted above for ensuring FPIC also apply in these circumstances:

- Participatory mapping should be undertaken to establish the extent of customary rights in land and to identify exactly which lands have been taken without consent;
- Reviews are undertaken of which institutions should represent the communities in conflict resolution

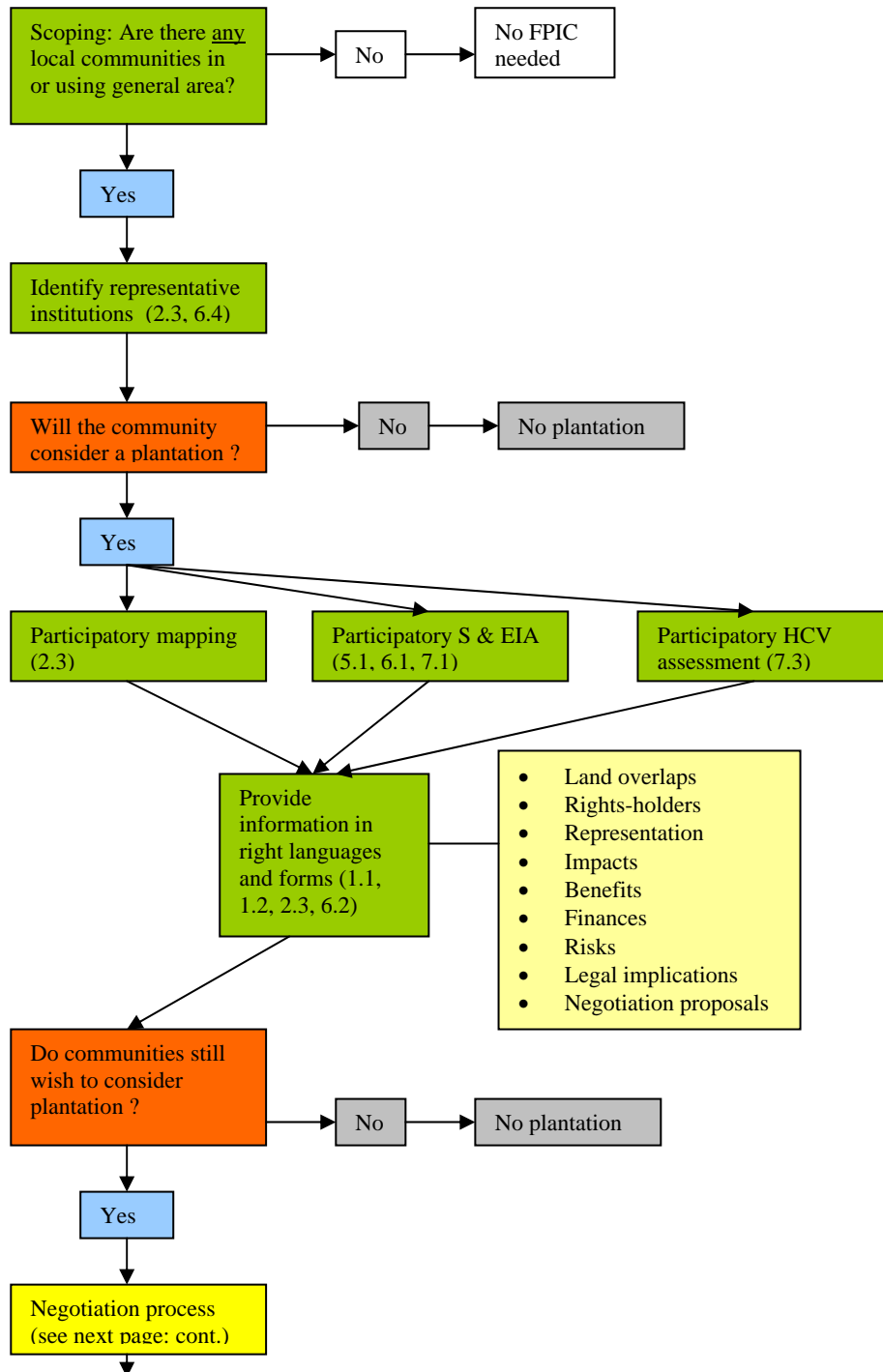
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- Participatory impact assessments should be carried out to assess fully and in an agreed way the extent of losses and damages for which compensation can fairly be claimed
- Agreements can be reached about the procedures to be used to resolve the land conflicts
- Negotiations can then be undertaken to reach agreements which could include options such as:
  - Return of land to the communities
  - Rehabilitation of affected lands and forests
  - Payment for the relinquishment of rights
  - Payments for losses and damages
  - Improved benefits for smallholders and workers
  - Compensatory development plans are agreed with the communities
- Negotiate agreements are formally agreed with local authorities and notarised as legal contracts
- Agreed monitoring mechanisms and procedures are established and followed to ensure that the agreements are complied with.

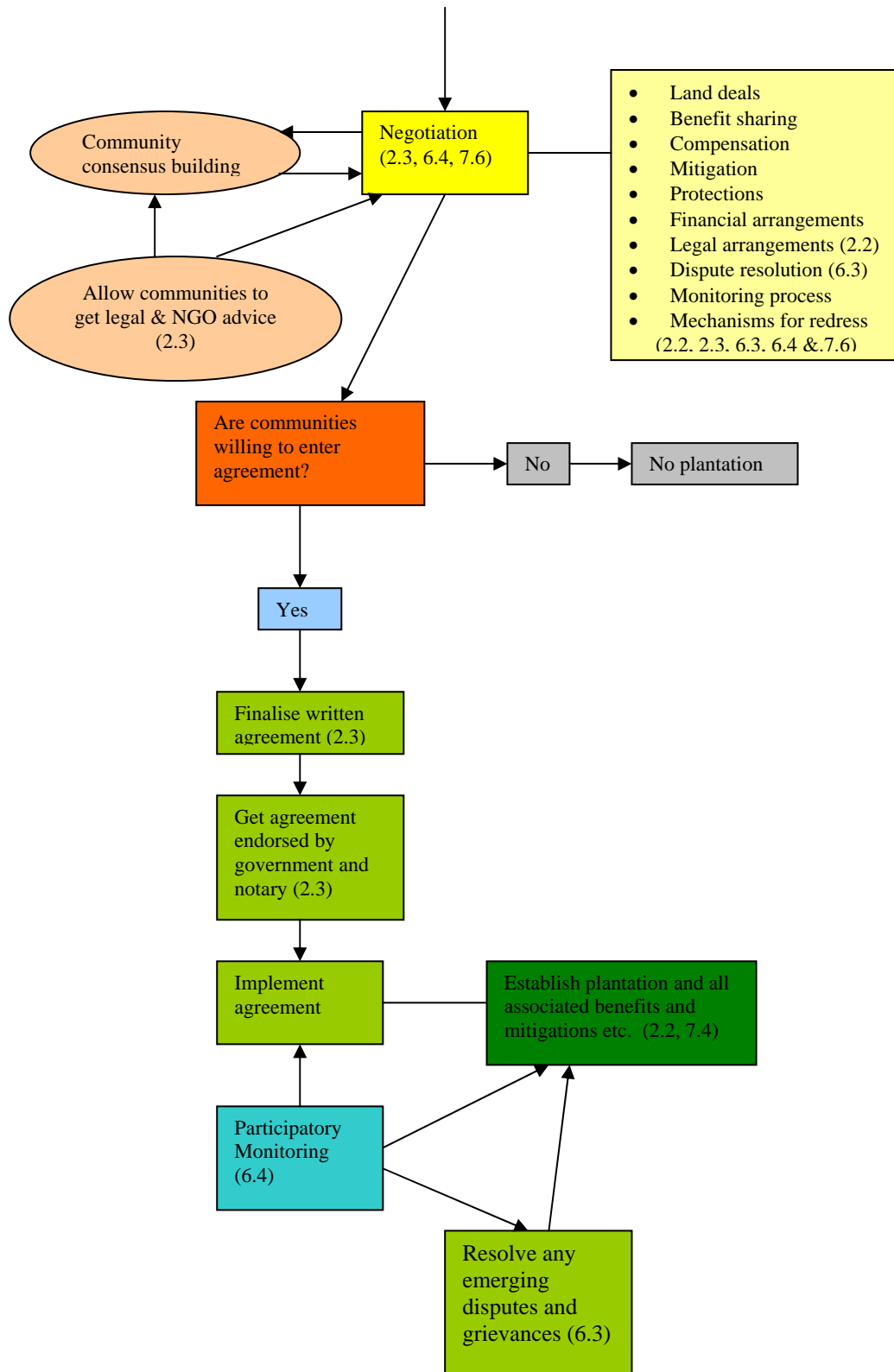
**Exercise:** Think about the plantation where you work. Was the plantations established on local communities lands? Did they give their Free, Prior and Informed Consent to the operation? Are there unresolved land conflicts? What measures do you think are necessary in your case to resolve these conflicts and bring the plantation into compliance with the RSPO standard?

### 13. Summing up:

All these steps can be summarised in a simplified diagram which also shows how FPIC is embedded in several key requirements of the RSPO P&C.



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