



# Asserting community land rights using RSPO complaint procedures in Indonesia and Liberia

Tom Lomax



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Tom Lomax

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### **About the author**

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## Acronyms

ACHPR	African Commission on Human and Peoples' Rights
CBO	Community Based Organisation
CSO	Civil Society Organisation
FPP	Forest Peoples Programme
GDP	Gross Domestic Product
HCVA	High Conservation Value Assessment
IIED	International Institute for Environment and Development
NCP	OECD National Contact Point
NGO	Non-governmental Organisation
NPP	RSPO New Plantings Procedure
OECD	Organisation for Economic Cooperation and Development
RSPO	Roundtable on Sustainable Palm Oil
SEIA	Social and Environmental Impact Assessment
UK	United Kingdom
UN	United Nations

## Abstract

The complaints procedure of the Roundtable on Sustainable Palm Oil (RSPO) is one of the options available to communities threatened by the negative impacts of the palm oil industry.<sup>1</sup> Drawing on direct experiences of supporting communities to use the RSPO complaints mechanism in Indonesia and Liberia, this review summarises how communities can get the most out of this procedure. Realistic outcomes include a temporary freeze on plantation development by palm oil companies while longer term solutions are negotiated.

The RSPO complaints procedure does provide a valuable tool for communities, though it is far from perfect. Given the scale of the challenge communities face standing up to the combined force of powerful corporations and states, this review advises that several advocacy strategies be pursued simultaneously to maximise chances of success. In addition, it highlights that non-judicial remedies such as the RSPO's should complement but not replace a strong parallel push for systemic national level legal and governance reform.

This note also situates the RSPO complaints procedure in the context of other options for communities wishing to challenge large-scale land deals affecting them, including use of national courts, media campaigns, regional and international human rights law procedures and the complaints procedures of major international finance institutions.

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1 This note concerns only the RSPO Complaints Procedure, not the Dispute Settlement Facility, which is also available to communities and others to help mediate disputes. The RSPO's website describes the Dispute Settlement Facility as 'RSPO's in-house facilitation service to support RSPO members (notably growers), local communities and other stakeholders to effectively use mediation as a means to help resolve disputes. It facilitates disputant parties to gain access to information, contacts, know-how and experiences to assist them to resolve palm oil production-related disputes in cases where at least one party is an RSPO member.' See [www.rspo.org/members/dispute-settlement-facility](http://www.rspo.org/members/dispute-settlement-facility) for more information.

## 1. Background: challenges faced by communities from the palm oil industry

Plantation development by large multinational palm oil companies can involve the large-scale dispossession of communities from their lands, territories and natural resources and damage to community property. Community grievances are frequently in response to state-granted concessions being imposed on their lands without their free, prior and informed consent and without fair, equitable and legally enforceable agreements. This is of critical importance to many rural communities who are strongly connected to their lands and natural resources as a basis for their culture, identity, food security and livelihoods.

A common underlying cause of this problem is that communities' ownership and management of land and natural resources they have used and possessed since time immemorial – land rights derived from customary law – are not adequately respected by state laws and government practices. This results in governments granting palm oil concessions to companies over the same lands and resources that have been used, owned or occupied by rural communities for centuries or longer. Single palm oil concessions can cover vast areas of 2,000 km<sup>2</sup> or more, creating significant potential for generating conflict with other land users or aggravating existing competition for land and resources. These concessions are generally in the form of extendable long-leases lasting 35–120 years, with rent payable to central government.

Given the high global demand for palm oil (e.g. for food, soaps and biofuel) and the fact that the prevailing palm oil industry model relies on very large areas of very cheap land and cheap labour in tropical forest regions, the scope for social and environmental harm is huge. This has been an important cause of human rights violations and deforestation in South-east Asia (particularly Malaysia and Indonesia) where industrial palm oil first developed on very large scales.<sup>2</sup> The signs are that these practices are being repeated in the 'new' palm oil frontiers developing in Africa and Latin America.

The Roundtable on Sustainable Palm Oil (RSPO) is a multi-stakeholder organisation set up in 2004 to respond to the urgent need for socially and environmentally sustainable palm oil. Central to the RSPO are its Principles and Criteria for the Production of Sustainable Palm Oil ('the RSPO Principles and Criteria'), which is the principal body of social and environmental rules that RSPO member companies

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2 Colchester (2011).



voluntarily commit to.<sup>3</sup> The standard was adopted in 2005, and was revised in 2007 and again in 2013. From community perspectives, important elements of the Principles and Criteria (which are broadly reflective of the current state of international human rights law) include the requirements that member companies:

- respect customary rights;
- only develop plantations on lands where they have the free, prior and informed consent of communities who have used, owned or occupied those lands; and,
- exclude from plantation development those areas essential to community needs and cultural identity or found to have high biodiversity conservation values.

Where companies are assessed as satisfying the RSPO standards, they benefit from being able to market their palm oil as certified sustainable using the RSPO label. Since parent companies often own other companies (sometimes via several intermediaries and in conjunction with joint investors and other shareholders), it is important to note that member companies must ensure that RSPO standards are complied with by companies over which they have a controlling stake (i.e. a 51% share or higher).<sup>4</sup>

When member companies are allegedly in violation of the RSPO Statutes, By-laws, motions approved by the General Assembly, or any other approved articles, including the Principles and Criteria for the Production of Sustainable Palm Oil, Certification System and RSPO Code of Conduct, communities or civil society counterparts can submit written complaints to the RSPO. In our experience a common reason for communities choosing to use the RSPO's complaints procedure has been the lack of effective or accessible judicial remedies, as well as lack of support for community land rights from laws and government practices.

The leverage provided by the RSPO complaints procedure stems from the fact that, as outlined above, RSPO certification is valuable to companies as it enables them to gain market access, since many buyers – including some of the biggest – are keen to only buy certified sustainable palm oil. Although this gives certified palm oil a small premium, the real incentive to meet the RSPO standard stems from the fact that if a RSPO member loses its certification because of compliance failures in one particular concession, subsidiary or mill, it loses certification for the entirety of its operations and will lose many of the big volume buyers as a consequence.

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3 It is important to refer to the Principles & Criteria that were in force at the time the behaviour being complained about took place. The current (2013) RSPO Principles & Criteria (valid since 25 April 2013) are available here: [www.rspo.org/file/revisedPandC2013.pdf](http://www.rspo.org/file/revisedPandC2013.pdf). The RSPO Principles & Criteria in force prior to that (since 2007) are available here: [www.rspo.org/files/resource\\_centre/RSPO Principles & Criteria Document.pdf](http://www.rspo.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf). Although the RSPO Principles and Criteria are the cornerstone of the RSPO standard, they are one element of the Statutes, By-laws, motions approved by the General Assembly, or any other approved articles, including the Principles and Criteria, Certification System, RSPO Code of Conduct and New Plantings Procedure.

4 See the RSPO Certification Systems document, at rule number 4.2.4: <http://rspo.org/sites/default/files/RSPOcertification-systems.pdf>.

The immediate concerns of most communities we work with have been to stop further loss of land and destruction of community property taking place without their consent. Many were keen for their complaints (and their rights and interests) to be taken seriously, and for the companies to come to the negotiating table to find a solution. Outcomes frequently sought by communities using the RSPO complaints procedure include the following:

- The return of land taken away from communities (restitution).
- Cash for damage to community livelihoods and property (compensation).
- Formal recognition by the company of community land ownership rights and guarantees that their land will be safe from future encroachment.
- Recognition that palm oil companies can only use community land and resources if it has been rented from them on terms that are fair, equitable and legally enforceable.
- Additional development benefits in the absence of development support from the state, e.g. permanent jobs and training, schools, clinics and roads.

## 2. The RSPO's New Plantings Procedures and the complaints procedure

The RSPO's New Plantings Procedures (NPP), which became effective from 1<sup>st</sup> January 2010, is important as it provides an opportunity to stop plantation development *before* it starts, averting the loss or destruction of community property.<sup>5</sup> Before a RSPO member company can commence clearing and planting of a new area, the NPP requires the company to give 30 days' notice and publicly disclose a project summary, and summaries of the relevant Social and Environmental Impact Assessment (SEIA) and High Conservation Value Assessment (HCVA). These are publicly disclosed on the RSPO's website. The NPP is therefore an important opportunity for public notification and feedback, and is therefore a useful spring-board for triggering the complaints process if required.

The clear disadvantage of the NPP is that most rural communities do not have access to the internet, do not speak English as a first language and even if they did they would probably not know to check the website regularly to see if a new NPP notification had been advertised for consultation that affects them. It is also not always easy to discern exactly which villages will be affected by a new planting, depending on the clarity of maps and other information disclosed.

For this reason alone, but also in order to disseminate adequate information and advice generally, intermediary civil society organisations (CSOs) or community-based organisations (CBOs) have an essential role to play in informing communities of the presence of an RSPO member in their areas and what this means. They can also be of vital help in regularly checking for new NPP notifications on the RSPO website<sup>6</sup> to ensure that the 30-day public consultation period is not missed and supporting communities to use the RSPO complaints procedure.

A complaint can also be made to the RSPO Complaints Panel at any time where a member company (or a company in which a member has a sole or majority interest) is alleged to have been operating in breach of the RSPO standards and rules.<sup>7</sup>

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<sup>5</sup> See detailed information on the RSPO's New Plantings Procedure here: [www.rspo.org/certification/new-planting-procedures](http://www.rspo.org/certification/new-planting-procedures).

<sup>6</sup> NPP notifications are posted on the RSPO website here: [www.rspo.org/certification/new-planting-procedures/public-consultations/](http://www.rspo.org/certification/new-planting-procedures/public-consultations/)

<sup>7</sup> See Chao (2013) for a short guide to the RSPO Complaints Panel system: [www.forestpeoples.org/topics/palm-oil-rspo/publication/2013/roundtable-sustainable-palm-oil-rspo-and-complaint-resolution](http://www.forestpeoples.org/topics/palm-oil-rspo/publication/2013/roundtable-sustainable-palm-oil-rspo-and-complaint-resolution).

Although there is an official form for submitting complaints to the RSPO,<sup>8</sup> a simple letter clearly presenting the following information should be sufficient:

- (1) Background information and key facts behind the complaint.
- (2) An explanation of why the complaint needs to be dealt with as a matter of urgency (where this is the case – e.g. what are the dangers/harmful consequences of not dealing with the complaint urgently).
- (3) A list of all allegations made against the company, including all relevant facts.
- (4) An explanation of why the various allegations demonstrate a violation of the RSPO's Principles and Criteria, New Plantings Procedure and / or Code of Conduct for Members (mentioning the relevant principle, indicator, criteria or rule numbers).<sup>9</sup>
- (5) Referring to evidence wherever possible (e.g. photographs, video, press reports, letters and other documentation) to help prove the allegations being made.
- (6) A clear statement of what urgent interim steps the complaining community would like the RSPO to consider requiring of the company to protect the community's position in the immediate-term – e.g. a temporary freeze on operations.
- (7) A clear statement of the community's position on what kind of *process* and *outcome* would be required by the community for the case to be properly resolved.

The RSPO complaints procedure is set out in a flow-chart replicated below.<sup>10</sup> A response from the RSPO Secretariat (including a holding statement where there are urgent risks of harm) can be expected within 10 days. A decision from the RSPO Complaints Panel on whether the complaint has merit can be expected within 30 days of the complaint being made, and this may include interim measures such as a request for a temporary freeze on company operations. A decision on the complaint from the Complaints Panel can be expected within a further 8 weeks. The Complaints Panel will then decide on an action plan, to be agreed to by both member and complainant. This action plan should then be monitored and verified.

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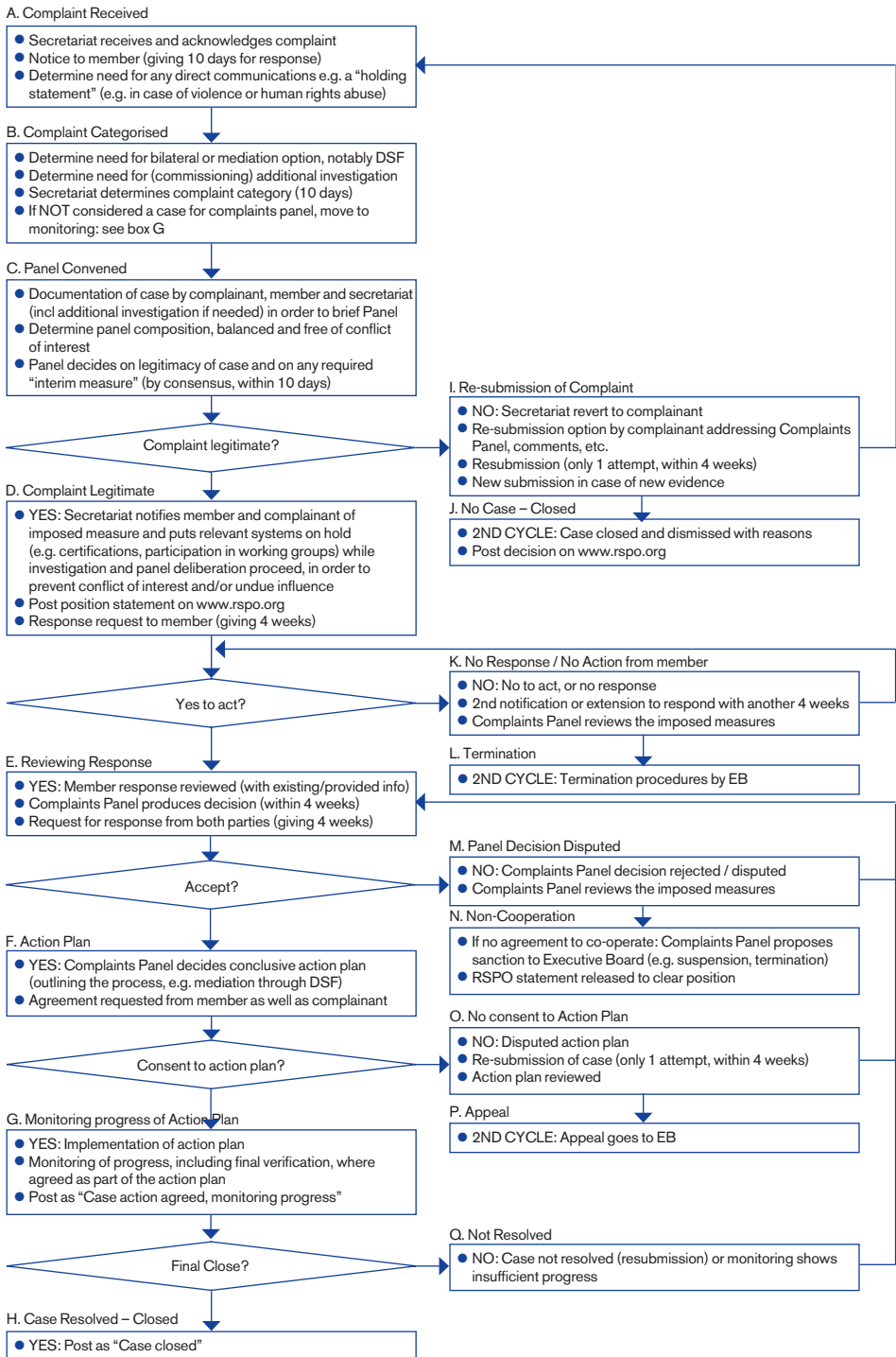
<sup>8</sup> A description of the RSPO Complaints Procedure, including downloadable complaint form, procedure flow-chart, current composition of the Complaints Panel, and minutes of Complaints Panel meetings, can be viewed here: [www.rspo.org/members/complaints](http://www.rspo.org/members/complaints). For submitting complaints by email, please check the website for current details of the Complaints Coordinator (currently Ravin Krishnan: [ravin.krishnan@rspo.org](mailto:ravin.krishnan@rspo.org)). To ensure complaints are dealt with promptly, it is also worth copying the RSPO's Head of Impacts (currently Dr. Sanath Kumaran: [sanath.kumaran@rspo.org](mailto:sanath.kumaran@rspo.org)).

<sup>9</sup> The Code of Conduct for RSPO members is available here: [www.rspo.org/resources/key-documents/membership](http://www.rspo.org/resources/key-documents/membership). For a link to the RSPO Principles & Criteria see footnote 3, and for a link to the RSPO's New Plantings Procedure see footnote 6.

<sup>10</sup> RSPO Complaints Procedure flow-chart can be viewed in the annex to this report and via the following link: [www.rspo.org/members/complaints](http://www.rspo.org/members/complaints). It can also be downloaded here: [www.rspo.org/members/status-of-complaints](http://www.rspo.org/members/status-of-complaints).

## RSPO Complaints procedure flowchart

(To be used in connection with RSPO Complaints system document)



As a last resort the RSPO may consider making sanctions if a member company consistently fails to respect RSPO standards or cooperate properly in dealing with a complaint. These include suspension or termination of the company's RSPO membership. Suspension and the threat of termination of membership are in fact significant deterrents as they prevent companies from selling palm oil as RSPO-certified and can have negative impacts on consumer perceptions, brand and reputation and stock value.

The Complaints Panel may suggest an investigation into the complaint, where the complaining community and the company cannot agree on the nature of the problem or its resolution. In our experience this has been done in two ways: (1) by a third party monitoring organisation; or (2) by a delegation from the RSPO.

An important consideration in such cases is that the third party organisation may be paid for by the company itself, making it a consultant to the company. This introduces a risk of a conflict of interest which will need careful monitoring. If the RSPO itself decides to send a delegation to evaluate the situation, it is important to note that since only one such mission has taken place to date (to our knowledge), the RSPO's capacity to make such an investigation is a work in progress. In our experience of one such mission, the RSPO appeared to be overly deferential to the company's interests, allowing it far too much influence in how the mission was organised and conducted. Clearly a very basic principle of any functional grievance process is that the party being complained about should not be able to determine how the grievance is dealt with, as they have a clear interest in ensuring the matter is dealt with in their favour.<sup>11</sup>

Whichever way the investigation takes place, care should be taken by CSOs and legal advisors supporting communities to ensure that the Terms of Reference of the investigation are agreed to by the complaining community and their advisors. The quality of the investigation, its methodology and the accuracy and integrity of the resulting findings and recommendations will need careful monitoring and proper consultation, to ensure their accuracy and usefulness. It should also be a requirement of this process that the final report is made public, though the names of individual community members may need to be redacted to protect them from negative repercussions.

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11 Growing community and CSO dissatisfaction with the RSPO Complaints Panel led to a strong resolution for its reform being adopted at the tenth General Assembly in 2013 which led to an independent review ([www.rspo.org/news-and-events/announcements/a-review-of-complaints-system-of-the-rspo-final-report](http://www.rspo.org/news-and-events/announcements/a-review-of-complaints-system-of-the-rspo-final-report)). There has been some improvement in the rigour and independence of the Panel since but delays and prevarications still cause considerable dissatisfaction.

### 3. Top tips for using the RSPO complaints procedure<sup>12</sup>

- **At the outset it is important to confirm whether the company in question has a duty to comply with the RSPO standard or not.** This may not always be immediately obvious, for example if the company cannot be seen on the online RSPO members list.<sup>13</sup> In such cases, further research will be necessary to see if the company is in fact a local subsidiary company that is majority owned or managed by a RSPO member. If this information is not available it is worth contacting the RSPO directly to ask them to confirm whether the company in question has a duty to comply with the RSPO standard or not. Members are required to notify the RSPO of all such connected or subsidiary companies, so the RSPO should have this information (unless the subsidiary's connection to an RSPO member is a recent occurrence and RSPO has yet to be notified).
- **The first step for CSO and legal community advisers is consultation.** This will require meetings with as many community members as possible from as broad a cross-section of the communities concerned – including women, youth, elders and minorities. This is important to find out from communities what the situation is on the ground.
- **Information sharing is a key role for community advisers:** The communities may not know that their land has been leased by their own government to a palm oil company, and on what terms. They may not know what the RSPO is, what standards the company should be complying with, and the availability of the RSPO's complaints procedure. One particularly effective way of informing communities is to support them to visit other communities who have previous experience of the palm oil industry and to invite them to share their experiences (good or bad). Showing communities photographs or videos of what large-scale palm oil plantations look like can also be much appreciated by communities, since it is hard to otherwise imagine what the impact on the landscape will be without seeing an example.
- **To make an informed decision on whether to use the RSPO's complaints procedure and/or another judicial or non-judicial grievance mechanism,** the community will need to know about all the options available, and the relative pros and cons.
- **It is important that it is the community's own collective and fully informed decision whether to use the RSPO's complaints procedure and/or whether to try other advocacy routes.** Ensuring communities are in the driving seat and able to make fully informed decisions through their self-chosen decision making processes is key.

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<sup>12</sup> NB. This section has a particular focus on the roles of CSOs and legal advisors.

<sup>13</sup> See RSPO list of members at: [www.rspo.org/members/all](http://www.rspo.org/members/all)

- **Key early community decisions require careful facilitation and support (including the decision whether to complain and who to)** to make sure they are the legitimate collective decisions of the community, and are not made on their behalf by elites or third parties. Such decisions include: which communities are going to be included in the complaint; how do the communities want to make and validate collective decisions for the complaint itself and during follow up; how they wish to structure their communication and negotiation with outsiders (which includes deciding whether certain community individuals will be nominated to play key roles during the complaint or will the community conduct the complaint as a collective at all stages; and if roles are to be assigned to individuals, will they be conducted by more than one community individual to spread the accountability, or will the individuals occupying those roles change and circulate over time, to ensure one individual does not 'take over'. Common pitfalls which need considering include the following:
  - **Customary institutions are sometimes co-opted, corrupt, or even formally integrated into local state government.** They may or may not therefore be legitimate and trusted representatives of their communities, and this will need careful consideration, and wide community participation and consultation to ensure decisions are the legitimate collective decisions of the entire community.
  - **Communities will need to ensure that the influence of diaspora or elite community members is not excessive.** Such community members have a stake in the process and may have valuable capacity to offer their communities, but there is a risk that some may try to exploit their position of influence to serve their private interests.

### Example of a community-centred complaint in Liberia

One approach that worked well concerned a complaint made by around a dozen communities against a company operating in Liberia. In the course of the work with those communities by a local CSO, the communities decided to nominate three representatives from each community to join a council of over thirty individuals, which itself nominated around a dozen community members to be on a community committee.

The committee was empowered to hold meetings – with CSOs, government, company – but had to report back to the council for consultation and decision-making by the council on minor matters, and via the council to the whole community for full consultations or when the whole community was needed to make key decisions (such as whether to let the company use some of their land or not).

Committee and council representatives were responsible for the downward dissemination of information, and upward return of feedback. Although the local CSO was careful to make sure this structure was decided on by the community, it was able to play a role in facilitating discussions and decisions, and in monitoring and strengthening capacity.



- **The distinction between making decisions and communicating them is crucial.** Although communicating decisions may be delegated to representatives, the community as a whole retains the right to make decisions affecting everyone. It is safest to assume that community representatives can only *communicate* decisions, but cannot themselves *make* decisions.
- **CSOs are often accused of creating complaints by government or companies** when in fact the situation is invariably already in a state of conflict. CSOs will need to be ready to respond to such accusations and be sufficiently robust. A very practical tip is for CSOs to consider asking communities to sign forms confirming that they want the CSO's support in filing a complaint and clarifying what kind of support the CSO will provide and the precise role the CSO will play in the process. This written authorization then forms good evidence to justify the complaint's legitimacy and the CSO's formal role.
- **It is advisable to diligently follow up with the RSPO in the course of a complaint** to make sure that the various steps in the procedure are followed in the right sequence and timescale. The status of a complaint and relevant documents should be posted on the RSPO website.<sup>14</sup>
- **When submitting a complaint to the RSPO Complaints Coordinator it is recommended that several staff members of the RSPO are copied,** including representatives of the Secretariat. Since the RSPO has a relatively small complaints handling team, this helps to ensure that the RSPO is notified of the complaint and that the complaint is being handled quickly and efficiently.
- **Taking care with confidentiality.** Communities who have signed complaints have been subject to personal intimidation or bribes and inducements, so if in doubt, it is advisable not to disclose the names of individual community members to the RSPO or companies.
- **Compliance with all applicable local, national and international laws** is a requirement of the RSPO Principles and Criteria (Principle 2), so violations of applicable laws can be included in complaints. In some cases, the RSPO Complaints Panel has asked for a national lawyer to give a legal opinion on allegations made.

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<sup>14</sup> See [www.rspo.org/members/status-of-complaints/](http://www.rspo.org/members/status-of-complaints/). Minutes of Complaints Panel meetings can be monitored here: [www.rspo.org/members/complaints](http://www.rspo.org/members/complaints). NB. The identities of the Complaints Panel members considering any given complaint are not disclosed, and that complainants and responding companies are not allowed to try to contact Panel members directly or otherwise influence the Panel's proceedings.

## 4. Outcomes and reflections from the RSPO complaints procedure

Perhaps the greatest benefit to communities of using the RSPO complaints procedure has been the following:

- A temporary freeze on operations on the request of the Complaints Panel;
- Official RSPO recognition of the legitimacy of the communities' concerns;
- Generating publicity to give visibility to the communities' complaints, with bad publicity also being a strong tool for getting companies to improve practices;
- Getting the company to the negotiating table with communities and their advisors;
- Improvements in company standard operating procedures and practices.

Although these outcomes can be achieved relatively quickly and will be of some benefit, a lasting protection of community land rights can take much longer, with the following factors being key:

- Active, timely and assertive monitoring, follow up and oversight from the RSPO;
- Strong, informed and unified communities;
- CSO and legal advisors providing proactive and continuous support to communities and pushing for efficient follow up from the RSPO;
- Companies willing to fully comply with their social and environmental commitments
- An enabling environment from government.

Many users of the RSPO complaints procedure have reported frustrations that their complaints are not dealt with sufficiently quickly or effectively; that the complaints process is under-resourced; that communication by the RSPO is poor; and that the RSPO is overly deferential to the interests of companies and insufficiently independent from those companies and the rest of the RSPO structure.

For instance, communities or CSOs making complaints are sometimes unclear as to exactly where the complaint stands in the procedure and the RSPO has also been accused of failing to follow the correct sequence of steps as per the complaints procedure. The Panel is also often seen as being slow to intervene even in where the consequences for community complainants are grave and urgent, and slow to assert its independence and authority over the actions of companies. Correspondingly, the Panel is often perceived as being overly quick to advise complainants and companies to enter into dialogue with the company in question and deferring any action by the Panel itself, despite the evident fact that making

progress in dialogue is often very difficult *until and unless* the Panel has made a clear decision (even on a preliminary basis) on the merits of the complaint. Such a clear decision is frequently the only incentive the community can leverage to ensure the company takes their concerns seriously, and improves prospects of productive dialogue significantly.

It is important that communities and CSOs involved in complaints are aware of these limitations, both to manage expectations and to ensure they are active in follow up with the RSPO to ensure prompt and effective progress. It is also important to note that the RSPO complaints process is currently under review and this will hopefully improve its performance in the future providing structural changes are made to strengthen the resources at its disposal and improve its independence and authority.

It is also crucial for communities and their CSO supporters or legal advisors to consider and prepare for how the company may react in response to a complaint being made against them to the RSPO. It is unfortunately common for companies to engage in 'divide and rule' tactics in order to get communities to withdraw complaints. It is important to be aware of this risk, to identify such tactics, and to respond quickly (including by alerting the RSPO and using national media). Strongly organised and unified communities are important, and CSOs and legal advisors can help strengthen capacity and solidarity.

For example, we have known companies to respond to the temporary freeze on operations required by the RSPO by dismissing large numbers of employees, with the apparent intention of coercing communities into withdrawing their complaints to protect jobs. It has also been noted that where the names of community members signing a complaint have been made public, companies have sometimes tried to offer those community members inducements or bribes (e.g. offers of jobs, motorbikes etc.) in order to get them to withdraw the complaint.

Jobs are unfortunately all too often used by palm oil companies as a tool to engineer both local and public opinion in favour of company plans. For example, jobs are often offered to community members *before* communities have had a chance to complete a full free, prior and informed consent process and agree (or refuse) a legally enforceable agreement with the company. This can cause irreconcilable divisions in communities and undermine their ability to make a coherent decision as a community.

Companies often use the promise of job generation and cite Indonesia's economic success to promote palm oil to governments. Communities, civil society and legal advisors will need to be fully informed and clear-eyed about the risks of poorly implemented palm oil projects, and the corresponding importance of ensuring best practice. A recent economic analysis of the palm oil industry<sup>15</sup> demonstrates how in Indonesia the palm oil industry has in fact failed to increase the number of rural

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15 Rhein (2015).

jobs since 1990 levels. It also shows that the palm oil industry has contributed little to Gross Domestic Product (GDP) there, while increasing Indonesia's reliance on food imports. Meanwhile, Indonesian communities are frequently dispossessed of their lands, natural resources and livelihoods, becoming reliant instead on often casual labour. This is a casualty of a prevailing tendency in the palm oil industry to rely on very cheap land and very cheap labour to maintain palm oil's competitive edge as a cheap oil.

Another risk that communities and their advisors will need to be prepared for is that community leaders known to be associated with high profile complaints to the RSPO may also be targeted by state or company security forces, prosecuted or even imprisoned. It is therefore better for communities to spread the responsibility for following up their complaints among many community members and their civil society and legal advisors, to minimise pressure on a few individuals.

Companies will also often use the media, viewing complaints as a public relations issue that can be resolved by communications alone. Companies will sometimes use the media to isolate complaining communities while engineering public support for their project by pointing to the jobs to be gained, and generating publicity e.g. highlighting company-funded community projects such as the construction of a new community centre or a new well.

## 5. Locating the RSPO complaints procedure in a broader advocacy strategy

When using a non-judicial complaints procedure such as the RSPO's it is important to recognise that no single tool is likely to be a panacea. Success will depend on consistent community support and mobilization combined with multiple complementary advocacy strategies used simultaneously or in a staggered manner. Additional advocacy strategies could include the following:

- National and international media attention and public exposure of poor practice by companies (including reference to parents and investors) and by governments.
- Lobbying elected representatives for support
- Lobbying company investors and banks, particularly other RSPO members or those with company policies concerning environmental and social issues.
- Legal cases (against the company or the government) in courts in the countries where communities are located.
- Legal cases against companies in the country where those companies are based (this may be the parent company rather than the local subsidiary).
- Making submissions to international or regional human rights law bodies charged with upholding or enforcing human rights laws.
- Using grievance procedures of International Finance Institutions such the World Bank where projects are receiving financing from such sources.<sup>16</sup>
- Making complaints using the Organisation for Economic Cooperation and Development (OECD) corporate accountability mechanism.<sup>17</sup>

Brief details of these advocacy strategies options and their advantages and disadvantages are addressed below:

**Media and bad publicity:** It is unfortunately common to find that companies will only take complaints against them seriously when there is a risk of reputational damage. Damage to reputations can affect companies' ability to raise capital, access markets and maintain the value of their stocks and shares. Bad publicity is therefore a very effective way of getting companies to see that there is a problem and this can lead to improvements in performance.

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<sup>16</sup> The Accountability Counsel's 'Accountability Resource Guide' discusses the various tools for redressing human rights and environmental violations by international financial institutions, as well as export promotion agencies and private corporate actors – see: [www.accountabilitycounsel.org/resources/arg/](http://www.accountabilitycounsel.org/resources/arg/).

<sup>17</sup> See for example the Guide developed by OECD Watch concerning the complaint procedure for use against companies registered in OECD countries: <http://oecdwatch.org/filing-complaints>.

Companies may well frequently react defensively to bad publicity, and this can make direct engagement or negotiation challenging, but then all too often companies are unwilling to engage or come to the negotiating table *without* some visible pressure first. Clearly, any information made public via the media or in NGO reports and briefings should be well researched and substantiated. Unfounded claims will undermine the credibility of those making the claims or lead to court proceedings for defamation or libel in the worst case.

Sometimes companies will accept having made mistakes and will try to generate good publicity by making high profile commitments to improve practices, e.g. through new company sustainability policies. Community advocates will need to keep a careful eye on whether those companies follow through with those commitments. When the pressure of bad publicity has been removed there is the risk that companies will no longer feel the same urgency to improve practices, and may resort back to business as usual. A long term strategy is needed to ensure strong promises are met by equally strong follow up action.

**Lobbying elected government representatives:** The effectiveness of getting the support of elected representatives is highly contingent on a country's political context of course. It is also often the case that land concessions have been granted by central government, and concession agreements may have the approval of government. Unfortunately, it is often the case that governments will automatically feel they should provide a protective 'political canopy' for private companies which takes precedence over the rights and interests of rural communities. This can lead to governments defending companies in the face of complaints from communities or civil society, or in the worst cases, oppressive use of arrest and prosecution, or threats of unemployment for community members working in the public sector, e.g. teachers or local government workers.

However in some cases, where elected representative are supportive of local communities, they can be effective advocates for the community in standing up to companies and the local or national government bodies or ministries involved. They may for example be willing and able to broker some kind of mediation process.

**Lobbying investors and banks:** Companies are of course dependant on raising capital from investors, including through issuing bonds and shares or acquiring loans from banks. Many investors and banks have their own reputations to consider, and some will have made their own policy commitments regarding the social or environmental sustainability of their investments. Communicating bad practices to investors may lead to pressure on the companies to improve practices or risk divestment or lack of access to credit.

**Legal cases in the courts of the country where communities are located:** As outlined above, it local courts may be costly, corrupt, inaccessible, ineffective or suffer prolonged delays (sometimes due to stalling tactics by companies or governments). This is often the reason why communities and their advocates seek to use non-judicial complaints mechanisms. However, this is not always the case,

and local courts are sometimes effective. At the very least, even where the odds are stacked against communities, a case in local courts can be a useful way by which community advocates can generate a focus for a wider campaign. Media and other advocacy tools can then complement that case to generate heightened pressure for change.

Likewise, having legal proceedings underway at the same time as an active RSPO complaint can be a useful tactic for communities even if the community is not confident that they will win the case in court, as a way of using the RSPO process as a platform for mediation and interim measures, with the benefit of the added pressure of court proceedings.

A further reason for at least trying to access justice through local courts is that it is often the case that appeals to international courts or human rights procedures are only admissible if the community can show that it has exhausted national remedies without success, or where remedies are simply unavailable, inaccessible or take an unreasonably long time.

In addition, taking a long view, an effective national judicial system is worth fighting for. Judicial systems do not get better by being avoided or ignored. Using courts and challenging them to uphold rights is therefore essential to developing a functional justice system.

**Legal cases in the courts of the country where companies are located:** The major advantage of doing this is where the companies are based in countries with a better judicial system than the country where the communities are located. Good judgments and their enforcement may be more realistic. Important considerations include the following:

- Not all countries accept jurisdiction for harm caused outside the country where the court considering the matter is located, so this needs to be checked with lawyers from that country. NB. European Union (EU) law does give broader jurisdictional access to the courts of EU member states for actions of companies based in the EU, even where the harm is being experienced outside of the EU.
- Companies often operate through locally based subsidiaries with a different legal identity to their parent companies. In such cases, court actions in foreign courts will need to target parent companies. This can be a challenge unless evidence shows that in fact those parents are at fault.
- Funding such cases may be a challenge, though there are legal firms who specialise in cases of these kind such as Leigh Day in the UK.
- Often such cases lead only to cash compensation. On the one hand, this is a strongly punitive measure that can be effective in encouraging companies not to behave in a way that leaves them liable for providing compensation. On the other hand, cash compensation can cause significant internal conflict in communities or be captured by community elites. Furthermore, what communities often want when their land is being used or acquired without their consent, is for the

company to give their land back rather than cash compensation for their losses, so this kind of action may not actually yield the result that communities really need to protect their land-based livelihoods, culture and food security.

**Making complaints using international or regional human rights bodies:**

At the international level there are the various United Nations (UN) complaints mechanisms, often connected to a particular instrument of international law. At the regional level, there are commissions and/or courts handling complaints associated with the regional human rights systems for Africa, the Americas and Europe.

Generally, these bodies will only take complaints concerning the behaviours of states, since human rights laws are binding on states. However, states can be held responsible for a failure to protect communities from the behaviour of companies and other third parties. In any case, when using a particular human rights law procedure, it is important to check that a particular country is a party to the relevant international law (often called treaties, covenants, conventions etc.)

The various international and regional human rights jurisdictions often also have

so-called 'special procedures' or 'special mechanisms', including special rapporteurs, independent experts or working groups, with mandates concerning particular themes or countries. They often accept complaints about specific cases, and will write to governments requesting information on issues of concern, may undertake country visits etc.

For example, the UN has a special rapporteurs with mandates relate to the right to food, housing, the rights of indigenous peoples etc. There is also the UN 'Working Group on the issue of human rights and transnational corporations and other business enterprises' which can also receive complaints and intervene directly with States, business enterprises and others. The African Commission on Human and Peoples Rights also has some relevant special mechanisms that will receive communications about specific cases, including the 'Working Group on Indigenous Populations/Communities in Africa' and the 'Working Group on Environment, and the Working Group on Extractive Industries, Environment and Human Rights Violations'.<sup>18</sup>

Some of these international law procedures will only admit cases where domestic remedies have been exhausted, and may only admit cases which have not already been handled by another international or regional law complaints procedure. These factors should be carefully checked before embarking on using any one international or regional law complaints procedure. The special procedures outlined above (special rapporteurs etc.) are a notable exception and are therefore perhaps the easiest to access.

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18 For a full list of UN complaints mechanisms see: [www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx](http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx) for, and [www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx](http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx) for information on UN special procedures. For similar information on the regional human rights mechanisms for Africa, the Americas, and Europe see [www.achpr.org/](http://www.achpr.org/) (Africa), [www.oas.org/en/iachr/](http://www.oas.org/en/iachr/) (Americas) and [www.echr.coe.int/Pages/home.aspx?p=home](http://www.echr.coe.int/Pages/home.aspx?p=home) (Europe).



The major disadvantage of using international human rights law mechanisms is enforceability of the recommendations, decisions or judgments they make, since it is entirely a question of political will whether states will respect and act on these. However, as with all these options it can be a valuable piece of the puzzle. Strong statements from influential bodies can be effective in media campaigns, and can be used to strengthen cases made using national courts or non-judicial mechanisms.

**Grievance procedures of International Finance Institutions:** All the key international finance institutions such as the institutions of the World Bank, the African Development Bank, the Inter-American Development Bank, and Asian Development Bank have their own grievance procedures, available for use by those alleging harm from projects that loans from those institutions have helped fund. Though the complaints procedures vary, this will generally include investigation reports and remedial action plans or recommendations.

Since access to loan facilities from such bodies is an important revenue stream, use of these complaints mechanisms can be a useful part of an advocacy strategy and provides a focus for a wider campaign. This is particularly helpful where governments have not shown itself willing to respond to the problem on its own, but where it may feel prepared to start listening and acting under pressure from an international finance institution. The key to any complaint is finding out what standards, safeguards, or procedural rules apply to the institution in question, and making sure that complaints clearly explain those standards or rules have been broken.

**OECD corporate accountability mechanism:** This is an option available to communities or other interested parties who wish to complain about the activities of a company operating in, or from, a country that is signatory to the OECD Declaration on International Investment and Multinational Enterprises including the OECD Guidelines for Multinational Enterprises. Governments from those countries are responsible for ensuring compliance by companies with the rules in those Guidelines.

The OECD complaints procedure is operated via the National Contact Points (NCPs) for those countries. On receipt of a complaint the relevant NCP/s will assess whether there is a case to answer, will try to mediate a resolution with the complainants and the company, and then make a final statement. Where mediation does not take place or fails the final statement can make a decision on the violations that have been alleged. Experiences of the OECD complaints procedure are variable, with some left dissatisfied by the time taken to participate in a long and drawn out mediation process. Before deciding whether to use the OECD procedure it is best to talk to others who have used the procedure before, particularly if they have done so using the same NCP. Hearing their practical experience will help in assessing the pros and cons of using the OECD corporate accountability mechanism and deciding whether it is suitable and appropriate or not.

## Conclusions

Ultimately, the most effective tools for enforcing community land rights should be the ones closest to home: protective national laws reflecting international and regional human rights and environmental laws, good governance, and effective judicial remedies. Use of the RSPO's complaints procedure can complement but should not distract from a concerted simultaneous push for systemic national level legal and governance reform.

Although the RSPO's complaints procedure is far from perfect, as the saying goes, "justice delayed is justice denied". Many communities faced with the loss of their land and destruction of their natural resources and livelihoods right now would rather have the RSPO complaints procedure than nothing at all, if only to temporarily prevent encroachment onto community lands, territories and resources, and buy time and space to find more long-term protection of community rights and interests.

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## Key RSPO documents

- Certification Systems document, 2007: <http://rspo.org/sites/default/files/RSPOcertification-systems.pdf>
- Code of Conduct for RSPO members: [www.rspo.org/resources/key-documents/membership](http://www.rspo.org/resources/key-documents/membership)
- Complaints System web link: [www.rspo.org/members/complaints](http://www.rspo.org/members/complaints)
- New Plantings Procedure, 2009: [www.rspo.org/certification/new-planting-procedures](http://www.rspo.org/certification/new-planting-procedures)
- Principles & Criteria for the Production of Sustainable Palm Oil, 2013: [www.rspo.org/file/revisedPandC2013.pdf](http://www.rspo.org/file/revisedPandC2013.pdf)
- Principles & Criteria for the Production of Sustainable Palm Oil, 2007: [www.rspo.org/files/resource\\_centre/RSPO Principles & Criteria Document.pdf](http://www.rspo.org/files/resource_centre/RSPO%20Principles%20&%20Criteria%20Document.pdf)

# Asserting community land rights using RSPO complaint procedures in Indonesia and Liberia

The complaints procedure of the Roundtable on Sustainable Palm Oil (RSPO) is one of the options available to communities threatened by the negative impacts of the palm oil industry. Drawing on direct experiences of supporting communities to use the RSPO complaints mechanism in Indonesia and Liberia, this review summarises how communities can get the most out of this procedure. Realistic outcomes include a temporary freeze on plantation development by palm oil companies while longer term solutions are negotiated.

The RSPO complaints procedure does provide a valuable tool for communities, though it is far from perfect. Given the scale of the challenge communities face standing up to the combined force of powerful corporations and states, this review advises that several advocacy strategies be pursued simultaneously to maximise chances of success. In addition, it highlights that non-judicial remedies such as the RSPO's should complement but not replace a strong parallel push for systemic national level legal and governance reform.

This note also situates the RSPO complaints procedure in the context of other options for communities wishing to challenge large-scale land deals affecting them, including use of national courts, media campaigns, regional and international human rights law procedures and the complaints procedures of major international finance institutions.

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