

The Round Table for Sustainable Palmoil (RSPO) and human rights

The latest developments in human rights and business and the
implications for the RSPO

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I.

Executive summary

Sustainable development in the palm oil sector will have to entail that the basic needs of human beings, involved in or affected by palm-oil development and operations, are met through the implementation and realization of human rights. This requires that both States and business enterprises take an active role. The latest developments in the field of business and human rights require businesses to respect human rights, even when States are not fulfilling their duty to protect human rights. This is now the consensus worldwide, laid down in the UN Protect, Respect and Remedy Framework and its guiding principles on business and human rights (GPBHR, 2011), offering internationally accepted guidelines on the responsibility of enterprises towards human rights. These guidelines are now incorporated into many other frameworks, including the IFC's and the FAO voluntary principles on the governance of land tenure.

Respect for human rights according to these guidelines means that companies must apply due diligence to avoid infringing on the rights of others, and to remedy situations where rights have been abused. This requires a pro-active approach, meaning that companies need to know and show that they respect human rights.

Using the guidance of international frameworks, this study has reviewed the policy commitment of the RSPO in the form of the Principles and Criteria (P&C) and the Code of Conduct (CoC), the due diligence processes in the P&C and the RSPO system (assessing impacts, integration, tracking effectiveness and communication) and the effectiveness of the mechanisms for remedy. This analysis has identified what can be improved in line with these international frameworks, initiatives and other emerging expectations to ensure that human rights are respected. Here is a summary of the key findings and gaps, and the most important recommendations for the RSPO.

The RSPO is considering setting up a task force on human rights. This review makes it clear that such a task force is necessary to support members in implementing human rights commitments, the recommendations are mostly directed at priorities for a task force. However, members also have individual responsibilities to respect human rights and cannot, and should not, be dependent on the RSPO or the certification mechanism.

Key findings and recommendations

1. The policy framework of the RSPO formed by the current and the reviewed Principles and Criteria and the Code of Conduct has a strong commitment on many of the human rights. However, some of the important human rights issues associated with the palm-oil sector, such as the right to food or to personal integrity and security, are not included. Vulnerable groups, including "stateless children" could also receive more attention. Therefore it is recommended to expand the P&C to cover all important human rights for the palm oil sector and also to clarify all terms and definitions and provide more guidance. This will serve four goals: (1) ensure all terms and definitions comply with international standards and are clearly defined (e.g. FPIC, fair compensation, user rights, HCVs) (2) provide growers and millers, and auditors with more practical information (3) give auditors more information to make auditing on human rights more effective (4) ensure attention is paid to vulnerable groups.

2. A human rights risk management system will be needed to prevent and address adverse impact on human rights, including legitimate tenure rights. The compliance-driven audit system nor the current social impact system is likely to capture full impact on human rights. A risk management system would enable members to develop pro-active approaches, policies and processes to mitigate this impact and diminish conflicts. The GPBHR offer guidelines to develop a risk management system to identify potential and actual human rights

impact, which can then support further impact assessments and audits. Furthermore, RSPO members could fine-tune this general risk mechanism for their own operations, supply chains and impact assessments. Consider strengthening the SIA by using elements from human rights impact assessments to fully capture potential and actual human rights impact, helping to develop appropriate measures and prevent problems from escalating.

3. The audit system could be developed to become a meaningful diagnostic starting point on human rights. The RSPO taskforce should initiate assessing the potential of the audit and certification system and provide the necessary capacity building. This includes analysing the capacity of auditors to identify human rights issues, looking at the sources used to inform the certification process (do auditors get input from stakeholders such as workers and communities and their representatives, from media, from the grievance mechanism, involvement of experts?).

4. Understanding (international) human rights principles and their relevance for the business does not come automatically. Neither is it the daily business of companies to understand human rights impact and identify appropriate action to mitigate or remediate adverse impact. Awareness raising, training and regular communication on human rights will be necessary to support companies in carrying out due diligence. This could be supported by showing members the business case for paying specific attention to human rights and establishing the right mechanisms to carry out due diligence. Buyers, retailers and investors could also play a role by investing more in building capacity on human rights in their supply chains. This should also be extended to suppliers and non-members of the RSPO. A more engaging, cooperative approach with suppliers, instead of a compliance approach, is thought to work best. The RSPO could offer a training package on human rights in the P&C, ensuring that all parties have the same understanding of the expectations expressed in the P&C.

5. Members as well as the RSPO itself will need to embed human rights commitments by integrating them into management procedures and assigning responsibilities. The RSPO taskforce could do this by starting to support members with the implementation. To be able to account for its respect for human rights, the RSPO and its members also need to track the effectiveness of measures taken to mitigate or remedy human rights impact, e.g. after the Social Impact Assessment. To ensure that human rights issues are addressed effectively, it is recommended that the RSPO monitors this on the basis of qualitative and quantitative indicators as required by the GPBHR. The RSPO should use the grievance mechanism, its feedback from external stakeholders and information from audit reports and corrective action plans in a more systematic way to measure its performance on human rights. In the case of (potential) significant human rights impact, the RSPO can support its members through root cause analysis to identify how and why the impact occurred, thereby helping the company to prevent or mitigate its continuation or recurrence. Buyers can develop indicators in collaboration with their suppliers, auditors can use indicators to measure progress. This will support a system of continuous improvement on human rights.

6. Although the RSPO is highly committed to transparency, communication on human rights might need a more pro-active approach. Members will need to be able to show that they are meeting their responsibilities in practice, not only as part of a formal reporting process, but more importantly in the form of meaningful dialogue and engagement with stakeholders. When indicators are used to measure progress, this will also facilitate the communication. For a pro-active form of communication, it is recommended that the RSPO assesses what needs to be communicated to which type of stakeholder and develop different forms that are culturally appropriate. Since formal reporting is required on severe human rights impacts, the ACOP format could ask members to show how they are addressing such an impact.

7. The grievance mechanism of the RSPO is quite advanced in comparison with other roundtables or multi-stakeholder initiatives. Since this is an important remedy mechanism dealing with human rights issues in the RSPO, it will be worthwhile to assess how effectively the grievance mechanism functions in line with criteria set by the GPBHR. This is best reviewed by a participatory review. How effective is the grievance mechanism

for the remedying of human rights impact in the eyes of the users, focussing on accessibility, equitability and transparency? The grievance mechanism also is an important source for continuous learning and improvement and should be systematically used as such.

8. Frequently, palm-oil operations are publicly associated with human rights violations. Many initiatives, guidelines and campaigns stress the importance of respecting the rights of indigenous people and rural communities. A human rights approach to land acquisitions, investments and operations is not only advocated by NGOs but also by many international bodies, including the UN, the FAO and the IFC, and global investors. Now that human rights standards and guidance are available, sustainable RSPO-certified palm oil can proceed to lead by example with a human rights approach.

2. BACKGROUND

2.1 What are human rights?

Human rights are the rights people have by virtue of being human. These rights have been laid down in several international treaties. The main reference points on human rights are constituted by the International Bill of Human Rights¹ and the core conventions of the International Labour organization². Many more treaties exist on human rights, which often cover the specific rights of vulnerable people, such as migrants, indigenous people, children or people with disabilities.

2.2 Responsibilities of companies towards human rights

For several decades now, the responsibilities of companies for complying with human rights versus the responsibility of governments in this respect has been hotly debated, since States have primary responsibility for human rights in international law. If countries have not ratified these international conventions or treaties, they are not legally binding for multinational enterprises. Although national and multinational enterprises are regulated by the laws of the countries in which they are based and in which they operate, some countries may lack the institutional capacity to enforce national laws and regulations or they may feel constrained from doing so by having to compete internationally for investment. Their home countries are often reluctant to regulate against harm done by these enterprises outside their territory. Many multinational enterprises have expressed their commitment to the standards set by international treaties on a voluntary basis, as have the members of the RSPO.

2.3 International guidelines and standards on business and human rights

Over the last two decades, many initiatives have been undertaken to develop frameworks for companies drawn from the international treaties and conventions, the most important development being the acceptance of the UN Guiding Principles on Business and Human Rights (2011), offering an internationally accepted guidance on the responsibility of companies towards human rights. Together, the following frameworks provide an authoritative set of policies and management processes that can provide a 'compass' to guide companies in meeting their social responsibilities and assuring stakeholders of the company's 'direction of travel':

1. UN Guiding principles on Business and Human Rights (the "Ruggie Principles")
2. OECD guidelines for Multinational Enterprises
3. Global Compact Principles
4. ISO 26000
5. IFC Performance Standards

A summary of these frameworks is given below.

The UN Guiding Principles for Business and Human Rights ("Ruggie principles")

The UN Guiding Principles on Business and Human Rights³ (also known as the "Ruggie Principles", hereafter referred to as: GPBHR), have become an authoritative global reference point for business and human rights since their publication in March 2011. These GPBHR apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure⁴. The core expectations of these guidelines have been incorporated in the ISO (26000), GRI and the OECD, IFC Performance standards in the development of their own guidelines.

¹ The International Bill of Human Rights consists of generally recognized human rights which are set out in the Universal Declaration of Human Rights (UDHR) and its two legally binding documents, the International Covenant on Civil and Political Rights (ICCPR) and the

² UN Guiding Principles on Business and Human Rights (hereafter: GPBHR) 12

³ UN Guiding Principles on Business and Human Rights: implementing the UN 'Protect, Respect and Remedy' Framework, proposed by the UN special representative John Ruggie, 2011

⁴ UNGP 14

Three pillars of the Ruggie Framework

1. Government: Duty to protect	2. Companies: Responsibility to respect	3. Victims: Access to remedy
The State duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication.	The corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.	The need for greater access by victims to effective remedy, both judicial and non-judicial.

Although the State's duty to protect is relevant, this study has focused on the second pillar, the Corporate Responsibility to Respect. The GPBHR's five Foundational Principles explain what the 'responsibility to respect' means, the scope of the responsibility and the policies and management processes a company should have in place. The eight operational principles for the purpose of this study will be divided into six steps (see table below), and will form a benchmark against which the RSPO's standards and system are analysed. The third pillar on the access to remedy is important for the analysis of the grievance mechanism.

Table 2 Necessary steps to meet the responsibility to respect

1. Policy commitment and embedding respect for human rights	
2. Carrying out due diligence	<ul style="list-style-type: none"> ○ Assessing actual and potential human rights impacts (principle 18) ○ Integrating and acting upon findings (principle 19) what mechanisms, procedures are in place to ensure that human rights are respected, and measures taken to mitigate and remediate negative impact ○ Tracking the effectiveness of the response to negative impact (principle 20), what elements are needed ○ Communicating how impacts are addressed (principle 21), particularly to affecting stakeholders
3. Allowing access to remedy (principles 22 en 29), what makes it effective?	

Since the UN guiding principles were published, there has been additional convergence in relation to human rights responsibilities including updated OECD Guidelines for Multinational Enterprises, European Union guidance to governments on embedding the UNGP, and enhanced International Finance Corporation (IFC) Performance Standards.⁵

OECD Guidelines for multinational enterprises

The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises cover all major areas of business ethics, including corporate steps to obey the law, observe internationally-recognised standards and respond to other societal expectations. The update of the guidelines, released in May 2011,⁶ brought them in line with the GPBHR. The update also amended the chapter on employment and industrial relations to bring it into line with the ILO MNE Declaration⁷.

The updated version has a chapter devoted to human rights, with strengthened provisions for supply chain and business relationships, set within a context of due diligence (as described in the GPBHR). The guidelines are increasingly recognized by governments as conditions for public support, such as subsidies and export credits.

⁵ EU strategy for corporate social responsibility 2011-2014

⁶ OECD (2011)

⁷ ILO Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration)

Global Compact Principles

The UN Global Compact⁸ is an initiative of the United Nations. Companies are expected to align their operations and strategies with ten universally-accepted principles in the areas of human rights, labour, environment and anti-corruption, six of which relate to labour standards and human rights⁹.

Relevant principles are:

1. Businesses should support and respect the protection of internationally proclaimed human rights; and
2. make sure that they are not complicit in human rights abuses;
3. Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
4. The elimination of all forms of forced and compulsory labour;
5. The effective abolition of child labour;
6. The elimination of discrimination in respect of employment and occupation.

Global Compact has collected and developed many relevant instruments. The Global Compact Self-Assessment Tool¹⁰ includes questions and indicators to enable companies to assess their own performance in relation to the principles. Global Compact has also collected many examples of good practice in the management of labour issues, which have been drawn from in developing measures of corporate responsibility. It also hosts the Global Compact Human Rights and Business Dilemmas Forum where many examples of good practices can be found¹¹.

ISO 26000

ISO (the International Organisation for Standardization¹²) published ISO 26000 in May 2010 as International Guidelines on Social Responsibility. Unlike other ISO standards, it is not intended for certification purposes but as guidance for its users. Two of the six core elements relate to human rights and labour practices.

ISO 26000 could become a widely-recognized instrument in the way that other ISO standards have (e.g. ISO 9000, ISO 14001). Its guidance was developed by multiple stakeholders worldwide including – exceptionally for such standards – stakeholders in developing countries. ISO guidelines consist of useful measures that companies can take to ensure respect for human rights and labour rights, including governance and specific information for certain issues (including land rights or child labour). They have also been brought in line with the GPBHR.

IFC Performance standards

The International Finance Corporation (IFC) is a member of the World Bank Group. It is the largest global development institution focused exclusively on the private sector in developing countries. The performance standards define IFC's clients' responsibilities for managing their environmental and social risks. The latest version has been fully aligned with the GPBHR, providing guidance on how to identify risks and impacts, and are designed to help avoid, mitigate, and manage risks and impacts as a way of doing business in a sustainable way. This includes stakeholder engagement and disclosure obligations of the client in relation to project-level activities¹³. The new version of the PS also include FPIC (when the circumstances described in the PS are present).

Performance Standard 1:	Assessment and Management of Environmental and Social Risks and Impacts
Performance Standard 2:	Labor and Working Conditions
Performance Standard 3:	Resource Efficiency and Pollution Prevention
Performance Standard 4:	Community Health, Safety, and Security
Performance Standard 5:	Land Acquisition and Involuntary Resettlement
Performance Standard 6:	Biodiversity Conservation and Sustainable Management of Living Natural Resources
Performance Standard 7:	Indigenous Peoples

⁸ For more information, go to: www.unglobalcompact.org

⁹ UN Global Compact web page 'The Ten Principles'

¹⁰ For more information, go to: www.globalcompactselfassessment.org

¹¹ <http://human-rights.unglobalcompact.org>

¹² For more information, visit: www.iso.org

¹³ for more information, visit: <http://www1.ifc.org/>

2.4. Other human rights initiatives in the context of agriculture and land

Several (multi-stakeholder) initiatives in agriculture have developed standards and a system for supporting these standards, usually via certification and capacity building. Some examples:

- UTZ certified (coffee, cocoa, and tea)
- Rainforest Alliance certified (coffee, cocoa, tea, and bananas)
- Fairtrade/Max Havelaar (also many agricultural crops)
- Roundtable for Sustainable Biofuels (RSB)
- Roundtable for Responsible Soy (RTRS)
- BonSucro
- Shrimp Aquaculture Dialogue (ShAD)

The Forest Stewardship Council (FSC) is another relevant initiative. It faces challenges similar to the RSPO regarding the exploitation of land for global commodities and their impact on human rights.

Fair Trade, Utz certified and Rainforest Alliance are all certification schemes for mainly agricultural products. However, they focus on small producers and workers' rights. Regarding labour rights, their indicators and guidance are more highly developed than the labour criteria P&C in the RSPO. Suggestions are given per principle in the review of the P&C. Other human rights, such as land rights, are not covered by these standards.

In 2012 a comparative review was undertaken by the Forest People Programme and the Rights and Resources Initiatives about the way commodity round tables are securing rights¹⁴. Commodity roundtables that were compared were the Roundtable on Sustainable Palm Oil, the Forest Stewardship Council, the Roundtable on Responsible Soy, the Roundtable on Sustainable Biofuels, BonSucro and the Shrimp Aquaculture Dialogue. The review focused on the following issues which are relevant for human rights: 1) the right to Free, Prior and Informed Consent (FPIC); 2) recognition of legal and customary rights (particularly in regard to land and natural resources); 3) conflict resolution mechanisms and 4) protection and management of areas containing high conservation values including areas crucial for environmental services, livelihoods and cultural identity.

In the analysis of the P&C of the RSPO in chapter 3, this comparison is used to suggest some improvements derived from these other initiatives.

¹⁴ Securing rights through Commodity Roundtables? A comparative review, Sophie Chao, Marcus Colchester, Norman Jiwan, 2012

3. Gap Analysis of the RSPO P&C and system elements

This analysis has the GPBHR as its starting point, since they provide most concrete guidance on the processes and mechanisms a company should have in place to ensure that human rights are respected. These are divided into three main steps.

1. Policy commitment and embedding respect for human rights (principles 16 and 23)
2. Carrying out due diligence (principle 17) by:
 - Assessing actual and potential human rights impacts (principle 18)
 - Integrating and acting upon findings (principle 19)
 - Tracking the effectiveness of the response (principle 20)
 - Communicating how impacts are addressed (principle 21)
3. Allowing access to remedy (principles 22 en 29)

The Plan, Do, Check, Act framework is highly applicable to the steps that are necessary for implementing corporate responsibility to respect.

Figure 1 Human rights due diligence and PDCA framework¹⁵



Technical guidance from other widely accepted standards or initiatives in agriculture that could form benchmarks for the RSPO is also taken into account. For useful technical guidance for indicators on labour and human rights, the ILO Conventions in combination with ISO26000, Global Compact Self Assessment tools, and agricultural initiatives like Utz certified or Rainforest Alliance have been consulted. The FAO voluntary guidelines on governance tenure and the reports of Oliver de Schutter, UN special rapporteur on the right to food, in combination with the IFC Performance standards, specifically written for investors, provide useful guidance for stakeholder involvement and land rights.

¹⁵ Based on figure in the Guidance for the Oil and Gas Sector on Implementing the UN Guiding Principles on Business and Human Rights, European Commission Human Rights Sector Guidance Project, draft version for publication 30 Nov. 2012-1 Feb 2013

The principles and criteria (based on the 2012 consultation version), and the code of conduct for all members provide the basis for implementation. They embody the policy commitment that its members expect from millers and producers, and provide guidelines for the management procedures that should be in place. Additionally, it is an instrument enabling auditors to assess the extent to which compliance is practised. The system elements of the RSPO provide the processes to support members in their implementation.

3.1 Implementing the responsibility to respect: Policy commitment and embedding respect

What the Guiding Principles Require

1. A policy commitment is a statement approved at the highest levels of the business that demonstrates the business' commitment to meeting its responsibility to respect human rights, and that communicates this internally and externally.
2. The statement should trigger internal implementation through appropriate operational policies and procedures that are necessary to meet the commitment in practice, and are essential for embedding respect for human rights throughout the business, including in its values.

Policy commitment in the principles and criteria

Committing to respect human rights

The new criterion 6.x in the 2012 consultation version, requires the growers and millers to respect human rights and to document and implement this policy. This makes clear that simply having a policy statement is insufficient.

This criterion could be supported by some indicators that serve as useful indicators both for the company and for the auditor to verify whether the policy is implemented (these indicators could be used for all policies): Indicators based on the GPBHR 16 are, that the policy should:

- be approved at the most senior level
- be based on internal and external expertise
- stipulate expectations of personnel, business partners, and suppliers
- be publicly available
- be communicated internally and externally to all relevant parties
- be reflected in internal policies and procedures

Criterion x.x (in the 2012 consultation version) 'commitment to ethical conduct', and 2.1 'compliance with national, local and international laws and regulations' are also closely related to human rights. A separate article gives human rights the necessary emphasis and is in line with the international principles, recognizing the fact that respect for human rights entails more than simply compliance with rules and regulations. However, it should also be clear that human rights are laid down in national, local and international laws and regulations and that ethical conduct is a prerequisite for human rights.

The P&C itself are obviously informed by experts and stakeholders, another requirement of the GPBHR.

Besides the newly proposed general human rights commitment 6.x, several other criteria refer (both implicitly and explicitly) to specific international human rights.

Reference to internationally recognised human rights

As the GPBHR confirm, business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, and they are required to respect all such rights, in any case the International Bill of Human Rights¹⁶ and the ILO Fundamental Rights¹⁷ (GPBHR12). Depending on circumstances, business enterprises may need to consider additional standards. Companies should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where

¹⁶ This Bill consists of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights

¹⁷ The principles concerning fundamental rights are set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

their human rights are adversely impacted. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; women; national or ethnic, religious and linguistic minorities; children; persons with disabilities; and migrant workers and their families¹⁸.

However, not all human rights are relevant for every company or every sector. The RSPO needs to know which human rights are most relevant due to the fact that they are at greatest risk for the sector. These rights need to have the focus of heightened attention¹⁹ and therefore should be covered by the P&C.

In the table below, human rights identified²⁰ most important for the palm-oil sector are compared to the coverage by the RSPO:

Table 3 Human rights in the palm-oil sector

Important human rights for palm-oil sector	Covered by the RSPO
Right to food	No
Land rights	Yes (criterion 2.2)
The right of those with customary rights to lands and other resources to give or withhold their free, prior and informed consent to operations planned on their lands	Yes (criterion 2.3)
The right to personal integrity and security	No
The rights of smallholders to capture a fair proportion of the value of their products; to represent themselves through their own freely chosen representatives or organisations; to organise freely as cooperatives or other farmers' organisations to improve their access to capital, technical assistance and markets	Yes
Labour rights of local, indigenous agricultural workers and migrant workers	Yes, although no specific provisions for migrants and indigenous people as labourers
The right to equal treatment or the prohibition of discrimination, particularly for women	Yes (criteria 6.8 and 6.9)
The rights of children, particularly stateless children born out of wedlock in plantations due to unjust laws that prevent plantation workers from marrying.	Only child labour is prohibited
Right to access to justice	No
Need for dispute resolution mechanisms in line with international human rights standards, including the UN Declaration on the Rights of Indigenous Peoples	Yes (criterion 6.3)
Access to information, freedom of expression and freedom of assembly	Yes (criterion 6.6)
Right to self-determination ²¹	No
Right to development (here understood as transparency and accountability in the use of revenue) ²² . It is essential that land leases or purchases are fully transparent, and that the revenues are used for the benefit of the local population.	No

The right to food is seen as an important human right to be acknowledged for the sector as this would be in line with the new developments on agriculture and human rights (further elaborated in chapter 4). Also other commodity roundtables, such as the RSB and Appendix II of the ShAD include food security explicitly. At the very least, the potential impact on these rights should be assessed as part of the social impact assessment, as well as the rights of several vulnerable groups, such as children, migrants, indigenous people or indigenous agricultural workers, or women.

¹⁸ Commentary with GPBHR 12

¹⁹ Commentary with GPBHR 12

²⁰ The Bali Declaration on Human Rights and Agribusiness in South East Asia identified the most important human rights. This is based on the international meeting of South East Asian Human Rights Institutions on 'Human Rights and Business in Bali 2011' focused on the challenges of ensuring respect for the rights of indigenous peoples and rural communities in the context of a rapid expansion of agribusiness, notably the palm-oil sector, while recognising the right to development and the need to improve the welfare and situation of indigenous peoples and rural communities.

²¹ Special rapporteur on the right to food, Olivier De Schutter, identified these in his report on large-scale land acquisitions and leases: a set of minimum principles and measures to address the human rights challenge, 2009

²² idem

The P&C do not give guidance in cases where the domestic situation makes it difficult to meet the responsibility to respect international standards on human rights, due to conflicting regulations. In this case companies should 'seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements'. Business enterprises should be able to demonstrate their efforts to respect the principles of internationally recognized human rights as much as possible²³.

Labour rights

The P&C cover several labour rights in Criteria 6.5-6.9. These include the four fundamental principles of the ILO. Since the conventions of the ILO do not specifically apply to companies, many international frameworks and initiatives²⁴ for the private sector have adapted these conventions into principles and indicators for companies (Global Compact, ISO 26000, OECD guidelines, SAI). The ILO helpdesk has developed specific guidance for plantation workers based on the ILO Conventions²⁵. SMETA (Sedex Members Ethical Trade Audit Best Practice Guidance) also offers indicators on labour rights. The Human Rights guidance per P&C document contains suggestions for each right to have more meaningful indicators for assessing whether these rights are respected. More sophisticated indicators for labour issues will be needed for auditors, since labour rights are difficult to assess in an audit. Workers are very dependent on their employer and are often not willing to talk freely about their rights not being respected.

Community rights

The rights of surrounding communities (including indigenous people) are often affected by palm oil operations. The P&C consist of several criteria that aim to ensure that those rights are respected.

- **Land rights and conflict resolution** (criterion 2.2)

Criterion 2.2 requires growers and millers to show that they have the right to use the land and that it is not legitimately contested by local people who can demonstrate that they have legal, customary or user rights.

While the government has an important role to play in protecting these land rights, the GPBHR point out that the responsibility of business enterprises to respect human rights 'exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations²⁶.

This assumes a pro-active role by business enterprises to assess who has rights to the land. People have rights, even if they do not claim them, which often is a matter of capacity. Therefore companies need to ensure that they know who has a legitimate right to the land. This is also confirmed by the FAO voluntary principles for the responsible tenure governance²⁷. An indicator that could be added is 'as part of the history of land tenure, the company should be able to show it has recognised and respected existing rights'²⁸. Some indicators are suggested in recommendation 5.2. This would reverse the burden of proof. Local people will not have to demonstrate that they have legal, customary or user rights, and business enterprises should be able to show there are no local people with such rights.

"Non-State actors should acknowledge that land, fisheries and forests have social, cultural, spiritual, economic, environmental and political value to indigenous peoples and other communities with customary tenure systems²⁹.

Additionally, the RSPO requires members to prove the absence of conflicts, and where conflicts exist, members have agreed with parties involved on an acceptable conflict resolution process (as described in criteria 6.3 and 6.4). It is not clear which steps in conflict resolution are a sufficient basis for certification.

²³ GPBHR 23 and commentary and ISO 26000 4.7

²⁴ including OECD guidelines, ISO26000, guidance material of GC.

²⁵ http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_116346.pdf

²⁶ commentary with UNGP 11

²⁷ The new FAO voluntary guidelines on the governance of tenure, 2012 (www.fao.org/nr/tenure), provide useful guidance for land rights. Specifically about the responsibility for business enterprises in principle 3.2

²⁸ In 2010 the FAO, together with IFAD, UNCTAD and the World Bank Group had already formulated some basic principles that should be taken into account when investing in land. The first principle is that 'existing rights to land should be recognized and respected.'

²⁹ FAO voluntary guidelines

Some suggestions from other commodity round tables³⁰:

- The RSB requires that 'land under legitimate dispute shall not be used for biofuel operations until any legitimate disputes have been settled through Free, Prior and Informed Consent and negotiated agreements with affected land users' (Criterion 12a.1).
- The RTRS requires that 'in areas with traditional land users, conflicting land uses are avoided or resolved (Principle 3) and that 'in the case of disputed use rights, a *comprehensive, participatory and documented community rights assessment* is carried out' (Principle 3.2.1). Furthermore, Principle 4.4.2 requires that 'there is no conversion of land where there is an unresolved land use claim by traditional land users under litigation, without the agreement of both parties'.
- The FSC states that 'appropriate mechanisms shall be employed to resolve disputes over tenure claims and use rights. The circumstances and status of any outstanding disputes will be explicitly considered in the certification evaluation.
- The ShAD requires a timeline for conflict resolution: 'At least 50% of the conflicts shall be resolved within one year from the date of being filed, and a total of 75% in the period between two successive audits' (Indicator 3.2.2).

○ **Customary rights and FPIC** (criteria 2.3)

The value of customary rights is confirmed in several international standards, often in relation to indigenous people. Additionally, the principle of free and prior informed consent is now widely used by institutions such as the FAO, the World Bank, IFC and several other international multi-stakeholder initiatives. Although the RSPO criteria also require FPIC, it does not refer to international standards and does not provide indicators and guidance for companies and auditors. Although the reference to the FIPC guide Forest People Programme is very useful, it is unclear to what extent it is used and read by companies and auditors, now that it is not included in the mandatory principles, criteria and indicators themselves?

For example, the concept of 'Free' consent, understood as consent given free of coercion or manipulation (e.g. without involvement of security forces), is not explicitly stated in the P&C. Some other standards on commodities at least refer to this in the guidance (FSC and RSB).

The right to FPIC and methodologies to respect this right are elaborated in the guidance of a number of standards, albeit not in the mandatory principles, criteria and indicators themselves.

Another question concerns whose consent should be obtained. The RSPO mentions indigenous peoples and local communities, while other standards mention land owners, users and stakeholders (RSB) and a right of traditional owners (RTRS). This could be solved by making the company responsible for identifying the rights holders, in line with the newest developments.

This would mean that finding out who lives in or makes use of the areas or has (legal or customary) entitlements in these areas is part of the risk assessment and the impact assessment. This is required by the ShAD for example.

○ **Fair compensation** (criterion 6.4 and indicators 6.4.1 and 6.4.2)

The indicators require a procedure for calculating and distributing fair compensation. More guidance is needed about conditions for fair compensation. Again this should be based on international standards as this is an integrated part of FPIC³¹. The guide for companies on FPIC also gives further guidance on compensation. IFC performance Standards also contain useful indicators³².

○ **Representation** (principles 2.3 and 6.4)

Representation is another important element of negotiations between indigenous peoples (or other

³⁰ Securing rights through Commodity Roundtables? A comparative review, Sophie Chao, Marcus Colchester, Norman Jiwan, 2012

³¹ United Nations Declaration on the rights of Indigenous People, art. 28

³² IFC Performance standard 5

communities) and the company, which should be based on international standards³³. The criteria and indicators do not clarify how companies know if they are negotiating with representative organisations or how auditors can verify this.

Some indicators derived from international standards are:

- Representatives should be chosen by the people affected in accordance with their own procedures
 - Companies must respect the choice of the communities to decide who represents them.
- **Social high conservation values (HCVs)** (principles 7.1 and 7.3)
- The principles protect high conservation value areas. Although the guidance indicates that these can also be social HCVs, these are not specified in the criteria, indicators or guidance. Definitions of HCVs were included in the annex of the 2007 version of the P&C, based on the definitions of FSC. HCVs 5 and 6 are closely related to human rights related to land rights and the rights of indigenous peoples. To be considered as an HCV, the definitions require the areas to be fundamental or critical to these rights. It is not clear from the P&C when these are regarded as such. Indicators on the involvement of communities to identify HCVs are lacking. When HCVs are identified, it is not clear to which extent communities can co-manage HCVs and to which extent traditional knowledge and customary practices of natural resource management are treated as an essential dimension of HCV management.

Policy commitment for all members

As leading document for all members of the RSPO, the Code of Conduct (CoC) refers to the requirement to implement the P&C. *Members to whom the P&C do not apply directly will implement parallel standards relevant to their own organisation, which cannot be lower than those set out in the P&C (3.2)*. This means that all members of the RSPO, when the new P&C are endorsed, indirectly express their commitment to respect international human rights. An explicit commitment in the CoC would be more in line with the GPBHR.

Communication and integration by members

It is important that all members fully understand the P&C and the CoC to be able to communicate it internally and externally. The CoC requires members to ensure that they allocate sufficient resources and personnel (3.3. and 3.4) to ensure implementation. Members are also required to actively and constructively communicate the roundtable process and the implementation of projects. Whether members are actually doing this and particularly on the human rights part, does not seem to be monitored. From the annual communication of progress, some growers and traders consider 'educating and guiding customers and suppliers on the RSPO' as a key action. Also the consumer goods manufacturers mention undertaking internal palm oil sourcing policy reviews, issuing responsible sourcing guiding principles and standards for suppliers and produced a supplier guide. Does this include education on human rights?

Integration further requires that members have actual management processes to implement the policies. It seems that the RSPO is not making an analysis of the ACOP, which would give an insight into the management processes to implement the policies in general. It is therefore not possible to get an insight into specific management processes on embedding human rights policies.

Policy embeddedness in the RSPO system

The RSPO system itself does not provide further information, guidance or training on human rights policies. For some topics, special working groups or task forces have been set up. Under these groups, more support and guidance is given for the implementation. The group that has most relevance for human rights is the Biodiversity and High Conservation Value Group. Human rights are part of the social high conservation values. This group provides guidance and support to RSPO members. It seems however that human rights have received little attention in this group so far. Concluding then, so far the RSPO has not yet been able to embed human rights in its structure. Since many disputes that the RSPO is facing are concerned with or related to

³³ United Nations Declaration on the rights of Indigenous People, art. 18, ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, art. 6 and 7

human rights, a pro-active and supportive approach to support members may be worthwhile and will help companies prevent and address conflicts more effectively.

Main findings and gap analysis policy commitment and embeddedness

Table 4 gap analysis policy commitment and embeddedness

Acknowledgement for potential impact on food security or the right to food, the right to personal integrity and security, right to access to justice, right to self-determination and right to development is lacking
<p>Regarding the impact on communities, the principles and criteria are unclear on several points and do not make use of international standards for more clear definition and guidance:</p> <ul style="list-style-type: none"> • ‘Legitimately contested’ land should be defined clearly and should be identified by a risk management system. • Neither the criteria nor the indicators give clarification on what ‘FPIC’ or ‘fair compensation’ is and how it should be obtained. The status of the guide on FPIC, which gives guidance on these matters, is unclear. • The indicators and guidance do not clarify how companies can be sure they are negotiating with real representatives of the affected stakeholders. • The definition of the HCVs should be part of the principles and criteria. For the social HCVs, the indicators should add that their identification cannot be done without the participation of local communities. Communities also need to be involved in deciding on compensation or in co-managing the HCVs. •
The human rights commitments in the P&C have not yet been fully embedded in the RSPO system. Whether members have embedded the policies in their management processes is not monitored by the RSPO.

3.2. Human rights due diligence process

Business enterprises need to know and show that they respect human rights. They cannot do so unless they have certain policies and processes in place³⁴.

It is through human rights due diligence that an enterprise identifies the information it needs in order to understand its specific human rights risks at any particular point in time and in any particular operating context, as well as the actions it needs to take to prevent and mitigate them. The process should include:

1. assessing actual and potential human rights impacts,
2. integrating and acting upon the findings,
3. tracking responses,
4. and communicating how impacts are addressed

³⁴ Commentary with GPBHR 15

Impact assessment

What the Guiding Principles Require

- *Businesses should identify and assess any actual or potential adverse human rights impacts with which they may be involved through their own activities or as a result of their business relationships.*
- *An assessment should cover adverse human rights impacts that the business enterprise may **cause** or **contribute** to through its own activities, or which may be **directly linked** to its operations, products or services by its business relationships.*
- *It is important that the company consults with relevant stakeholders, especially potentially affected groups and relevant experts.*
- *Human rights risks to people should be the focus, as distinct from risks to the business itself (although the two are increasingly related).*
- *When setting priorities, the risks should be ordered according to where (e.g. in which countries) the risk of adverse impacts is most significant; companies should factor in their suppliers here as well.*

Why does this matter?

Companies usually ask why they should do a human rights impact assessment, when they are already performing social impact assessment. Pro-actively managing human rights risks and impact provide a business with the opportunities to³⁵:

- Develop pro-active approaches to mitigating any problems, which can diminish conflicts
- Understand where the company lags and has gaps, in relation to human rights due diligence
- Develop appropriate policies, processes and systems to add to the existing company approach
- Develop a systematic approach to the management of human rights risks and impacts
- Develop relevant community projects based on identified risks and impacts, and local need

Since stakeholder engagement and involvement is key to human rights due diligence, it is important to realize the benefits, also for the company, to whom it provides an opportunity to³⁶:

- Manage expectations and potential misinformation related to the HRIA process
- Clarify the key human rights risks and impacts associated with the business activity
- Verify, validate, or amend the company's assessment on key (factual and perceived) human rights risks and impacts
- Foster good relations by encouraging all types of opinion to be raised and continuous communications
- Work in partnership with stakeholders to develop mitigating actions (if applicable)
- Find creative solutions to addressing local problems
- Secure the social licence to operate
- Help legitimise the HRIA process and ensure buy-in from key stakeholders
- Ensure a comprehensive monitoring and evaluation of the company's performance addressing human rights risks and impacts

Below we see how a human rights impact assessment can be integrated into the existing impact assessment system.

³⁵ Guide to Human Rights Impact Assessment and Management (HRIAM), International Business Leaders Forum (IBLF), International Finance Corporation (IFC) in cooperation with Global Compact, 2010 (www.ifc.org/hriam)

³⁶ www.ifc.org/hriam

Assessing human rights impact in a social impact assessment

It is a fact that there can be significant overlaps between an HRIA and other impacts and risks assessments that often consider some human rights issues. A reliance on an existing risks and impacts assessment without considering human rights in a comprehensive and systematic way may leave the company exposed to a host of hidden and nascent human rights issues that may develop into significant human rights risks (including legal, financial and reputational) for the company, its investors and its shareholders in the future.

According to the GPBHR, the human rights assessment process typically includes:

- Assessing the human rights context prior to a proposed business activity
- Identifying who may be affected
- Cataloguing the relevant human rights standards and issues
- Projecting how the proposed activity and associated business relationships could have adverse human rights impacts on those identified
- Assessing risks to people, not only to the company

To ensure that the current Social Impact Assessment (SIA) is adequately addressing human rights, the RSPO can ask itself the questions in table 5³⁷:

Table 5 Key questions to review the SIA

- Taken together, does the SIA leave any human rights risk areas uncovered?
- Does the SIA consider risk to human rights, not just risk to the company?
- Does the SIA identify predictive behaviours associated with typical activities or actions that are likely to lead to human rights impacts?
- Does it consider contextual risk arising from gaps in the regulatory framework (e.g. related to recognition of informal land title) or from conflicts between national and international standards?
- Does it capture the risk that certain activities will heighten stakeholders' vulnerability to adverse human rights impacts?
- Is it informed by meaningful consultation with potentially affected stakeholders or their representatives?
- Does someone involved have a holistic view of how human rights risks are captured and addressed?
- Is it undertaken regularly?

It would be worthwhile to analyse how the current practice of social impact assessment required by the P&C is functioning and how it could be strengthened to include human rights. This would help companies to address issues at an early stage and prevent many conflicts.

Impact assessment in the Principles and Criteria

The RSPO principles require a social impact assessment (criteria 6.1 and 7.1). To ensure human rights are fully captured, a more systematic mapping of potential rights holders is needed, despite the reference to engagement, consultation and negotiation with potentially affected stakeholders in several places in the P&C. The rights of vulnerable groups need particular attention (women, migrants, children, indigenous people, etc.) This can best be done when the relevant human rights standards and issues are used as a starting point.

Criteria 6.1. requires an impact assessment when aspects of plantation and mill management have social impact? How do they know? It is not clear when a social impact assessment as meant in criteria 6.1 is deemed necessary? It is not clear either whether the two-yearly review of the plans as required includes a new impact assessment. Criterion 7.1 requires an impact assessment prior to new planting or operations, or expanding existing ones. According to the GPBHR, to assess the impact on human rights the assessment should be undertaken regularly³⁸, at least prior to a new activity or relationship, prior to major decisions or changes in the operation or in response to, or anticipation of, changes in the operating environment (e.g. rising social

³⁷ Guidance for the Oil and Gas Sector on Implementing the UN Guiding Principles on Business and Human Rights, European Commission Human Rights Sector Guidance Project, draft version for publication 30 Nov. 2012-1 Feb 2013

³⁸ UNGP 18 commentary

tensions) and periodically throughout the life of an activity or relationship.

Impact assessment in the RSPO system

The RSPO does not use a risk assessment system to identify potential impact on human rights. The certification system can be seen as a means of assessing the actual impact on human rights, in the form of non-compliances with the principles and criteria. Therefore it is relevant to understand how the certification system functions in assessing human rights impacts. This is beyond the scope of this study however. In general, it is known that there are some limits to auditing when this involves gaining a fair understanding of the impact on social issues. Audits can serve as a tool for identifying current shortfalls in standards, but they are only ever a snapshot in time. Even then, for audits to be focussed on seeking the truth and not just be a check-box exercise, it is important to consider the quality and credibility of auditors. They need to have the knowledge and the time to be informed not only by the management, but also by workers, trade unions, NGOs and community organisations. They also need time to build trust with workers and communities, which requires specific skills that not all auditors possess.

Human rights impact assessment is not only important for growers and millers, but for all members of the RSPO to show their respect to human rights. Buying certified palm oil will not automatically mean that a member respects human rights. All companies, including buyers and traders, retailers and investors, have to ensure that they do not unwillingly cause or contribute to human rights violations in their operations and relationships, and must develop processes to ensure they prevent and mitigate risks or remedy actual impact (GPBHR 18). Members could for example look at their relationship with the government and use their influence to prevent or address negative impact.

The following tools provide helpful guidance for a Human Rights Impact Assessment:

- For an overview: http://www.csreurope.org/data/files/csreurope_hria_paper_reviewed2.0.pdf
- <http://www.guidetohria.org> (developed by the International Business Leaders Forum and the IFC)
- Human Rights Compliance Assessment by the Danish Institute for Human Rights (<https://hrca.humanrightsbusiness.org/>)
- Human Rights Matrix by the Business Leaders Initiative on Human Rights <http://www.humanrights-matrix.net>

For human rights impact assessment, stakeholder engagement and consultation are essential.

Human rights due diligence is about people. It reflects the entitlement of every human being to be treated with dignity. It therefore involves relationships – between the enterprise and those whom it may impact³⁹.

Has the RSPO ever assessed how these function in practice? Probably members and stakeholders would benefit from awareness raising of the importance of stakeholder engagement and guidance how this could be implemented.

Useful guidance:

- See the FAO voluntary principles on tenure governance for further guidance and indicators. http://www.fao.org/fileadmin/user_upload/nr/land_tenure/pdf/VG_en_Final_March_2012.pdf
- HRIAM for practical guidance on how to identify stakeholders, how to analyse stakeholders and how to engage with stakeholders. http://www1.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Guide+to+Human+Rights+Impact+Assessment+and+Management
- IFC Performance standard 1 advises implementing a stakeholder engagement plan scaled to the project risks and impacts. http://www1.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES

³⁹ Corporate Responsibility to respect, Interpretative Guide, UN Office of the High Commissioner for Human Rights, 2011

Main findings and gap analysis impact assessment

Table 6 Gap analysis impact assessment

Assessing risks on human rights impact is not included in the RSPO system and neither the audit system nor the social impact assessment seem to capture these risks.
The social impact assessments required are insufficient to capture the impact on human rights: <ul style="list-style-type: none">○ Not all human rights issues that are relevant for palm oil are included in the P&C and therewith in the impact assessment○ Systematic mapping of potential rights holders and other stakeholders seems to be lacking○ It is unclear whether stakeholders are truly engaged in the process to assess impacts○ Social impact assessments are not done regularly○ It is unclear whether contextual risks are considered or information is used from the RSPO grievance mechanism or the grievance mechanisms at company level, or information from media or NGOs
It is not likely that the audit system is able to capture the impact on human rights, it needs to be assessed how it functions and where it could be strengthened to become a meaningful diagnostic tool to capture impact on human rights, if even as a snap shot.

Integration and taking appropriate action

What the principles require

To address adverse human rights impacts, businesses should:

- integrate the findings from their impact assessments across relevant internal functions and processes
- take appropriate action to prevent and mitigate the impacts identified
- have the internal decision-making, budget allocation and oversight processes in place to enable effective responses.

Why does it matter?

Often impacts are not assessed by those who control the decisions and actions that can prevent, mitigate or remediate impacts. Therefore it is important to involve decision makers and others who control the actions to identify and implement solutions. Managing human rights risks effectively means being able to respond speedily and easily. This can make a significant difference. It not only involves embedding the policy, making everybody understand the implications for their work, assigning responsibilities and providing training, it also involves the actions taken after a particular impact is identified. This means that somebody in the enterprise needs to be involved in addressing it and securing effective action. When this is clearly defined, the potential for timely and sustainable response is greater, and human rights risks are reduced.

Integration according to the Principles and Criteria

Who checks whether the plans for avoidance and mitigation (6.1.3) that need to be developed after the impact assessment or the new planting procedure are appropriate to address adverse human rights impact?

Procedures in the RSPO to ensure human rights are respected

Integration obviously is important at company level. However, it goes beyond the scope of this study to analyse the integration in RSPO members.

The members of the RSPO have set up a number of procedures that can be relevant for the integration of human rights.

- a) The certification procedure can help to identify issues and agree on follow-up.

Compliance auditing alone is insufficient to achieve improvements on issues of social performance⁴⁰. To be able to assess how this is functioning in relation to human rights, the following questions need to be answered. What happens when ‘non-compliances’ are found? What action is taken to ensure that human rights issues are mitigated or remediated? Does the auditor check whether the company has procedures in place to address these issues? Does the auditor know who is responsible within the company? Who determines which action is appropriate for remediation? When is certification denied?

b) Training

Training is needed so that companies understand the corporate responsibility to respect human rights and to identify the oversight processes that are needed to enable an effective response. Training so far is mainly directed at growers and does not include human rights. Wild Asia is apparently offering training to auditors, companies and consultants on the P&C. It is unclear whether human rights is part of this training and whether this training is mainly directed at Malaysian players. Is it therefore sufficient to cover training needs on human rights?

c) The dispute settlement system and grievance panel

The dispute settlement system aims to ‘provide a means for achieving fair and lasting resolutions to disputes in a more time-efficient and less bureaucratic and/or legalistic manner, while still upholding all RSPO requirements including compliance with relevant legislation’. It is mainly meant for resolving disputes around land (FPIC, customary rights etc.). With this mechanism it seems the RSPO provides mediated support to decide on what action is appropriate to mitigate and remediate negative impact.

d) The implementation plan

This plan should result from an impact assessment as part of the ‘New planting procedure’. It should involve actions to mitigate and remediate human rights impacts identified. This should include clarifying who is responsible and identifying internal functions and processes to address human rights. Does this happen in practice?

e) Communication procedure

In the communication of progress, members could report how they integrate human rights and what processes they have set up to address human rights. It is unclear whether this is happening.

Main findings and gap analysis integration and taking appropriate action

Table 7 Findings and gap analysis integration and taking appropriate action

The principles and criteria do not give guidance on how to verify whether companies are integrating plans to prevent, mitigate and remediate human rights impacts well into the business
Training and capacity building for companies and auditors do not seem to include human rights. Do companies and auditors know what is appropriate action on human rights?
The RSPO does not have specified responsibilities for support on human rights in its system and does have an oversight of how well human rights are integrated or what forms an effective response. No qualitative or quantitative indicators are set.

Tracking effectiveness of the response

⁴⁰ Notably, professor Richard Locke of MIT’s Political science Department has conducted substantial research on the compliance auditing approach, including ‘Virtue out of Necessity?: Compliance, Commitment and the Improvement of Labor Conditions in Global Supply Chains, Politics & Society, Vol.37, no.3 (Sept. 2009)

What the principles require

To verify whether adverse human rights impacts are addressed adequately:

- Companies need to track the effectiveness of their responses
- Tracking should be based on:
 - appropriate qualitative and quantitative indicators
 - internal and external feedback
 - direct feedback from affected stakeholders
 - variable sources of information (experts, grievance mechanism, etc.)

Why does it matter?

Recognising that “what gets measured gets managed”, tracking human rights issues and responses is an essential part of the ongoing management of a company’s impacts⁴¹:

- It can help identify trends and patterns, highlighting where there are repeat problems that may require systemic change; this provides senior management and others with the “big picture” and it also highlights best practices that can be disseminated across the enterprise to further reduce risk and improve performance.
- It can also identify good practices that can be shared more broadly within the business to continuously improve performance.
- It is fundamental to the company’s ability to account both internally and externally for its success in respecting human rights (external communication is discussed below). By maximising the information it has about its human rights performance, the enterprise enables robust internal accountability and lays the basis for whatever external communication is required or advisable.

Tracking effectiveness means more than monitoring compliance. It is about the effectiveness of measures taken to mitigate, prevent or remediate adverse human rights impact.

Drawing on relevant internal and external sources helps to derive as accurate a picture as possible, and should include both quantitative and qualitative feedback. Stakeholder engagement, especially potentially affected stakeholders, and information from grievance mechanisms, is important in this respect.

Defining quantitative indicators offers precision and can be more easily integrated into, or correlated with, existing systems. However, because respect for human rights is about impacts on people, qualitative indicators will always be important.

Tracking in the Principles and Criteria

The criteria require that plans for avoidance and mitigation of adverse impact are developed in the form of management planning and operational procedures on the basis of the impact assessment and regular monitoring and continuous improvement (6.1 and 7.1). It is unclear how the effectiveness of these plans to address human rights issues is tracked. The GPBHR⁴² provide guidance, which could be used for further indicator development and guidance.

RSPO systems to track the effectiveness of the response

The practice of the RSPO seems to be that the audit procedure identifies major and minor non-compliances. A corrective action plan is discussed with auditors. The system does not seem to collect data to check whether these corrective action plans indeed lead to improvements on human rights. Social audits can provide useful and necessary “snapshot” data about a company’s performance; however, consistent evidence suggests that

⁴¹ Guidance for the Oil and Gas Sector on Implementing the UN Guiding Principles on Business and Human Rights, European Commission Human Rights Sector Guidance Project, draft version for publication 30 Nov. 2012-1 Feb 2013 and Corporate Responsibility to respect, Interpretative Guide, UN Office of the High Commissioner for Human Rights, 2011

⁴² Particularly principles 19 and 20

they often miss issues due to their brief superficial nature, suppliers' manipulation of records and worker self-censorship in audit interviews⁴³.

No other review seems to be available to track how the RSPO or its members responded to potential negative impact and to establish its effectiveness to prevent, mitigate or remediate the impact. It is unclear how the data originating from the grievance mechanism is used to measure the effectiveness of measures taken.

The RSPO has made a cost-benefit analysis for the impacts of the RSPO certification, which seems an important analysis to make to ensure the costs were worthwhile. However the analysis mainly looked at the benefits for the companies themselves, such as reduction in labour turnover, a major reduction in conflicts (which saves a lot of money) and improved relations with stakeholders. These benefits are no doubt also beneficial for the people involved and this could be reviewed as well.

At the company level, it is often mentioned that it is difficult to develop quantitative indicators to measure performance or the effectiveness of measures on human rights. However, since many companies track the number of health and safety incidents, or the number of days since the last health and safety incident for employees, an equivalent metric could be developed for incidents affecting local communities. A combination with qualitative indicators based on feedback from the communities would provide valuable information.

Main findings and gap analysis related to tracking effectiveness

Table 8 Findings and gap analysis tracking effectiveness of the response

It is unclear how the benefits and positive impact for the people involved in or affected by palm oil operations are taken into account when the results and progress of the RSPO are measured. Is continuous improvement defined as improvements for people?
The audit system does not track the effectiveness of the response/improvement plans adequately. Can the RSPO develop qualitative and quantitative indicators to measure improvements?
It is unclear how data from the grievance mechanism is providing feedback on tracking the effectiveness of improvement activities.
If the RSPO and members do not track how effective measures are in mitigating or remediating potential or actual human rights impact, it will be difficult to account for its respect for human rights.

Communication and reporting

What the principles require

- Companies need to be prepared to communicate externally in order to account for how they address their impacts, particularly when concerns are raised by or on behalf of affected stakeholders.
- Communication needs to be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences.
- The information should be sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved.
- Information should pose no risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.
- Companies that may have severe human rights impacts should report formally on how they address them.

⁴³ See Richard Locke, Matthew Amengual, Akshay Mangla, "Virtue Out of Necessity? Compliance, Commitment and the Improvement of Global Labour Supply Chains", *Politics and Society*, 37(3), 2009, pp 319-351.

Why does it matter?

All relevant standards now require companies to show that they respect human rights in practice and how they address impact. In Ruggie's words:

*"Human rights due diligence can be a game-changer for companies: **from 'naming and shaming' to 'knowing and showing'**. Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights. Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence."*

Building trust in a company's efforts to address its human rights impacts entails being candid and open about problems and taking responsibility when things go wrong. Businesses need to be able to show that they are accepting their responsibility to respect human rights in practice. That means, at a minimum, having internal information-gathering and accountability systems and being able to account externally for their actions if faced with allegations of human rights abuse. Communication will be required, without waiting for a request, if there is a risk to affected stakeholders' safety or welfare so that they can take steps to protect themselves. Formal reporting will be required where there is a risk or occurrence of severe impacts.

The focus of the GPBHR is on *being able to* communicate how an enterprise addresses its adverse human rights impact. This means having the information available so that it is in a position to communicate. The timing, recipients and means of that communication are then the subject of separate decisions⁴⁴.

This does not mean that the company has to reveal publicly all the issues identified and every step it takes to mitigate risks. On the other hand, communications that are obviously an exercise in obfuscation or self-promotion will not reap the benefits of transparency, and may lead to criticism and distrust of the enterprise. Conversely, enterprises that have pushed the boundaries of transparency to discuss the human rights challenges they face and the kind of human rights impact they are trying to address are generally seen as more credible in their claims of respecting human rights.

Communication and reporting in the Principles and Criteria

The principles and criteria and indicators make many requirements on transparency:

- Adequate information on environmental, social and legal issues in appropriate languages and forms
- Keeping records of requests and responses except where this is prevented by commercial confidentiality or where disclosure of information would result in negative environmental or social outcomes
- Publicly available documents on land titles/user rights (criterion 2.2)
- Publicly available documents on health and safety plan (criterion 4.7)
- Publicly available plans and impact assessments relating to environmental and social impacts (criteria 5.1, 6.1 and 7.1)
- HCV documentation (criteria 5.2 and 7.3)
- Details of complaints and grievances (criterion 6.3)
- Negotiation procedures (criterion 6.4)
- Continuous improvement plan (criterion 8.1)
- Public summary of assessment report, including extent of certification of associated smallholders
- Open and transparent methods for communication and consultation between growers and/or millers, local communities and other affected or interested parties

Although transparency obviously is an important element of the principles, criteria and indicators, they mainly require that the information is made publicly available. This does not automatically mean that the information is accessible for the intended audience, especially when this involves the local community and indigenous people. Communication on human rights requires a more pro-active approach to inform particularly affected stakeholders. The question therefore is whether the methods of communication used by growers and millers to communicate on human rights impacts and improvement plans are sufficient to inform all stakeholders.

⁴⁴ UN interpretative guide, 2011

Communication and reporting in the RSPO

The RSPO Code of Conduct requires members to report progress towards the RSPO mission annually. Members also need to specify their commitments by means of a time-bound plan. Reports will be posted on the RSPO website. RSPO will publicize collated progress reports annually, including a list of non-reporters. Non-adherence to the Code of Conduct may eventually lead to excluding the member from the RSPO.

The question here concerns whether these general reporting requirements are leading to reporting on human rights.

The headings of the ACOP are quite general (strategic view, time-bound plan, etc.). Is this form of reporting sufficient to encourage members to report on severe human rights impacts as is required by the GPBHR? Not reporting on a publicly known conflict around severe human rights impact they are involved in may affect a member's and the RSPO's credibility. Does the RSPO encourage its members to also report on these sensitive issues?

Communication includes informing external stakeholders and being prepared to account for how the company addresses impact. Communication to different audiences can consist of different type of information. For instance, a retail company should be able to communicate to its investors how it addresses potential or actual human rights abuses in its supply chain. When communicating with affected stakeholders, it is more specific on how the impact will be addressed. In that case, communication could be limited to that group and should take account of literacy-, language- and cultural communication barriers.

Main findings and gaps regarding communication and transparency

Table 9 Findings and gaps regarding communication

The current system of reporting and communication may not be sufficient to encourage members to gather relevant information on how they address impact when this information is requested by certain groups in society.
The current system of formal reporting does not require members to formally report on severe human rights impacts, which may affect the members' and RSPO's credibility.
Members should envisage different groups they may need to communicate to on different types of issues on human rights and develop various means of communication, taking account of how they can access information, and what will be the most effective. Making information publicly available is not enough.
It is unclear whether the information provided by members that are involved in human rights impact is sufficient for stakeholders to evaluate whether the action to address the impact was effective.

3.3 Grievance mechanism

What the principles require

- *Companies should establish or participate in effective operational-level grievance mechanisms for stakeholders who may be adversely impacted by their activities, in order that grievances may be addressed early and remediated directly.*
- *Such mechanisms should not preclude access to judicial or other State-based processes, or undermine the role of legitimate trade unions.*
- *Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.*

Why does this matter?

An operational-level grievance mechanism is a formalised means through which affected stakeholders can raise concerns about the impact the company has on them and can seek remedies. It is distinct from traditional whistle-blower systems; rather, it is a channel specifically intended for individuals or their legitimate representatives to raise concerns about impacts without having to show a breach of any standard, including human rights.

Effectiveness criteria in the principles

In order to ensure their effectiveness, non-judicial grievance mechanisms should be:

- (a) **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes
- (b) **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access
- (c) **Predictable:** providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation
- (d) **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms
- (e) **Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake
- (f) **Rights-compatible:** ensuring that outcomes and remedies are in accordance with internationally recognised human rights;
- (g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;
- (h) **Based on engagement and dialogue:** consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

Two key functions of non-judicial grievance mechanisms are:

- First, they support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence. They do so by providing a channel for those directly impacted by the enterprise's operations to raise concerns when they believe they are being, or will be, adversely impacted. By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly.
- Second, these mechanisms make it possible for grievances, once identified, to be addressed and for adverse impacts to be remediated early on and directly by the business enterprise, thereby preventing harm from compounding and grievances from escalating.

Grievance mechanism in the principles and criteria

The grievance mechanism in 6.3 is intended for millers and growers. The P&C require that there should be a mutually agreed and documented system for dealing with complaints and grievances, which is implemented and accepted by all parties.

The indicators require that the system shall resolve disputes in an effective, timely and appropriate manner (6.3.1), the documentation of the process and the outcome shall be available (6.3.2) and the system shall be open to all affected parties (6.3.3).

The effectiveness criteria provided by the GPBHR (principle 31) are based on an extensive research and try-out in several pilot projects⁴⁵. The criteria and indicators of the RSPO are partially compliant with these

⁴⁵ Between 2009 and 2010, the practical applicability of a set of principles for effective non-judicial grievance mechanisms that address complaints or disputes involving businesses and their stakeholders were tested.

criteria:

Table 10 Effectiveness criteria applied to operational level grievance mechanism

-	It seeks to be legitimate by requiring that it is a mutually agreed and documented system accepted by all parties.
-	It seeks to be accessible (6.3.3). However, accessibility also requires a pro-active attitude by the company, ensuring that all potential affected stakeholders know and understand the system. Additionally, assistance should be provided for those who may face barriers to using it.
-	The system is predictable , if it is indeed a mutually agreed system, understood by all, with an included time-frame, and clarity about the types of outcomes that can be expected.
-	Nothing is organised for the equitability of the grievance mechanism in the criteria. Affected stakeholders are often at a considerable disadvantage dealing with a company in terms of the expertise they have available to them on issues such as their rights, scientific data, and other relevant information. If individuals accept the outcome of a grievance process because they lack key information, that outcome is unlikely to be sustainable and may lead to even greater grievances and protest in the future. Therefore the company should respect and trust the providers of advice, training or expertise to affected stakeholders.
-	The indicators require that the process and outcome are documented and therefore strives to be transparent . The primary issue here is transparency towards the aggrieved individual. Sometimes confidentiality can be essential in order to protect an individual from suffering retaliation measures.
-	There is no indication that the grievance mechanism should be rights-compatible . In practice, many grievance mechanisms are not presented in terms of human rights. However, by addressing them seriously and in line with all the other principles, a company can help ensure that they are sustainably resolved and do not escalate, leading to serious human rights impacts ⁴⁶ .
-	Furthermore, it is not clear how the company will use the grievance mechanism as a source of continuous learning for prevention of new conflicts and grievances.

The grievance mechanism in the RSPO

The P&C require a grievance mechanism at the level of millers and growers. The RSPO also provides three types of grievance mechanism of the RSPO: the complaints system, the dispute settlement facility, and the new plantings procedure. The RSPO currently seems to be one of the sector initiatives in agriculture with a more sophisticated grievance mechanism.

The RSPO refers to the effectiveness criteria of the UNGP. To understand whether these mechanisms are effective, the following questions can be asked. Since this study can only assess what is laid down in the written procedure, the RSPO could complement this by a review of its grievance mechanism's effectiveness in practice.

Gaps and questions of RSPO's grievance mechanism

Table 11 Gaps and questions regarding the grievance mechanism

Questions⁴⁷	RSPO grievance mechanism
Does the RSPO provide one or more mechanisms through which stakeholders who may have concerns about the impacts of members' operations on their welfare, including their human rights, can raise those concerns?	The complaints mechanism of the RSPO as well as the dispute settlement facility are used by stakeholders to raise their concerns, including human rights. The mechanism has been running for several years now and is complemented by the dispute settlement facility.
Do the mechanisms meet the effectiveness criteria set out in the GPBHR? Have the assumptions in this regard been tested with the groups for whose use they are intended?	The RSPO is certainly seeking to meet the effectiveness criteria and seems to be aware of potential barriers for stakeholders to access the grievance mechanism. Whether it is addressing these barriers adequately cannot be assessed by this study. Only a review of the system with the

[http://baseswiki.org/en/Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned, CSRI, 2011](http://baseswiki.org/en/Piloting_Principles_for_Effective_Company-Stakeholder_Grievance_Mechanisms:_A_Report_of_Lessons_Learned,_CSRI,_2011)

⁴⁶ Report on lessons learnt, 2011

⁴⁷ Based on questions from the Corporate Responsibility to Respect human rights, an interpretative guide, UN office for the high commissioner on human rights, 2012

	<p>participation of stakeholders is able to assess whether cultural specificities are taken into account and how comfortable they feel to raise concerns. One concern is the accessibility for palm oil workers, since they are not using the RSPO grievance mechanism. Another concern is whether the information published on the website, including notifications on the status and progress of grievances, is sufficient to reach all stakeholders, including those without access to internet?</p>
<p>Do the mechanisms not preclude access to judicial or other State-based processes, nor undermine the role of legitimate trade unions?</p>	<p>It seems that the RSPO grievance mechanism is complementary to other (judicial) processes. It is not clear whether trade unions are playing any role here, since the grievance mechanism has not been dealing with labour issues (yet). A review of the grievance mechanisms individual members have in place may provide more information on the role of trade unions.</p>
<p>In the event that grievances are not resolved through the RSPO grievance mechanism, is it clear to all involved what alternative points of recourse exist?</p>	<p>The information on the website is quite clear, with flow charts of the process and an ultimate recourse by bringing the complaint to the Executive Board of the RSPO.</p>
<p>Are the results from the grievance mechanism used to inform the due diligence processes, as well as to identify patterns and trends that suggest lessons for continuous improvement?</p>	<p>The intention is that the grievance panel also 'endeavours to capture wider lessons and make recommendations to the RSPO Executive Board on any systemic improvements'. The RSPO should consider how this is feeding into the due diligence process, specifically impact assessments.</p>

Useful links for more information on effective grievance mechanisms:

http://baseswiki.org/en/Main_Page: a dispute resolution community where all can share knowledge, find information and engage with others.

http://baseswiki.org/w/images/en/5/53/CSRI_GM_Report_2011.pdf: Piloting principles for company-stakeholder grievance mechanisms: a report of lessons learnt.

4. Observations of the emerging expectations relating to agriculture and human rights

4.1. Importance of ESG criteria used by investors

One multinational company in five has to face at least one allegation of having violated human rights, according to a recent study by ESG research provider Vigeo⁴⁸. The study analyses what measures companies are taking to respect human rights and lists the 30 best performing companies in this respect. There are many other raters and researchers like Vigeo that describe the behaviour of companies on environmental, social and governance issues (ESG) for financial investors. Another is SAM (Sustainable Asset Management), which provides benchmarks for the Dow Jones Sustainability Index.

Social responsible investment (SRI) and the use of non-financial factors (also known as ESG) in financial decision-making has picked up momentum, and the range of actors engaged in the debate has expanded from a few pioneers to mainstream global financial actors. The UN Principles for Responsible Investment provide a framework for achieving better long-term investment returns, and more sustainable markets. They offer a path for integrating ESG criteria into investment analysis and ownership practices. So far, 927 investors have adapted these principles. The Equator Principles (EPs) provide a benchmark for managing social and environmental risk in project finance by the financial industry. To date, 68 financial institutions and 27 countries have adopted these principles, and adoption rates are growing in Asia, Africa and South America. The principles require that borrowers do environmental and social assessments, based on IFC Performance Standards. IFC Performance Standards have now fully integrated human rights into their framework (Chapter II, 3.5).

Financial actors no longer constrain themselves to the options of investment or divestment, and many have adopted systems and processes for identifying human rights risk. The financial sector has also seized the initiative to identify where human rights can be integrated into the fundamental processes in investment⁴⁹. It still faces major challenges here, such as how material social issues are, can they be quantified and what bearing do they have on asset valuation? Or the challenge concerning how social issues should be integrated into the investment processes of a wide range of financial actors, from the point of identifying an asset that might be an attractive investment, through to how an investor or asset manager communicates, monitors, and follows up with the asset related to its impact and performance *vis à vis* social issues.

Which human rights are part of ESG is not such an easy question to answer. Some financial institutions have sector policies, which include some human rights relevant for the sector, while others refer to Global Compact, the Universal Declaration on Human Rights or ILO conventions. Rating and index agencies are not always clear about how they include human rights in their assessments. MSCI (6200 clients worldwide) mainly looks at support for controversial regimes and extreme human rights violations. Additionally, slave labour, child labour, freedom of association, and the concept of a living wage, are all elements considered in the evaluation of a responsible investment policy. This area of concern is widening to include such considerations as the impact on local communities, the health and welfare of employees and a more thorough examination of a company's supply chain.

Recently a group of investors identified the ESG issues related to investments in farmland. They mention how social issues can become material for the investment: *especially those associated with land grabbing, such as land ownership rights or human rights of workers, can impact the security of tenure and stability of productivity, which in turn may impact the profitability and the reputation of investors*⁵⁰. Principles for responsible farmland investment include respect for human rights and labour rights and respect for existing land and resource rights.

Two examples of financial institutions that use human rights criteria as part of ESG are HSBC and Robeco.

⁴⁸ The study is based on Vigeo's ratings and analyses the behaviour of nearly 1,500 North American, European and Asian listed companies regarding their respect for human rights between 2009 and 2012.

⁴⁹ Values Added, the challenge of integrating human rights into the financial sector, DIHR, 2012

⁵⁰ Responsible investment in farmland, PRI, 2011

HSBC (one of the world's largest banking and financial services organisations)

HSBC Global Asset Management believes that the ability of companies to manage these risks impacts the value of their investments. The business case for responsible investment is clear. They believe it is in the interest of their clients and society at large to encourage the companies they invest in to manage ESG issues appropriately, as well as to understand the materiality of these issues and to incorporate them into their investment decisions. They are committed to the United Nations Principles for Responsible Investment. This means that they incorporate ESG issues into investment analysis and decision-making processes. They will seek appropriate disclosure on ESG issues by the entities in which they invest. They will promote acceptance and implementation of the principles within the investment industry. They will work together to enhance their effectiveness in implementing the principles. They use the Equator Principles and sector policies to guide how they do business, taking into account the impact on the environment and people⁵¹.

In the Netherlands, in 2012 the Dutch Association for Sustainable Investors (VBDO) commissioned a research into the practices of Dutch companies to implement human rights⁵². This included the practices of several financial institutions. They all indicated that human rights is an important part of their engagement with companies on ESG issues.

Robeco (an independent asset manager operating globally, based in the Netherlands)

Robeco had a fund classification made by Sustainalytics, and the assessment of companies' policies and practices on ESG issues was done by SAM. According to Robeco, SAM apparently already uses criteria in line with the GPBHR, as well as with other international frameworks. Robeco's analysts have access to the ratings and can see where a company scores well and where there is still room for improvement. Human rights are part of this analysis. When Robeco engages with companies, it always sets objectives of engagement, including those pertaining to human rights, and sets parameters prior to the start of each and every engagement case. Such a dialogue can take several years. If the dialogue does not lead to the desired changes, Robeco may exclude companies from its investment universe. These companies will be assessed every year, and may be re-instated once the changes have been made.

4.2. Expectations originating from relevant developments regarding human rights and agribusiness

New guidelines and principles have been developed recently, particularly in relation to the impact that agribusiness (and other exploitations of natural resources) can have on surrounding communities, although mainly focussed on the role of the government. More general standards for business are also relevant and were discussed in chapter I. The IFC Performance Standards on environmental and social sustainability give the most specific guidance to companies on stakeholder engagement, indigenous people, management of natural resources and land acquisition and involuntary resettlement. The Institute of Human Rights and Business (IHRB) started developing guidelines on a rights-based approach to business land acquisition and use. The IHRB draft guidelines were developed following a series of consultations with a variety of key stakeholders across three continents (India (2009), Colombia (2010), South Africa (2010), and Kenya (2011)). The guidelines are based on rights-based principles of transparency, accountability and non-discrimination, and provide practical guidance steps for companies throughout key phases of any land project – the pre-operation phase, the consultation period and during relocation and rehabilitation. These have not been finalized yet and their status is as yet unclear.

The following relevant themes are emerging from the latest developments, initiatives and guidelines:

The responsibility to respect human rights and carry out due diligence to avoid infringing on rights of others

As discussed in the previous chapters, this responsibility has now been confirmed by different international

⁵¹ <https://www.hsbc.com/citizenship/sustainability/sustainability-risk/equator-principles-and-sector-policies>

⁵² Take a closer look, VBDO, Human Rights@Work and BECO, 2012

frameworks and guidelines. An important one for the RSPO regarding land is the adaptation of the **'Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests'** in the Context of National Food Security (2012)⁵³. These guidelines form the first comprehensive global instrument on tenure and its administration to have been developed by governments through negotiations conducted in the United Nations System. Although they are voluntary, they can have an impact on national policies and laws due to their broad consensus and authoritative character.

The guidelines refer to tenure rights in recognition of the fact that many of the poor gain access to land and other natural resources through tenure rights other than ownership. The guidelines focus not only on the tenure rights to land, but also explicitly address tenure rights to fisheries and forests, acknowledging the fact that the livelihoods of many of the poor are diversified and dependent on access to natural resources. Further, the guidelines are specifically geared towards the governance of tenure, since governance is often a crucial element in determining if and how people, communities and others are able to acquire tenure rights to use and control land, fisheries and forests. Moreover, the guidelines do not present a tenure right as a human right, but instead place tenure rights in the context of human rights. They recognise that tenure rights are important for the realization of human rights, including the progressive realization of the rights to adequate food and adequate housing⁵⁴.

These guidelines are important for the RSPO because they allow governments – but also civil society, private sector and citizens – to judge whether their proposed actions and the actions of others constitute acceptable practice. Moreover, the principles, although mostly directed at States, also have a general principle for non-State actors, including business enterprises (3.2 of the general principles), which is in line with the GPBHR:

"Non-State actors including business enterprises have a responsibility to respect human rights and legitimate tenure rights. Business enterprises should act with due diligence to avoid infringing on the human rights and legitimate tenure rights of others. They should include appropriate risk management systems to prevent and address adverse impacts on human rights and legitimate tenure rights. Business enterprises should provide for and cooperate in non-judicial mechanisms to provide remedy, including effective operational-level grievance mechanisms, where appropriate, where they have caused or contributed to adverse impacts on human rights and legitimate tenure rights. Business enterprises should identify and assess any actual or potential impacts on human rights and legitimate tenure rights in which they may be involved. States, in accordance with their international obligations, should provide access to effective judicial remedies for negative impacts on human rights and legitimate tenure rights by business enterprises. Where transnational corporations are involved, their home States have roles to play in assisting both those corporations and host States to ensure that businesses are not involved in abuse of human rights and legitimate tenure rights. States should take additional steps to protect against abuses of human rights and legitimate tenure rights by business enterprises that are owned or controlled by the State, or that receive substantial support and service from State agencies."

Land acquisitions and negotiations of investment agreements should be done with respect for human rights

In the last couple of years, several other principles were proposed by international agencies, some of which led by Olivier de Schutter, special rapporteur on the right to food, highlighting the importance of human rights and specifically the right to food.

As early as in 2009, De Schutter developed a set of core **principles and measures to address the human rights challenge in large-scale land acquisitions**⁵⁵. He highlights how international human rights law could provide guidance to ensure that these investment agreements contribute to the realization of the human right to adequate food, and proposes a minimum set of core principles and measures for host States and investors alike. *States should ensure, prior to carrying out any evictions or shifts in land use which could result in depriving individuals from access to their productive resources, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimising, the need to resort to forced evictions.* In all cases,

⁵³ FAO Guidelines on land and agriculture, OHCHR (Olivier de Schutter)

⁵⁴ An overview of the voluntary guidelines on the governance of tenure, Paul Munro Faure, Land Tenure Journal, no.1 2012 <http://www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/view/48/88>

⁵⁵ Large-scale land acquisitions and leases: A set of core principles and measures to address the human rights challenge, Mr. Olivier De Schutter Special Rapporteur on the right to food, 2009

effective legal remedies or procedures should be provided to those who are affected by eviction orders.

In September and October of 2009, agreement was reached among the main international agencies (World Bank, FAO, UNCTAD, and IFAD) that a set of **principles for responsible agricultural investment**⁵⁶ involving significant acquisition of resource rights is warranted, and that the seven principles that were developed and contained herein are essentially the right ones. They also agreed that after an expanded consultative process, the principles will then need to be translated into actions for investors, governments, donors and international agencies, at different levels. However, soon afterwards many organisations and networks denounced the initiative. De Schutter also publicly criticized the initiative for being "woefully inadequate" and regretted the absence of a human rights approach. The Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources do not refer to human rights. As a result, the dimension of accountability of governments and private actors alike, and of control by independent bodies, is lost⁵⁷.

In 2011, de Schutter presented **guiding principles on human rights impact assessments of trade and investment agreements**⁵⁸. The guiding principles are aimed at providing States with guidance on how best to ensure that the trade and investment agreements they conclude are consistent with their obligations under international human rights instruments. These guiding principles are also meant as a source of inspiration for companies carrying out human rights due diligence, in order to identify, prevent, mitigate and account for the human rights impacts of their activities, particularly in the negotiation and conclusion of investment agreements with the host States in which they invest.

It is clear that the State has an important role and responsibility – or in human rights terms, a duty to respect human rights – especially when negotiating with companies about land acquisitions or investments. At the same time, the GPBHR also confirm that even where the State does not protect human rights, this does not diminish the responsibility of the company or investor.

These guidelines emphasize the impact on the right to food and the assessment needed to understand the consequences of the investment on this right. Therefore the guidelines could have some useful guidance on how to measure the impact on the right to food in an impact assessment of the RSPO. Only through assessing the impact on these elements and including a participatory dimension, can it be ensured that the contracts providing for the lease or sale of land will distribute their benefits equitably between the local communities, the host State, and the investor.

Forced evictions should be avoided and free and prior informed consent is key

There seems to be a consensus that involuntary resettlements and forced evictions should be avoided. As de Schutter in his recommendations says: *'in principle, any shifts in land use can only take place with the free, prior and informed consent of the local communities concerned*. Forced evictions should only be allowed to occur in the most exceptional circumstances. They are only allowable under international law when they are in accordance with the locally applicable legislation, when they are justified as necessary for the general welfare, and when they are accompanied by adequate compensation and alternative resettlement or access to productive land⁵⁹. States should expropriate only where rights to land, fisheries or forests are required for a public purpose. States should clearly define the concept of public purpose in law, in order to allow for judicial review⁶⁰.

Additionally, IFC Performance Standard 5 and World Bank Operational Manual 4.12 both recommend avoiding involuntary resettlement and forced evictions where possible and exploring alternative project designs. In

⁵⁶ Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources by FAO, IFAD, UNCTAD and the World Bank Group, 2010, a discussion note

⁵⁷ Keynote address by Dr. Olivier de Schutter, special rapporteur on the right to food at the UNCTAD Commission on investment, enterprise and development, 2010

⁵⁸ Guiding principles on human rights impact assessments of trade and investment agreements, Report of the Special Rapporteur on the right to food, Olivier De Schutter, 2011

⁵⁹ Large-scale land acquisitions and leases, Olivier de Schutter, 2009

⁶⁰ Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests' in the Context of National Food Security

Guidance Note 5 corresponding to IFC Performance Standard 5, the IFC encourages its clients to shun land acquisition that would result in community displacement.

The World Bank and IFC require a company to develop a resettlement action plan in the case of involuntary resettlement. They recommend that when resettlement is involuntary, a consultation process based on the concept of free, prior and informed consent will minimise the risk of community opposition to the project and to maximise the enjoyment of the community members' rights. (according to IFC PS5, resettlement is considered involuntary when affected persons or communities do not have the right to refuse land acquisition or restrictions on land use that result in physical or economic displacement. This occurs in cases of (i) lawful expropriation or temporary or permanent restrictions on land use and (ii) negotiated settlements in which the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail.

The IFC and World Bank only require free and prior informed consent in cases of resettlement of indigenous peoples. Most guidelines also require that involuntary resettlement is minimised by exploring project and design alternatives; that the livelihoods of all displaced persons in real terms are enhanced, or at least restored, relative to the pre-project levels; that the standards of living of the displaced poor and other vulnerable groups are improved⁶¹.

Building trust and meaningful engagement with local communities

Furthermore, the latest developments reiterate the importance of building trust with local communities. Often, conflicts with local communities may arise before resettlement becomes an issue. It is essential that meaningful engagement with local communities is carefully planned from the very beginning so as to avoid any conflicts which may later impact on resettlement planning and implementation, e.g. in the form of community protests, which bear high operational and reputational risks for the company. For example, the lack of indigenous community trust may subsequently impact on the capacity to obtain free, prior and informed consent in relation to land acquisition and use, which is a domestic legal requirement in some jurisdictions. Building community trust should be prioritised as soon as the company decides to invest in a project which may involve community relocation.

4.3 International campaigns around 'land grabbing'

Despite the emerging consensus on respect for human rights and expectations of companies, and guidelines for States, the current practice of selling and acquiring land is often not in accordance with these emerging expectations.

Several campaigns by civil society organisations are being run and reports are published that denounce the issue of 'land grabbing'. We mention two campaigns here.

One campaign is the GROW campaign of Oxfam International and the reports that have been published. Oxfam is particularly concerned about the impact on food security of the poor⁶² and is calling on the World Bank to institute a temporary freeze on investments involving large-scale land acquisitions. A freeze would create the space to develop policy and institutional protection measures to ensure that no World Bank-supported project resulted in land grabbing and would allow time for the wider impacts of land transfers on poverty and food security to be assessed.

Another campaign is the International Land Coalition, a global alliance of civil society and intergovernmental organisations working together to promote secure and equitable access to, and control over, land for poor women and men through advocacy, dialogue, knowledge sharing and capacity building. In their report "Land rights and the rush for land"⁶³ the coalition draws the following preliminary conclusions:

- The weak legal protection of resources held under customary tenure makes local people vulnerable to

⁶¹ For example also, *Involuntary Resettlement Safeguards*, Asian Development Bank, March 2011

www.adb.org/documents/policies/safeguards/ir-good-practices-sourcebook/ir-good-practices-sourcebook-draft.pdf

⁶² Our land, our lives, time out on the global land rush, Oxfam briefing note, October 2012

http://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf

⁶³ Land rights and the rush for land, IIED, Cirad and ILC, 2012,

http://www.landcoalition.org/sites/default/files/publication/1205/GSR%20summary_ENG.pdf

dispossession.

- Insufficient action is being taken by host governments to limit the further impoverishment of 'rural' communities that may be expected from 'land rush'. Additionally, international law is not being properly put to work in service of this requirement.
- The challenge is to stop dispossession and land allocations that do not serve a genuine public interest, to legally recognise the rights of the poor, and to steer towards more equitable models that give a key role to existing land users.

Further, this report calls for urgent action to bring harmful land transfers to a halt, and to redirect capital into more fruitful forms of investment where possible.

Other initiatives have been taken in Asia.

- The development of a land reform monitoring framework was initiated by ANGO and the Land Watch Asia (LWA) campaign. Piloted in seven Asian countries, this land monitoring framework articulates the key assumptions and indicators, and formulates the methodology and mechanisms for CSOs to undertake monitoring – in order to engage constructively in policy dialogue with their governments, and to share their findings with other countries as part of the regional campaign. This monitoring framework does not provide a fixed, common set of indicators, but defines the direction and parameters for CSOs undertaking land monitoring in support of their policy advocacy work⁶⁴.
- In 2010 a coalition of Asian NGOs developed a proposal for a code of conduct Governing Corporate Investments and Operations in Indonesia and Malaysia out of concern for some alarming conditions about the investment and operation of logging and palm oil plantations in Indonesia and Papua New Guinea⁶⁵. The scope represents critical human rights protection and accountable investment requirements that are not in place within the legal framework of Indonesia, nor do they form the core rules of bilateral agreements between Indonesia and Malaysia in trade-related pacts. It is unclear what the status of this document is.
- Another important document is the Bali Declaration on Human Rights and Agribusiness in South East Asia of 2011, arising from an international conference of National Human Rights institutions of South East Asia, calling on States in Southeast Asia to protect, respect and secure the rights of indigenous peoples and rural communities whose rights are being violated by agribusiness investment and the operations of palm oil corporations⁶⁶. Actions by States are needed, as well as efforts by financial institutions, development agencies, investors and sectoral bodies to develop voluntary standards consistent with international norms to improve corporate performance.

Main findings for the RSPO

When human rights are fully integrated into the P&C as well as in the system, the RSPO can support their members in being prepared and being able to show to investors how they respect human rights in practice and the implementation of 'due diligence on human rights'.

The RSPO criteria are in line with most emerging new guidelines, with the exception of the areas that have been identified in chapter 3. However, it is not within the scope of this study to assess how the procedures are carried out in practice or whether the impact assessment is able to identify all potential rights holders in advance and whether stakeholder engagement is defined in an effective way from the beginning. Neither is it clear what role the government plays in these procedures and whether the negotiations take human rights into account. Since many conflicts seem to exist around tenure rights of communities, it is likely that RSPO members are not always able to obtain FPIC from communities.

An active civil society seems to be emerging worldwide, calling for a human rights approach. These groups will be a relevant source of reference when integrating human rights into the system and practice of the RSPO.

⁶⁴ CSO Land Reform Monitoring in Asia, 2012,

http://www.landcoalition.org/sites/default/files/publication/1438/CSO_Land_Monitoring_Full.pdf

⁶⁵ Academic Document Framework: Code of Conduct Governing Corporate Investments and Operations in Indonesia and Malaysia, 2010

⁶⁶ <http://www.forestpeoples.org/sites/fpp/files/publication/2011/12/final-bali-declaration-adopted-1-dec-2011.pdf>

5. Conclusions and Recommendations

Specific recommendations for the P&C per criterion have been made in the human rights review per criterion document. A summary of the key conclusions and recommendations follows:

5.1. Expand the policy commitment to other specific human rights and to vulnerable groups

The commitments in the P&C and CoC do not explicitly cover all human rights that are relevant for the sector. Members should be aware that there is a risk of these rights being potentially negatively impacted. The RSPO should consider including the respect for the right to food, the right to personal integrity and security and the rights of children (more than child labour), the right to self-determination and the right to development (transparency and accountability in the use of revenue) in the principles. This will raise the awareness on these rights. At the very least, the potential impact on these rights should be assessed as part of the social impact assessment.

Vulnerable groups, such as children, migrants, indigenous people or indigenous agricultural workers, or women are not sufficiently protected by the P&C. The RSPO might consider developing indicators for these groups to ensure they receive more attention. At the very least, the social impact assessment should assess impact on these groups.

The RSPO could be more specific in the requirements for communication and integration on human rights policies to encourage its implementation.

5.2. Principles and criteria should be clear in their reference to international standards

The principles and criteria are not consistent in their reference to international standards. Improving this aspect will ensure more guidance and the right interpretation. This certainly is the case for labour rights for which many widely accepted standards and guidance directed at companies have been developed. The separate document with Human Rights guidance per criterion specifies recommendations.

Several international standards exist for the criteria on FPIC and customary rights. The new voluntary principles of the FAO on tenure governance are particularly relevant for further guidance and indicators. The RSPO should ensure that FPIC is obtained in accordance with these international standards, which are mentioned in the Human Rights guidance per criterion (2.3). This also applies for fair compensation (6.4).

The HCVs should be defined more in terms of rights of communities and indigenous peoples. The right to food, the right to development, user rights to the land, cultural identity or heritage are all at stake here and should be identified as part of the impact assessment and HCV analysis. When HCVs are defined in terms of being 'critically' or 'fundamentally' related to human rights, this should be made clear.

5.3. Clear guidance, communication and possibly training on human rights policies and procedures is needed

More guidance in the P&C, as is recommended to clarify the meaning of some criteria and indicators, will not be sufficient to ensure that the policy commitments on specific human rights are indeed embedded in management systems. Specifically at the national level, one cannot expect that all local managers have the same understanding of criteria and indicators based on international standards. Different actors can play a role in offering more guidance, training or even starting with raising awareness on human rights.

- The RSPO could support all its members by offering a training package to ensure that they all have the same understanding of the expectations expressed in the P&C.
- A specific training would be needed for auditors. At the minimum, auditors should have a basic human rights training and understand what the GPBHR require to be able to verify its implementation.

- Buyers, investors and retailers could also invest in informing actors in their supply chain and building their capacity to be able to implement these commitments on human rights. They should also support growers and millers to find the business case for implementing standards on human rights. A more engaging and cooperative approach, instead of a compliance approach, would seem to work better.

5.4. Consider developing a risk assessment on human rights, which would strengthen the social impact assessment and the audit system

The principles and criteria require companies to do a social impact assessment. To ensure that this fulfils the important role of identifying the human rights impact with which companies may be involved, it needs to be strengthened. This is an essential part of doing due diligence and provides the basis for the further process of integration, continuous improvement, tracking effectiveness of the response and reporting on human rights. There are also several benefits for a company in getting this right, at the very least a reduction of conflicts. A risk assessment to identify potential impact on human rights, would give more direction to a social impact assessment and also to audits. A risk assessment may be done jointly within the context of the RSPO at country level or individually, when it concerns the potential impact of management procedures on human rights.

The main elements to include in a risk assessment and in the social impact assessment are⁶⁷:

- Cataloguing the relevant human rights standards and issues (including internationally recognised human rights as a reference point). Special attention should be given to legal, customary or user rights to the land and impact on vulnerable groups.
- Drawing on internal and/or independent external human rights expertise.
- Starting with identifying the parties that may be affected (using systematic mapping).
- Besides meaningful consultation with potentially affected groups and other relevant stakeholders, as is already incorporated in the P&C, consider developing a Stakeholder engagement Plan⁶⁸(required by the IFC).
- A periodic assessment, also prior to major decisions or changes in the operations.

The RSPO could consider taking a supportive role in raising awareness on the importance of human rights in the impact assessment, and on the importance of stakeholder engagement. The RSPO can also encourage all its members to do a risk assessment of potential human rights impact as part of their commitment to the responsibility to respect human rights.

5.5. Strengthen the auditing/certification system to become meaningful as a diagnostic starting point on human rights

The RSPO and its members use the certification/auditing system as a way to identify actual human rights non-compliances. As has become clear from this review, compliance-based auditing is not enough to ensure that human rights are respected, even when the auditing system is strengthened. Auditing can play a role as a diagnostic starting point at best. Ways of improving the system would include an assessment of the quality of the current audits and auditors with regard to human rights non-compliance. On the basis of this assessment, more guidance and training could be given to auditors. An essential element will be the systematic involvement and consultation of stakeholders and their representatives.

Other elements that can enhance the certification system would involve moving away from compliance-driven relationships between buyers and suppliers in favour of relationships founded on dialogue, capacity building and partnership⁶⁹. It should be stressed that it is not the audit, but the improvement that happens after the audit

⁶⁷ GPBHR 18 and commentary

⁶⁸ IFC Performance standard 1, 27

⁶⁹ The cultural shifts in supply chain management were discussed in the workshop Respecting human rights through global supply chains, Shift workshop report October 2012

that suppliers will be measured by, and follow up with suppliers on corrective actions and providing support where possible.

5.6. Setting up a task force on human rights to ensure specific attention is paid to integrating human rights in members and the RSPO itself.

So far the RSPO has not fully integrated human rights into its system. The explicit policy commitment to respect human rights is a good start and several elements in the system will be helpful, especially the grievance mechanism. As a minimum, this includes clarifying where the responsibility for human rights lies in the organisation, allocating budget and oversight processes, as part of the indicators. The responsibility within the RSPO should also be made clear by setting up a task force.

Among other things mentioned further in these recommendations, this task force can also assess how the auditing system works in encouraging corrective action plans and remediation. Corrective action plans and remediation can benefit from support by the RSPO on what constitutes appropriate action when there is adverse impact on human rights. To know what is appropriate, the RSPO can provide support through root cause analysis or similar processes to identify how and why the impact occurred in order to help prevent, or mitigate the risk of, its recurrence.

5.7. Consider setting up a tracking mechanism on how human rights are addressed

If the RSPO and its members fail to track how effective their response is in relation to human rights issues, this will affect their credibility in the long term. Therefore an important step is to define a combination of qualitative and quantitative indicators, preferably set in a multi-stakeholder context. The RSPO could use the grievance mechanism, its feedback from external stakeholders and information from audit reports and corrective action plans in a more systematic way to measure its performance on human rights. Buyers could be involved to define indicators together with their suppliers. Auditors can also be involved in measuring this progress. This will support a system of continuous improvement on human rights and when this system is in place, it will make it much easier to respond to stakeholder concerns and to communicate progress.

5.8. From ‘naming and shaming’ to ‘knowing and showing’

‘Naming and shaming is a response by external stakeholders to the failure of companies to respect human rights. Knowing and showing is the internalization of that respect by companies themselves through human rights due diligence’.

John Ruggie, 2010

The RSPO is committed to transparency and requires its members to be transparent, report about its progress and make stipulated information available. This may not be sufficient or in line with the GPBHR. A more proactive attitude towards communication is needed. Members need to be able to **show** that they are meeting their responsibility to respect human rights in practice. That means, at a minimum, being able to account externally for their actions if faced with allegations of human rights abuse. They can only show this when they **know** – by assessing impacts on human rights, having an internal accountability system, setting indicators and setting up a system for tracking.

When communicating to different audiences, using various methods appropriate for the audience will be most effective. Directly affected stakeholders, who very likely do not have access to internet, need to be informed in a different manner than internationally established NGOs. Members therefore need to be creative and culturally sensitive in their communication. The RSPO could support their members when necessary.

The topics affected stakeholders need to be informed about may differ per group. Communities need to be informed of the outcome of impact assessments and intended mitigation or remediation measures, the

engagement process and the grievance mechanism at a minimum.

The ACOP need to include at a minimum communication about how severe human rights impacts are addressed. When they are involved in a dispute concerning human rights allegations, they could choose to use the formal report to show how they are trying to solve the dispute as long as this does not pose risks to affected stakeholders. This is important for the credibility of the RSPO and the commitment of its members to respect human rights.

5.9. Review and adapt the grievance mechanisms to ensure their effectiveness for human rights

The operational-level grievance mechanism required in the P&C is partly in line with the GPBHR. A review would be needed to assess their effectiveness in practice. Such a review should particularly pay attention to the accessibility (do potentially affected stakeholders know and understand the system?) to equitability (ensure that providers of advice, expertise and training are respected and trusted). Another important element to pay attention to is whether the transparency of the system is not endangering the position of the aggrieved individual. The grievance mechanism needs to be closely linked to impact assessment and management processes to prevent and mitigate human rights, and should serve as a source of continuous learning.

Reviewing the grievance mechanism with feedback from stakeholders is crucial to ensuring that the system is effective as remediation for negative impact on human rights and as an important source of information for tracking the effectiveness of measures taken. The review should also focus on how accessible, equitable and transparent the system really is in the eyes of its users.

Abbreviations

ACOP	Annual Communication of Progress
ANGOC	Asian NGO Coalition
CoC	Code of Conduct
CSO	Civil Society Organisation
EP	Equator Principles
ESG	Environmental, social and governance
FPIC	Free, Prior and Informed Consent
FSC	Forest Stewardship Council
GPBHR	Guiding principles on business and human rights
HCV	High conservation values
HRIA	Human Rights Impact Assessment
IFC	International Finance Corporation
IHRB	Institute of Human Rights and Business
ILO	International Labour Organisation
LWA	Land Watch Asia
OECD	Organisation for Economic Co-operation and Development
P&C	Principles and Criteria
PDCA	Plan Do Check Act
RSB	Roundtable for Sustainable Biofuels
RTRS	Roundtable for Responsible Soy
SAM	Sustainable Asset Management
ShAD	Shrimp Aquaculture Dialogue
SIA	Social Impact Assessment
SRI	Social responsible investment