

# COLUMBIA CENTER ON SUSTAINABLE INVESTMENT

## Submission to Bonsucro re Production Standard V5 (2019-21)

July 2020

Prepared by Nami Patel and Sam Szoke-Burke



Columbia Center  
on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

### About

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is the only university-based applied research center and forum dedicated to the study, practice, and discussion of sustainable international investment.

### Executive Summary

This submission seeks to respond to challenges associated with implementing, and auditing for compliance with, three aspects of Bonsucro's proposed Production Standard V5 ("the Draft Standard") and proposes a concrete solution that will complement Bonsucro operators' efforts to more effectively meet that Standard in practice.<sup>1</sup>

Despite some concerning erosions of inclusive approaches found in the previous version,<sup>2</sup> the Draft Standard sets out directives, some binding and others not,<sup>3</sup> for operators to:

- (1) Obtain the **free, prior and informed consent** (FPIC) of Indigenous and traditional communities when establishing or expanding operations<sup>4</sup> and when such communities relinquish any land rights;<sup>5</sup>
- (2) Implement transparent and participatory processes to **assess, monitor, and evaluate** the environmental and social impacts of new and existing projects;<sup>6</sup> and
- (3) Establish accessible dispute resolution and **grievance mechanisms** that allow communities to raise and resolve problems with the operator.<sup>7</sup>

These directives indicate a critical need to protect the human rights, livelihoods, and priorities of local communities by enabling them to meaningfully participate in and influence decision-making throughout the life of a sugarcane project. Yet meaningful community participation in relevant decision-making processes is often unachievable without community access to technical support and empowerment—from paralegals, lawyers, scientists, among other support providers. Communities' need for support in the context of investment has been acknowledged by the Inter-American Commission on Human Rights<sup>8</sup> and the Roundtable on Sustainable Palm Oil (RSPO),<sup>9</sup> as well as experts within the United Nations<sup>10</sup> and World Bank.<sup>11</sup>

Facilitating affected communities' access to technical support also benefits private sector organizations. Specifically, a lack of community support increases the risk of grievances and conflict, stemming from issues such as mismatched expectations, inadequate consultation and participation opportunities for communities, or onerous community-company agreements.<sup>12</sup> A recent study focusing on the sugarcane sector in Kenya, Malawi, and Tanzania found that land-related disputes in those countries often cause long delays, with nearly half of these disputes lasting over 10 years.<sup>13</sup> In addition to these delays, local disputes and conflict can tarnish reputations and shut entire projects down. In one case, these disputes risked costing a sugarcane operation in Malawi as much as US\$ 101 million in foregone revenue, which would reduce its net present value by up to 110%.<sup>14</sup> More generally, in a 2018 USAID investor survey, more than 50% of land-based investment companies surveyed cited a recent increase in disputes over local community access to resources and land.<sup>15</sup> Successful mitigation strategies reportedly used by companies included active community engagement and the establishment of effective grievance mechanisms;<sup>16</sup> such processes are more likely to be effectively navigated by communities who can access relevant technical support.

One challenge in the facilitation of community access to support is the question of who pays for that support. In contrast to operators of large mills and of large-scale sugarcane plantations, which can generally afford the expertise needed to pursue investments, local communities often struggle to secure funding needed to access technical support. To meet this funding gap, we propose that Bonsucro require operators to make financial contributions to a Basket Fund for Responsible Investment. By increasing community access to technical support, a Basket Fund would help operators to more effectively meet Bonsucro's standards with regard to FPIC and community participation in decision-making, impact assessment and monitoring, as well as dispute resolution and grievance mechanisms.

## Section 1. Our Suggested Solution: a Basket Fund for Responsible Investment

A Basket Fund for Responsible Investment refers to an independently administered fund that receives financial contributions from multiple sources and then makes grants to pay for technical support for investment-affected communities. In this case, financial contributors would include Bonsucro operators whose revenues exceed a certain threshold, potentially alongside such operators' financiers, investors, large-scale suppliers, and customers, among others. By diversifying its sources of funding, a Basket Fund can achieve greater independence of community support, decoupling each financial contribution to the Basket Fund from the decision-making process on who will receive the funding. This minimizes the risk of those financial contributions exacerbating the operator's actual or perceived undue influence over the community or support provider.

Requiring operators to make regular financial contributions to a Basket Fund for Responsible Investment would also assist Bonsucro to more effectively monitor operator compliance with its Production Standard. Payments from operators into a Basket Fund would be an easily auditable indicator to help Bonsucro measure, and help operators demonstrate, operator compliance with the elements of Bonsucro's standards on informed and empowered community participation in investment-related decision-making processes.

While a Basket Fund for Responsible Investment is a relatively novel solution, it is also feasible. Different types of basket funds have already been established by a multi-stakeholder initiative (MSI)<sup>17</sup> and by industry actors,<sup>18</sup> and mandatory investor contributions to a basket fund for community legal assistance is even included in Sierra Leone's National Land Policy,<sup>19</sup> indicating host government openness to such a solution.

Regular financial contributions by operators to a Basket Fund for Responsible Investment can facilitate operator compliance with the Draft Standard's requirements for FPIC and appropriate community participation in decision-making, impact assessment and monitoring, and dispute resolution and grievance mechanisms. The Draft Standard should, therefore, incorporate one of the three options below to require operators to make regular financial contributions for the financing of independent support to affected communities. In each case, the Draft Standard should include core indicators and/or guidance that explicitly mention Basket Fund contributions as one necessary, but not in itself sufficient, measure operators must take towards the implementation of the Draft Standard's ultimate requirements for FPIC and community participation in decision-making, impact assessment and monitoring, and dispute resolution and grievance mechanisms.

**Option 1.** Bonsucro could facilitate the establishment of a Basket Fund for Responsible Investment, with appropriate arrangements for independent and autonomous operation, and the Draft Standard could require relevant operators to make financial contributions into it.

**Option 2.** The Draft Standard could require relevant Bonsucro operators to make financial contributions into an appropriate external Basket Fund **where such a fund exists.**

**Option 3.** The Draft Standard could impose a more general requirement for relevant Bonsucro operators to make financial contributions towards independent community support, in ways that do not jeopardize the independence of that support. This would include contributions to a Basket Fund, among other approaches, but would not usually include the operator directly paying the support provider, as doing so introduces unacceptable risks of perceived or actual undue influence.<sup>20</sup>

### Section 1.1. FPIC and Community Participation in Decision-Making

The Draft Standard should explicitly require operators to make financial contributions to a Basket Fund for Responsible Investment as a part of their efforts to meet the Draft Standard's requirement<sup>21</sup> to obtain the free, prior and informed consent (FPIC) of Indigenous and traditional communities.<sup>22</sup>

FPIC refers to the right of a community or people to participate in decision-making on issues relevant to their well-being and to give or withhold consent to any project or policy that would affect them or their lands or resources. The components of FPIC include:

1. **Free:** Community members give or withhold consent voluntarily, without coercion, intimidation, or manipulation.
2. **Prior:** Consent is obtained well before each stage of project authorization, and is actively sought and maintained on an ongoing basis throughout the life of a project.<sup>23</sup> This means that while the Draft Standard expressly calls for FPIC “before any operations are established or expanded,” the invocation of the FPIC standard actually entails ongoing, iterative FPIC processes throughout the life of the sugarcane project.
3. **Informed:** Community members access, understand, and deliberate on all relevant project information before giving or withholding consent.
4. **Consent:** Community decisions to agree, refuse, or offer conditional consent to projects or activities that affect their land or resources are respected.

It will often not be possible to obtain a community's FPIC if community members do not have access to the technical support and skill development needed to access and understand information about the project, deliberate internally, navigate processes to influence decision-making, and, where they are willing to grant actual or conditional consent, negotiate the terms of such consent. For example, a recent decision by the Roundtable on Sustainable Palm Oil's Complaints Panel found an agribusiness plantation operator in breach of applicable requirements to obtain the FPIC of an affected community during community-company negotiations in part because of a likely lack of legal support. In particular, the Complaints Panel found that “[t]he element of “informed” [in the requirement to obtain free, prior and informed consent] was not complied with as the investigation found the community members had very limited information prior to the signing of the MoU” and that “[t]he limited understandings of the provisions of the MoU found among the community members [...] further suggests that no legal advice was received to interpret the rather legal language used in the MoU.”<sup>24</sup>

Such support to communities requires funding. While some companies have sought to directly finance technical support to communities,<sup>25</sup> this approach brings a considerable risk of introducing actual or perceived undue influence over community beneficiaries. One solution to this challenge is a Basket Fund that receives financial contributions from Bonsucro operators and then independently grants funding for technical support to communities in relation to a relevant sugarcane production process.

Making contributions to a Basket Fund can help operators more effectively meet Bonsucro's standards while also strengthening their local relationships and improving their decision-making processes. Basket funds lead to more prepared and communicative communities, helping operators to better understand and incorporate community perspectives into project design and decisions and reducing the risks of costly conflict.

MSIs focusing on sustainable production have also experienced a number of challenges in ensuring operator compliance with their standards. For example, in one study, MSI auditors were found to have a “flawed” and “weak” understanding of the applicable MSI standard, particularly relating to social criteria like FPIC and customary rights of affected communities;<sup>26</sup> this resulted in “faulty” assessments and companies proceeding with their investments despite being in “serious violation” of FPIC and High Conservation Value (HCV) requirements.<sup>27</sup> While never sufficient in itself to prove that FPIC has been obtained, proof of each operator's financial contributions to a Basket Fund would be an easily auditable indicator of concrete actions taken by the operator as part of broader efforts to obtain the FPIC of affected communities, thus helping Bonsucro to track operator commitment to, and compliance with, the Bonsucro Standard.

### Section 1.2. Impact Assessment and Monitoring

The Draft Standard should explicitly require operators to make financial contributions to a Basket Fund for Responsible Investment as a part of their efforts to meet the Draft Standard's requirement of inclusive impact assessment and monitoring processes.<sup>28</sup>

The Draft Standard requires that new projects and greenfield expansions be covered by environmental and social impact assessments (ESIAs). The guidance to the core indicator for this requirement states that the ESIA “shall start prior to the formulation phase of a project, focus on significant issues and identify stakeholders to involve them, consider impacts on individuals with special consideration for vulnerable ones, and provide information on possible alternative or appropriate mitigation measures.”<sup>29</sup> It also notes that ESIA-related decisions “shall be based on meaningful engagement with affected stakeholders (as defined by OECD), monitored and evaluated.”<sup>30</sup>

The Draft Standard's ESIA requirement should be interpreted to incorporate the FPIC requirements included in other parts of the Draft Standard. This is consistent with the Inter-American Court on Human Rights, which has held that:

The purpose of ESIA's is not only to have some objective measure of such possible impact on the land and the people, but also [...] to 'ensure that members of the [affected community] are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is **accepted knowingly and voluntarily**.'<sup>31</sup>

The necessary incorporation of FPIC into impact assessment requirements is also echoed by legal expert Dr. Cathal Doyle, who posits that for impact assessments to be meaningful, they "must be conducted at each stage in the decision-making process where FPIC is required and provide an effective participatory mechanism through which the nature and severity of any potential limitations on indigenous peoples' rights are determined by, or in conjunction with, the concerned peoples."<sup>32</sup>

In addition, the above interpretation is consistent with the iterative nature of the Draft Standard's FPIC requirement. As noted above, while the Draft Standard identifies FPIC as a necessary component to **begin** a sugarcane project, FPIC cannot be obtained without ongoing, iterative processes for consultation and the maintenance of consent throughout the lifecycle of a project. This is consistent with the OECD's Guidance for Meaningful Stakeholder Engagement, itself a point of reference within the Draft Standard's requirement for ESIA,<sup>33</sup> which defines "meaningful stakeholder engagement" as "**ongoing** engagement with stakeholders that is two-way, conducted in good faith and responsive."<sup>34</sup>

As described under Section 1.1, above, FPIC-compliant ESIA process incorporating meaningful stakeholder engagement can best be achieved by financing technical support to each affected community. Community access to such technical expertise and support would be facilitated by a requirement for relevant operators to make regular contributions to a Basket Fund.

Finally, contributions to a Basket Fund for Responsible Investment can help operationalize meaningful and empowered community participation in the monitoring of an operator's obligations and project impacts.<sup>35</sup> Involving communities in monitoring can help create norms and pressure for greater compliance with negotiated agreements, applicable laws, and Bonsucro's standards. Yet such monitoring efforts generally require a degree of technical knowledge and resources; for example, the Draft Standard instructs mills to measure dissolved oxygen levels in receiving streams by utilizing a very specific technical method.<sup>36</sup> Community access to such technical expertise would be facilitated by a requirement for relevant

operators to make regular contributions to a Basket Fund.

### *Section 1.3. Dispute Resolution and Grievance Mechanisms*

The Draft Standard should explicitly require operators to make financial contributions to a Basket Fund for Responsible Investment as a part of their efforts to meet the Draft Standard's requirement that operators have in place a grievance mechanism that is compliant with the United Nations Guiding Principles on Business and Human Rights (UNGPs).<sup>37</sup>

Criteria 1.3 requires the grievance mechanism to be accessible to all parties, adapted for local use, "mutually agreed on," and allow for "complainants to choose individuals or groups to support them and/or act as observers." Allowing for communities to choose the people to support them is meaningless without also making sure the necessary funds are available, in an independent manner, for the community to procure such support. Rather than relying on operators to directly finance third party experts, which, as described above, can introduce risks of perceived or actual undue influence over communities, the Draft Standard should require operators to make financial contributions to a Basket Fund for Responsible Investment that then finances technical support for affected communities.

The Draft Standard's requirement that grievance mechanisms are consistent with the expectations of the UNGPs includes requirements that non-judicial grievance mechanisms be "equitable" and "accessible," among other characteristics. The UNGPs explain that to be equitable, grievance mechanisms must ensure 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."<sup>38</sup> Similarly, being "accessible" entails "providing adequate assistance for those who may face barriers to access."<sup>39</sup> The UNGPs also recognize that power imbalances often exist between businesses and affected stakeholders in the context of a dispute, and the resulting need for financial resources to facilitate the community access to "information and expert resources."<sup>40</sup> Requiring such funding to be paid by operators into a Basket Fund for Responsible Investment is, therefore, a promising way to effectively comply with the Draft Standard's requirement for a UNGP-compliant grievance mechanism.

## Section 2. Troubling Changes in Draft Production Standard V5

The following table sets out some concerning features with the Draft Standard solely as it relates to the sub-topics of this brief, namely: FPIC and community participation in decision-making; impact assessment and monitoring; and dispute resolution and grievance mechanisms. It should not be taken as an exhaustive review of the Draft Standard.

FPIC and Consultation		
Previous Standard Language	Draft Production Standard V5	Discussion of Shortcomings
<p>Criterion 5.7: “For greenfield expansion or new sugarcane projects, to ensure transparent, consultative and participatory processes that address cumulative and induced effects via an environmental and social impact assessment”</p>	<p>Core Indicator 1.1.2 (Notes): The operator shall have an identification, prioritization and engagement plan with interested and affected parties (i.e. internal, external, directly, indirectly impacted, and vulnerable stakeholders, as well as indigenous, tribal and traditional communities). The plan shall be revised at least annually.</p> <p>(Guidance): The process of engaging with indigenous and tribal communities shall take into consideration ILO Convention 169, guaranteeing indigenous peoples the right to free, prior and informed consent consultation and guaranteeing good faith.</p>	<p>The elimination of express requirements and guidance for operators to conduct “transparent, consultative and participatory processes with all relevant stakeholders” throughout the lifecycle of a project is concerning. While FPIC is still required in Indicator 1.2.3, the removal of a focus on process risks encouraging operators to take an “extractive” approach to obtaining consent, rather than emphasizing the rights of affected community members to be informed and to participate in and influence decisions regarding the project. The narrowing of FPIC rights to Indigenous and tribal communities in 1.1.2 is also inconsistent with other mentions of FPIC in the Draft Standard and risks limiting the participation of affected communities that are not Indigenous or tribal.</p>
<p>Criterion 5.8: “To ensure active engagement and transparent, consultative and participatory processes with all relevant stakeholders”</p>		

## Impact Assessment and Participatory Monitoring

Previous Standard Language	Draft Production Standard V5	Discussion of Shortcomings
Criterion 5.7: “For greenfield expansion or new sugarcane projects, to ensure transparent, consultative and participatory processes that address cumulative and induced effects via an environmental and social impact assessment”	Core Indicator 4.1.6 (Guidance): An ESIA process shall start prior to the formulation phase of a project, focus on significant issues and identify stakeholders to involve them, consider impacts on individuals with special consideration for vulnerable ones, and provide information on possible alternative or appropriate mitigation measures. Decisions shall be based on meaningful engagement with affected stakeholders (as defined by OECD), monitored and evaluated.	The removal of express mentions of FPIC from ESIA requirements implies an intention to avoid the FPIC standard. We submit (in section 1.2, above) that ESIA requirements should still be interpreted to incorporate an FPIC requirement.
Core Indicator 5.7.1 (Notes): “ESIA process shall start prior the formulation phase of a project, focus on significant issues and involve key stakeholders to identify them, provide information on possible alternative or appropriate mitigation measures for making decision based on free prior informed consent (FPIC) process, monitor and evaluate implemented measures.”		
Core Indicator 4.1.3 (Notes): The EIMP addresses key environmental issues: biodiversity, ecosystem services, soil, water, air, climate change, use of crop protection chemicals, use of artificial fertilisers, cane burning and noise. The plan shall be implemented and progress monitored. A summary of the EIMP shall be made available to relevant stakeholders.		

## Grievance Mechanisms and Dispute Resolution

Previous Standard Language	Draft Production Standard V5	Discussion of Shortcomings
Indicator 5.8.1 (Notes): “Ensure that when dispute, grievances and conflicts arise, the operator acts appropriately to resolve them through negotiated agreement between parties based on Free, Prior and Informed Consent”	Indicator 1.3.1: “operator must have in place a mutually agreed on and documented grievance mechanism that meets the expectations laid out in the UN Guiding Principles for Business and Human Rights”	While the framing of grievance mechanism requirements in the context of the UN Guiding Principles is helpful, the elimination of guidance for operators to establish an FPIC-compliant negotiated agreement with complainants following the resolution of such a mechanism is a missed opportunity to reiterate the iterative nature of the FPIC requirement. This is especially important, given that post-dispute resolution agreements can be an important tool for communities and community members to subsequently hold operators to account and for regulating and facilitating communication between communities and operators, including establishing processes which can enable communities to participate in and influence decision-making moving forward. In addition, the design and establishment of the mechanism itself should be FPIC-compliant.
Indicator 5.8.2: “Percentage of projects involving multi stakeholders where agreement has been reached by consensus driven process based on Free, Prior and Informed Consent”	No equivalent	
Indicator 5.8.2 (Notes): “Negotiated agreement shall be based on Free Prior Informed Consent. Evidence of negotiated agreements shall to be demonstrated.”	No equivalent	

## Endnotes

- 1 This submission builds on CCSI's ongoing research on innovative ways to finance technical support for project-affected communities. See Szoke-Burke, S and Cordes, K.Y, "Innovative Financing Solutions For Community Support In The Context Of Land Investments," Columbia Center on Sustainable Investment (2019), <https://bit.ly/3fKesYG>.
- 2 See "Troubling Changes in Draft Production Standard V5" below.
- 3 This assumes that, as for V4.2, Core Indicators require "full compliance" in order to qualify for certification, whereas only a minimum of 80% of non-Core indicators need be satisfied to qualify for certification.
- 4 Bonsucro Draft Production Standard Version 5 (2020), Core Indicator 1.2.3, Guidance ("Where indigenous and traditional communities are identified, free, prior and informed consent (FPIC) will be required before any operations are established or expanded")
- 5 Bonsucro Draft Production Standard Version 5 (2020), Indicator 4.3.2.
- 6 Bonsucro Draft Production Standard Version 5 (2020), Core Indicators 1.1.2, 1.1.3, 1.1.4, 4.1.6, and Indicators 4.3.3, 5.1.4.
- 7 Bonsucro Draft Production Standard Version 5 (2020), Core Indicator 1.3.1.
- 8 Inter-American Commission on Human Rights, "Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands And Natural Resources" (2009), para. 312, <https://bit.ly/3jkyLht>.
- 9 See discussion accompanying note 24, below.
- 10 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (2009), U.N. Doc. A/HRC/12/34, para. 51, <https://bit.ly/2CSFXko> (noting that consultation procedures for Indigenous peoples are often "not effective" and that imbalances of power need to be addressed by, among other things, ensuring communities have the "financial, technical and other assistance they need" without such assistance being used "to leverage or influence indigenous positions in the consultations").
- 11 Goodland, R, "Free, Prior and Informed Consent and the World Bank Group," Sustainable Development Law & Policy, Vol 4 Issue 2 (2004), <https://bit.ly/30ui3DA> (noting, in a discussion of meaningful participation of communities affected by World Bank-funded projects, that "Balanced negotiation demands education of stakeholders (governments, proponents, affected communities) on their rights and responsibilities. Such negotiations between asymmetrical parties usually need advocates, facilitators, and technical assistance.")
- 12 See, e.g., Conteh, S, "How not to conduct Large-scale Agricultural Investments: Lessons from the Malen/Socfin Land dispute in Sierra Leone," <https://bit.ly/3emBjrH> ("the 2011, 2012 and 2013 lease/sub-lease agreements and the processes leading up to them were fundamentally flawed. [...] Any insistence that due process was followed in the [negotiation of the] previous lease arrangement is disingenuous. The severe power imbalance between the parties and the lack of independent legal support to the communities ensured that any outcome was bound to be skewed.")
- 13 Feyertag, J and Bowie, B, "Tenure Risk in the African Sugar Sector Can Cause Companies to Lose Up to \$100 Million," TMP Systems and ODI (Feb. 2019), pp. 1, 2; Feyertag, J et al, "Assessing the Costs of Tenure Risks to Agribusinesses," TMP Systems and ODI (Feb. 2019), p. 14.
- 14 Ibid, p.3.
- 15 USAID, 2018 Investor Survey on Land Rights (2018), pp. 6, 21-22, <https://bit.ly/3j5Lpkz>.
- 16 Ibid, pp. 7, 27-29.
- 17 See, e.g., the RSPO's Dispute Settlement Facility Trust Fund, <https://bit.ly/2WgjUe7>.
- 18 See, e.g., Kumacaya, discussed in Arljung, M and Hansson, L, "Bridge Over Troubled Waters: How Can We Bury the Hatchet Between Industry and Civil Society?" (Apr. 2018), <https://bit.ly/329Z7g9>.
- 19 Government of Sierra Leone, "Final National Land Policy of Sierra Leone," Version 6, Ministry Of Lands, Country Planning and The Environment (2015), pp. 66-7, <https://bit.ly/2AVmRJJ>.
- 20 Szoke-Burke, S and Cordes K.Y, above note 1, p. 26.
- 21 Demonstration of FPIC is not listed as a core indicator in Indicator 4.3.2, and hence may not be subject to the requirement of "full compliance." This is both troubling and inconsistent with other mentions of FPIC in the Draft Standard and the general logic of FPIC as a process implemented in order to protect the fundamental human rights of project-affected communities.

- 22 Bonsucro Draft Production Standard Version 5, (2020), Core Indicators 1.1.2, 1.2.3, and Indicator 4.3.2. See, especially, Guidance for 1.1.2 (“The process of engaging with indigenous and tribal communities shall take into consideration ILO Convention 169, guaranteeing indigenous peoples the right to free, prior and informed consent consultation and guaranteeing good faith.”) and Guidance for 1.2.3 (“Where indigenous and traditional communities are identified, free, prior and informed consent (FPIC) will be required before any operations are established or expanded”).
- 23 Szoke-Burke, S and Cordes, K. Y, “Mechanisms for Consultation and Free, Prior and Informed Consent in the Negotiation of Investment Contracts,” *Northwestern Journal of International Law & Business* Vol. 41 (forthcoming, 2020-21), p. 10, <https://bit.ly/3fwhlfK> (“obtaining consent and consulting communities is not an obligation that can be fully and finally satisfied at any one point in time; instead, consent and consultation processes should take place regularly as part of 'a continuous, iterative process of communication and negotiation spanning the entire planning and project cycles.' Given the on-going nature of the consultation and FPIC standards, a government’s [or in this case, a Bonsucro operator’s] obligations do not expire as soon as consent is obtained. Continuous consultation and consent ensure a greater degree of participation and influence for communities, and improve communication between them and government and company representatives; this helps to safeguard the human rights that underlie consultation and FPIC requirements, potentially including rights to self-determination, water, health, and food, among others”).
- 24 Roundtable on Sustainable Palm Oil, “Complaints Panel’s decision on the Golden Veroleum Liberia’s (GVL) Complaints” (13 Feb 2018), para 1.1.3, <https://bit.ly/39igMDQ> (“The element of “informed” was not complied with as the investigation found the community members had very limited information prior to the signing of the MoU. These included representatives of the [Butaw Welfare and Development Association] who were involved in the negotiation of the MoU. The limited understandings of the provisions of the MoU found among the community members, including those who have according to their own words negotiated the MoU, further suggests that no legal advice was received to interpret the rather legal language used in the MoU.”)
- 25 Anaya, J. S., Evans, J and Kemp, D, “Free, prior and informed consent (FPIC) within a human rights framework: Lessons from a Suriname case study” *RESOLVE FPIC Solutions Dialogue* (2017), <https://bit.ly/3gSn1kj>.
- 26 Environmental Investigation Agency, *Who Watches the Watchmen? Auditors and the breakdown of oversight in the RSPO* (2015), pp. 6, 19, <https://bit.ly/3fpyXtF>.
- 27 *Ibid*, pp. 9, 20.
- 28 Bonsucro Draft Production Standard Version 5, (2020), Core Indicators 1.1.2, 1.1.3, 1.1.4, 4.1.6, and Indicators 4.3.3, 5.1.4. See, especially, Guidance for 1.1.3 (“establish engagement processes with displaced populations, implement a livelihood impact management plan, and track livelihood outcomes and mitigate and/or reverse all adverse impacts of displacement”), Notes for 1.1.4 (“At minimum, the impact assessment must cover...actual and potential impacts of the operation on the environment, workforce, and communities. A summary shall be made available to...identified stakeholders”), Guidance for 4.1.6 (“ESIA process shall [...] focus on significant issues and identify stakeholders to involve them” [...] “Decisions shall be based on meaningful engagement with affected stakeholders (as defined by OECD), monitored and evaluated. The operator shall involve independent third party experts”), and Notes for 4.3.3 (“collaborative and collective action to promote sustainable water use and participation with other water users [...] to allocate water equitably and without conflict”).
- 29 Bonsucro Draft Production Standard Version 5, (2020), Core Indicator 4.1.6, Guidance.
- 30 Bonsucro Draft Production Standard Version 5 (2020), Core Indicator 4.1.6, Guidance.
- 31 Inter-American Court of Human Rights, *Case of the Saramaka People v. Suriname*, Judgment (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs) (Aug. 12, 2008), para. 40 (emphasis added).
- 32 Doyle, C, “Indigenous Peoples’ Rights: Is HRIA an Enabler for Free, Prior and Informed Consent?,” in Götzmann, N (ed.), *Handbook on Human Rights Impact Assessment* (2019), p. 136.
- 33 Bonsucro Draft Production Standard Version 5 (2020), Core Indicator 4.1.6, Guidance (“An ESIA process shall start prior to the formulation phase of a project, focus on significant issues and identify stakeholders to involve them, consider impacts on individuals with special consideration for vulnerable ones, and provide information on possible alternative or appropriate mitigation measures. Decisions shall be based on meaningful engagement with affected stakeholders (as defined by OECD), monitored and evaluated”).
- 34 OECD, *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*, (2017), p. 82, <https://bit.ly/38R8p1O> (emphasis added).

- 35 Bonsucro Draft Production Standard Version 5, (2020), Principle 1 (“Assess and Manage Environmental, Social & Human Rights Risks”, Principle 4 (“Actively Manage Biodiversity and Ecosystem Services”, and Principle 5 (“Continuously Improve Other Key Areas of the Business”). See, especially, Guidance for Core Indicator 1.1.3 (“establish engagement processes with displaced populations, implement a livelihood impact management plan, and track livelihood outcomes and mitigate and/or reverse all adverse impacts of displacement”), Notes for Core Indicator 1.1.4 (“At minimum, the impact assessment must cover...actual and potential impacts of the operation on the environment, workforce, and communities.”), Guidance for Core Indicator 4.1.6 (“ESIA process shall [...] focus on significant issues and identify stakeholders to involve them” [...] “Decisions shall be based on meaningful engagement with affected stakeholders (as defined by OECD), monitored and evaluated. The operator shall involve independent third party experts”), Notes for Indicator 4.3.3 (“collaborative and collective action to promote sustainable water use and participation with other water users [...] to allocate water equitably and without conflict”), and Notes for Indicator 5.1.4 (“Internal and external audit processes demonstrate that systems improvements are ongoing”).
- 36 Bonsucro Draft Production Standard Version 5, (2020), Indicator 4.3.6. (“Dissolved oxygen is an indicator of the quantity of oxygen available in the receiving stream to support life. Sampling should be carried at the discharging point”). See Guidance from v.4.2 which details the analysis method, which remains unchanged in Draft Standard <https://bit.ly/38W90iW> (“It should be noted that effluent flows from a mill vary considerably during the week and along the season. DO samples should represent average conditions in the stream being monitored. [...] DO analysis should be made using iodometric (Winkler – reference method), luminescence-based (optical sensor), amperometric (probe) or spectrophotometric methods of analysis, in line with local legislation if applicable. The protocol of measurement will depend on the methodology used”).
- 37 Bonsucro Draft Production Standard Version 5, (2020), Indicator 1.3.1 (“the operator must have in place a mutually agreed on and documented grievance mechanism that meets the expectations laid out in the UN Guiding Principles for Business and Human Rights: Legitimate, Accessible, Predictable, Equitable, Transparent, Rights-compatible, a source of continuous learning and based on stakeholder engagement”). See, especially, para 3 (noting “Procedures are in place to ensure that the system is effectively communicated to and understood by” local communities) and para 5 (noting “The system allows for complainants to choose individuals or groups to support them and/or act as observers”).
- 38 OHCHR, United Nations Guiding Principles for Business and Human Rights (UNGPs), Article 31(d).
- 39 UNGPs, Art. 31(b).
- 40 UNGPs, Art. 31, Commentary, para (d) (“In grievances or disputes between business enterprises and affected stakeholders, the latter frequently have much less access to information and expert resources, and often lack the financial resources to pay for them. Where this imbalance is not redressed, it can reduce both the achievement and perception of a fair process and make it harder to arrive at durable solutions”).



**Columbia Center  
on Sustainable Investment**

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY



Design by Michael J Morgan

With deep thanks to Alexandra Carruthers, Kaitlin Cordes, and Gabriel McCormick for their helpful reviews.

*Cover Photo by think4photop on Shutterstock*

**[ccsi.columbia.edu](https://ccsi.columbia.edu)**

**Columbia Center on  
Sustainable Investment**

**Jerome Greene Hall  
435 West 116th Street  
New York, NY 10027  
Phone: +1 (212) 854-1830  
Email: [ccsi@law.columbia.edu](mailto:ccsi@law.columbia.edu)**