Free, Prior and Informed Consent as a response to ‘land grabbing’: some lessons from the field

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Free, Prior and Informed Consent (FPIC)

FPP and FPIC:
- World Bank OMS > OD > OP and IFC PS: since 1984
- ITTO 1989-1992: ‘sust. livlihds’ from mandatory to voluntary
- FSC 1992 to now: ‘legal & customary’ land and ‘FIC’
- Protected areas 1994-now: FPIC and customary lands, TEK Whakatane Mechanism 2010-now: conflict resolution
- World Commission on Dams 1999-2000: FPIC accepted
- Extractive Industries Review 2001-3: FPIC accepted
- IACHR, CERD and UN HRC: since 1995
- SHaD 2009-now: getting social issues addressed
- RSB: not directly involved: MC has advised on land and FPIC
- HCRV 2003-now

FPP in palm oil sector
- RSPO P&C: HR adviser to SawitWatch
- Detailed study of land acquisition in Indonesia
- Review of Smallholder sitw: Task Force on Smallholders
- Activated human rights procedures
- RSPO and FPIC: training > guide for companies
- IFC-CAO complaints re Wilmar: now in 3rd complaint
- HSBC review: totally untransparent procedures
- Regional review of expansion in SE Asia
- Palm oil spreads to Africa
- FAO VG process: drafting FPIC Implementation Guide
- Current: 15 case study FPIC implementation review

The scale of the problem
- 4 m ha in Malaysia: Peninsula now all but fully planted
- Sarawak set to double (half on peat) most on NCRs, Sabah also still expanding fast
- Indonesia gone from 6 m ha in 2005 to near 9 m ha today
- Expansion proceeding at 1 m ha per year
- Over 20 m ha in provincial land use plans

Drivers
- 30% of global vegetable oil market is palm oil
- Expanding markets especially in Eastern Europe, India (= 2 m ha.) and China
- Profitability: prices have risen steadily for 2 decades (slight dip at the moment)
- Biofuels: domestic policies, energy security, avoids loss of foreign exchange, seems ‘green’.

The scale of the problem
Widespread land conflicts

- 1000s of land conflicts related to oil palm in Indonesia: 3 years ago (RT8) BPN said there were 7,000 land disputes of which 3,500 cases, now it notes 8,000 land disputes for agribusiness in all
- 5 years ago we found 40 cases in the Sarawak courts, today there are said to be several hundred
- Crop now expanding in SE Asia, Africa, Central and South America

Human rights abuses

- Land grabs trigger resistance and then repression
- Killings and violence against persons
- Destruction of properties
- Deprivation of livelihoods
- Criminalization of subsistence
- Labour disputes, debt slavery
- See: [link](http://www.youtube.com/watch?v=MF1h9chcWVo&feature=plcp)

Underlying causes

- Weak land governance institutions overwhelmed by massive scale of new land deals
- Legal framework denies strong or enforceable rights to customary land owners
- Government policies favour large scale land development of monocrops for export over diversified smallholder agriculture
- Vested interests: politicians and govt- seekers profit from land allocations
- In Indonesia land concessions are main source of both personal wealth and party campaign funds for district regents

Alternative land governance

- In Thailand (world no 3 producer) oil palm has developed mainly as a smallholder crop (70% by area) through conversion of rubber, rice paddies and marginal lands
- More equitable development results
- Tenures are more secure and rule of law somewhat better than eg Indonesia
- Infrastructure better developed
- Are there interim solutions where land governance weak?

FPIC: a new solution?

[Image of FPIC: a new solution?]
FPIC as a right

- An expression of the right to self-determination and the collective right to property (Saramaka vs Suriname)
- The right of indigenous peoples to give or withhold their free, prior and informed consent, as expressed through their own freely chosen representatives, to measures that may affect their lands and territories and wider rights
- Affirmed in international law and jurisprudence over past 20 years, now in UNDRIP

Problems of Implementation

- Studies show that failures mostly due to lack of awareness of due process or bad faith: coercion, prior permitting, post facto compensation, State expropriation, lack of information, manipulated leadership, land brokers
- Preference to individualise land acquisition and avoid collective representation (cf labour disputes)
- Failures also result from unhelpful legal framework: eg lands revert to State on expiry of lease
- Third party certification: inadequate indicators and/or substandard auditing

Access to Justice?

- Sarawak: IOI and LTK: court case started in 1996. Concession acquired by IOI 2006. NCRs judged to exist 2011: now being appealed by IOI.
- Sabah: Genting Plantations: case filed in 2002 ask for recognition of NCR and injunction on expansion: company disputed admissability of case: 10 years later Federal Court ruled case admissable: is it now too late?

Court decisions on NCR

Mapping land claims
**New Plantings Procedure**

- Requires transparency (webposting) prior to land clearance: 30 day window to get process back on track
- Liberia: halted expansion of Sime Darby on Vai lands in Grand Cape Mount: govt objected
- Now Government Land Commission seeking to title customary lands ahead of palm planting
- Liberia: seeking to halt Golden Veroleum (GAR)
- Nigeria: Wilmar in Cross River State
- Cameroon: Herakles and BioPalm
- DRC: Congo Oil Derivatives

**Seeking remedies: some precedents**

CAO: Wilmar in Sambas West Kalimantan:
- CAO mediated and negotiated agreements, land restored, agreement not to expand, compensation paid and extra smallholdings

**Precedents (2)**

CAO 2: Wilmar and Pangean Riau:
- Complex land situation with local people and trans-migrants, land dispute clarified, NGO (Scale Up) mediated negotiation, agreement reached, extra smallholdings allocated

**Onerous procedures**

- Procedures too complex for communities to activate
- Requires major investment of NGO efforts
- Impossible to scale this up to reach whole sector
- 1/20th of Wilmar holdings so far addressed

**Framework reforms needed**

- CAO Audit found that IFC staff were investing when they should know the sector was highly problematic and in violation of IFC PS
- Weak management response and NGO appeal led to WB President to freeze all WBG funding for palm oil while new strategy developed
- New screening tools obliges staff to check for adequate land governance: IFC and WB ‘2-step’
- Importance of maintaining – in fact strengthening WB safeguards – not just FPIC but also land rights
- TFD dialogue on FPIC and WB for 2013

**FAO Voluntary Guidelines**

- Requires FPIC for IPs but weaker consultation for other local communities
- What are the rights of local communities?
- All peoples have right to self-determination but not clear that communities have rights of ‘peoples’ or how they should be represented if not through local government
- OTH why should private sector development be prioritised over citizens’ rights
- FPP finalising FAO FPIC Implementation Guide
- Land governance reforms remain key need
Further action research needed

- Collate all international human rights jurisprudence related to land rights of ‘local communities’
- Gather further information about what rights local communities / peasants / campesinos are really demanding
- Assess risks of imposing the FPIC ‘solution’ if not being demanded by the peoples concerned

Meanwhile use other international remedies

- CERD urgent action procedures
- Special Rapporteurs on the Right to Food and Rights of IPs
- UN Framework and Guiding Principles
- Bali Declaration
- ASEAN HR Commissions
- Pressure on government
- Focus on land tenure and rights
- Responsibilities of corporations to respect human rights
- Need also for regional action on transnationals

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Thank you