Welcome by Duncan Pruett and Annelies Zoomers

With greater pressure on natural resources and the commons, and a large number of land conflicts, there is an increased interest in, but also new challenges for, the development and promotion of the right of Free Prior and Informed Consent: for instance, there are emerging questions about FPIC’s application beyond indigenous peoples; and implementation is in need of improvement.

Annelies Zoomers introduces LANDac, the IS-Academy on Land Governance for Equitable and Sustainable Development. In the field of land governance much can be learnt from FPIC experiences.

Presentation Marcus Colchester: Free, prior and informed consent in the context of land grabbing (see attached powerpoint)

Marcus first emphasizes the need to think of FPIC in a much broader context, not just as a stand alone tool.

The Forest Peoples Programme (FPP) has been involved with FPIC-related concepts and voluntary standards for the private sector since the 1980s through different institutions and initiatives – e.g. the Round Table on Sustainable Palm Oil (RSPO). Various reports are or will soon be available on the FPP’s website http://www.forestpeoples.org/, among others 15 new case studies on the implementation of FPIC in the oil palm sector.

Large-scale oil palm expansion in Indonesia and Malaysia has led to widespread conflict, land grabs and human rights abuses. In Thailand, with better land governance (more secure tenure and rule of law) and better developed infrastructure, the oil palm is mainly produced in smallholdings which provide more equitable development outcomes and benefits for farmers. The question is: are there interim solutions for countries where land governance is weak?
FPIC may be a solution, but it is above all a right: it is an expression of the right to self-determination and collective right to property. FPIC thus gives communities the right to say no to oil palm. It is an iterative right, an on-going engagement: indigenous people want a relationship of trust, not a business deal.

A number of problems of FPIC implementation were identified from the 15 case studies and previous work (see powerpoint). An improvement is seen in the RSPO’s new planting procedure which requires transparency (web-posting) prior to land clearance, and thus provides a 30 day window to get the process back on track.

FPP has worked with communities and palm oil investments. In the Sime Darby case in Liberia, a concession for a large oil palm expansion was halted; the government first strongly objected. Now the government and company have come to a more constructive discussion with the communities: they are seeking to title customary land before planting. This is a positive example in the context of FPIC. In the case of Wilmar International (an IFC client) in Indonesia, following complaints from FPP and partners the IFC’s compliance advisory ombudsman mediated negotiations to gain redress and restitution of land for communities: they received compensation and extra smallholdings. Despite the problems there was some success. This is a case of "retrospective FPIC". Judicial and complaints procedures are very onerous, slow and too complex for communities: it requires major investment and NGO efforts and is impossible to scale up for the whole sector. Only 1/20th of Wilmar’s oil palm holdings so far have been addressed.

Broader reforms are thus needed. The International Finance Corporation (IFC) staff were investing in palm oil even though they were aware of many problems. Strengthening the World Bank Safeguards on FPIC and land rights is needed; they still have weak standards on land rights: the safeguards on land are ambiguous on indigenous peoples, and non-existent for non-indigenous groups.

In the Voluntary Guidelines (VGs) FPIC is required for indigenous peoples, but a much weaker consultation is asked for other local communities. However, under international law, all peoples have a right to self-determination, but there is a lack of clarity about how this applies to non-indigenous groups, how they should be represented if not through local government, etc.

Further action research is needed on FPIC.

Comments by Kristen Genovese

There is much reason for concern about IFC implementation of FPIC standards. The IFC seems to interpret FPIC as applying only to the client's design of the project, not whether the community consents to the project itself. In addition, IFC does not require companies to obtain FPIC necessarily before the project, whereas after the investment, IFC doesn’t have much leverage. This interpretation of FPIC does not help IFC’s clients avoid conflict.

The current review of the World Bank Safeguard Policies should comply with international law. WB has discussed the possibility of adopting FPIC, we need to look closely at how they implement it: ensuring that its interpretation of FPIC is consistent with international law, allowing for the possibility that the Bank will not finance a project if the community does not consent to it.

The example of the Marlin mine in Guatemala (by Goldcorp from Canada), which received a loan from IFC in 2004, shows the IFCs problematic implementation of FPIC. The mine is on the territory of two indigenous communities. One community voted against the mine in a referendum, whereas the other community was not asked for consent. It has been a source of conflict ever since. Many human
rights bodies have confirmed that the mine violates the principles of FPIC, but only retrospective FPIC is possible now.

However, there are larger issues at stake: Guatemala should decide on the type of development it wants, and question the need for investment in extractive industries, with large numbers of people voting against mining in referenda all over the country. Individual FPIC discussions are necessary, but the debate should be broader.

There is a large imbalance between investors’ rights and community rights and access to justice. Some grievance mechanisms have been successful in providing redress for communities, but dialogue processes are not appropriate for all circumstances.

General discussion

MC = Marcus Colchester
KG = Kristen Genovese

One problem of implementation that was missing from the presentation is: it’s not clear who the lawful communities are that you have to deal with.

MC: The RSPO standard states that the first step in FPIC is: identify your stakeholders. This is very tricky; it is difficult to identify which claims are real. Participatory mapping with communities and neighbours is a useful tool to define who the rightful owners of land are. There are cheap and easy methods for it now, by only using a smartphone and Google Maps. FPP is using this technique in the DRC now. It is important to make sure that maps are also approved by neighbours.

In case studies, did you notice any difference between RSPO member companies and non-members?

MC: We did identify that RSPO members are improving their performance: there are gains and real benefits, e.g. through the new planting procedure. The company in Liberia was happy with our influence and criticism of their procedures, they were eager to improve.

How do you deal with the problem of compensation, as large amounts of money can ruin people’s lives if they don’t know how to handle it?

MC: We recommend that part of the planning discussion is about how to set up a transparent mechanism on community agreement how the money is used. An FPIC-based renegotiation between the Lusan people and East Kalimantan logging company provides a positive example: it was agreed to set up a community trust fund so that the money was used for wider community purposes, not for personal interests. Another case in West Kalimantan unfortunately showed that the leader ran off with the money. Transparency is crucial: IFC has been quite successful in setting up a community trust fund in one case, the Ralco dam on the BioBio river, which displaced the Pehuenche people.

Much training is needed for communities to be able to engage successfully with FPIC. To what extent should (financing) training be a responsibility of the company or others?

MC: Training is key for communities but also for companies: they are very interested in training as well. A good example is the organization of parallel FPIC trainings for community groups and company groups, after which they come to a shared understanding.

Palm oil is an easy target, but what about other more complicated or ambiguous crops: is the same tension seen in other sectors?
MC: We haven’t looked at other crops so much. Recently we carried out a review of six main commodity round tables to compare their FPIC and land procedures; this is available on the website. They address it in different ways: practical challenges are quite similar, but the legal framework is very different. Palm oil is a neutral crop; the problems have to do with its modes of production.

There are also other studies comparing the different commodity standards and their work on land rights, by Swiss Development Cooperation/Reinier de Man.

In compensation mechanisms, land for land should probably be the first way to compensate, as it offers a lifetime livelihood. With community trust mechanisms and shared profits, there is a risk that companies will avoid registering profits in that country: profits will flow to other countries.

Before moving to implementation, we should first ask ourselves some other questions: What does successful implementation of FPIC mean? It is difficult to delink FPIC from the general development discussion. People may be against the project or just want a good deal. The focus on compensation is problematic because it means something went wrong in the first place. We should ask ourselves if deals between companies and communities are good in the first place, and what the role of government is.

NGOs mostly use FPIC reactively, after the project has started: this is not free prior consent. Instead, we should talk about co-ownership and granting benefits beforehand: there are successful examples in Indonesia. We should not focus too much on large scale companies and deals, the real issues are different. In Riau, over 60% of oil palm production is done by smallholders. An uncontrolled process is taking place with production moving into the peat lands. Local and higher governments should be more involved: they are also struggling with the process, they need capacity building. We have to look at positive examples and setting guidelines.

RSPO is an example of prior involvement to prevent conflicts, improving the livelihood of smallholders etc. We should identify and upscale good examples of smallholder involvement: how many hectares are needed as a minimum, what are good models.

This is a broader discussion about alternatives and how people can be involved and benefit. But the two discussions are connected: often large scale deals involve smallholders being granted land or losing part of their land but maintaining other part. So they can negotiate and get a deal.

It is important to see how FPIC can be accepted by more stakeholders. But this is very difficult: even within the RSPO, it was difficult to get FPIC accepted.

MC: This goes back to the question whose role it is. Under human rights law, governments have the obligation to respect and ensure human rights and protect their people. Under UN guiding principles, the principal obligation is with the state, but businesses also have responsibility to respect human rights, even where state law or practice are at variance. Both parties have a responsibility, but it is much more difficult for companies to respect these rights if government is operating in contrary ways.

What requires further exploration is the question of extractives: in some industries it is more understandable why the state invokes its power of eminent domain and expropriates, e.g. a mine or dam. In the palm oil sector, there are no reasons for planting in that particular area and expropriating that area: they should let people choose themselves.

The assumptions behind FPIC are not always in line with development processes, inclusiveness etc. It assumes that there is a clear community, whereas communities are heterogeneous and complicated. Another assumption is that only directly affected people should have a say, whereas in reality, more groups are indirectly involved. It is important to broaden the discussion. The concept is too local and inward looking.
MC: Successful implementation means that rights are successfully respected. It is a subjective judgement, based on what people say. Whether development is successful for the broader community is another point of view: do people know what they want and need? We are talking about peoples with a right over their land, they have a right to say yes or no.

KG: In my work, people who defend their rights are put forward as anti-development. That is dangerous. This is a life and death situation in many countries: human rights defenders are killed. Often, the option given to the community is either the mine or nothing: there is no discussion on broader development, what do you want instead is not asked. Conversation with communities should be about the kind of development they want, not just this or nothing; but this is how the companies put it. Communities don’t know that there are companies investing in their area and that there are opportunities to resist. So there is much need for proactive action with communities, to support them to define development priorities beforehand and prepare.

What should organizations and Dutch ministry etc. do – in what fields should they push? World Bank Safeguard reviews is on the agenda now.

MC: First of all, they should have a do no harm agenda; but there is also a policy and lobbying agenda within the organizations with governments in the countries; this is a big struggle. Reactive FPIC actions are also still much needed.

The discussion on development should also engage with national governments. It is now the trend to work directly with businesses, as this is easier: bilateral and multilateral engagement is often considered too difficult. This is a dangerous development. For example, FSC has not had a great impact on national legislation: it has led to islands of excellence in a pool of dirt. More interaction with governments is needed: even though politically there may be much corruption, at a lower technical level there are many hardworking and engaged people, they are left out.

The VGs were also designed to help national governments.

MC: Companies should be willing to go above and beyond the law, but the narrative that private sector should solve all problems is wrong. Standards include many issues (e.g. land rights) that cannot be dealt with by the private sector; but government is not dealing with them in a good way either. We can have some repair work with the private sector for the moment, but for solving the problems we need revised laws, policies and institutions.

The question on government or business is a non-issue: it’s not either one or the other. We should avoid tunnel vision by focusing only on one element such as FPIC: private sector responsibility is much broader. Companies have to gain a social license to operate. If they enter in a clear, honest and transparent way, a common goal can arise, but there will always be dilemmas. A good example is the case of slum redevelopment in Mumbai: the government laid a framework where commercial developers can redevelop slums, but developers should be invited by the local community. Most companies nowadays understand that proactive engagement is important. There are no clear-cut handbooks; it demands much attention and commitment from people high up. There should be a net positive gain: losses should be totally compensated, and it is even better to have a positive gain.

A rights-based approach and a development approach are not that different. We should work with communities to help them claim better rights and decide on what development they want. There is an important role to play for NGOs in many countries.

Whereas the private sector expects a role from governments, governments are putting everything on the plate of the private sector. Donors should support southern governments more. Local governments are in urgent need of support e.g. with land use planning. It’s a pity donor governments
are going away from these essential issues. FPIC is good, but better law and implementation is much better.

MC: The idea was to look at FPIC in a broader context. FPIC is part of the solution, but the amount of cases is a big challenge: expectations may be too high. It should be noted that FPIC does not require a 100% consensus in communities: communities have their own ways, capacities and institutions to take decisions.

Voluntary standards should not divert attention from strong local/national institutions or rule of law: they should also work on government institutional development (e.g. RSPO, IFC etc.)

MC: People themselves are the decision-makers: they should be informed and their decisions accepted.

Closure by Annelies Zoomers and Duncan Pruett