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Interview with Marcus Colchester, founder of the NGO Forest Peoples Programme, on the ‘Free, Prior and Informed Consent’ of communities

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EDITOR'S NOTE

Marcus Colchester is Senior Policy Advisor for the NGO Forest Peoples Programme (FPP). FPP was founded in 1990 to link environmental NGOs concerned with deforestation to forest peoples. Since then, FPP has evolved into a human rights group, working in support of the self-determination of forest peoples. See his biography at the end of the interview.

London, 18 December 2017.

Individual / people consent: two genealogies

1 **Laurent Thévenot**: How did you come to use the notion of Free Prior Informed Consent, which has an *individual* basis, to fit *communities*?

2 **Marcus Colchester**: There are two origins of consent in the human rights world and one of them derives from the experiments that the Nazis carried out on prisoners, particularly Jewish prisoners, and that was considered very evil. After the war, they decried such practices and that is why this notion of prior informed consent became a right of individuals in the medical world. That is one history of law that you can trace back to Second World War, to the Nazis’ crimes. But, the notion of FREE, prior and informed consent, as a right of peoples, is something that you can trace back to a completely different origin, going back to the French Revolution or the American Declaration of Independence, going back to Thomas Paine and John Locke, to the idea that the government is not legitimate unless it has “the consent of the governed”. That

is a very famous phrase in the Declaration of Independence of the United States. Government has to be based on the consent of the governed and that's the basis on which the Americans joined the First World War when they argued for this principle of the consent of the governed which, using the language of Lenin, they termed "self-determination". So, free, prior and informed consent is a procedural right that is an expression of the right of all peoples to self-determination. As you know, self-determination is one the principles of the U.N. Charter. It was a key principle of the Treaty of Versailles, of course and then became incorporated into the U.N. Charter after the Second World War. Indeed that principle - of self-determination - was part of the Grand Alliance already called the United Nations even before the end of the Second World War when the British and the Americans created their alliance against Nazism. Nazism is a common point in this. But there are two very different histories of rights. So, our work at the Forest Peoples Program has always been to do with this right of peoples as collectives, which are recognized entities in international law of having this right to determine their own destiny.

3 **L. T.:** Was it the key notion from the very beginning of the FPP?

4 **M. C.:** Yes. And from long before. It goes back to the Barbados Declaration of Anthropologists in 1971 where there was recognition that the struggle of indigenous peoples required the solidarity of anthropologists; they should collaborate in a process of liberation. Within a year, people were talking about this liberation as self-determination. The International Working Group for Indigenous Affairs was created at about that time and then also Survival International. Both were created at that time based on this idea of self-determination.

5 **L. T.:** Self-determination? Not Free Prior and Informed Consent?

6 **M. C.:** No, not Free, Prior and Informed Consent. That evolved more in the late eighties, early nineties, as a key principle, an expression of the rights of peoples. So, when you came to the renegotiation of the International Labor Organization Convention 107 as it was, which became ILO 169, the first one was on Tribal and Indigenous Populations and it was changed into Tribal and Indigenous Peoples. I was on the Committee of Experts for the renegotiation of this Convention, which was adopted in 1989. At that time, you know, the principle of free, prior and informed consent started to be part of international law. Of course, you can trace back this idea that you needed to get the agreement of native peoples, you can trace this back to the seventeenth century, when English chartered companies were giving Royal Charters to go and colonize the world, but they always had to acquire the land with the consent of the 'native princes'.

7 **L. T.:** "Consent" was the word?

8 **M. C.:** "Consent" was the word. And of course that evolved into the tradition of Treaty-making with indigenous peoples. That is an illustration. So, this principle goes back really deep in History: basically, if you do not want a war, you have to get people's consent. It is a collective right. That is the point that I am trying to make. So, if you now study the international jurisprudence to see where does the right to free, prior and informed consent come from, then they say this is a derivative right from the right to property - the collective property of peoples - and the right to self-determination. They flow together to give you this right of having a say over your lands, and what happens to them, as a people.

Collective rights on land, levels of authority, the puzzle of who represent the people

9 **M. C.:** Now, as anthropologists and as activists on the ground, we know that it is more complicated. Peoples are not polities. Political institutions may be much more fragmented and not so readily expressed that just peoples can give consent in such circumstance. This is also being puzzled through in the courts. For example, there is a very famous case which the FPP was involved in, which was the case of Saramaka People against Suriname which was in the Inter-American Court of Human Rights (in Costa Rica). The case went through two adjudications, both in favor of the Saramaka People. Indeed, the court ruled that they had the right to free, prior and informed consent over the government's intent to issue logging and mining concessions over their land. The Court ruled that, indeed, under the American Convention on the Human Rights, this people should have had a choice and therefore the government must recognize their rights to their land and to have this right to consent.

10 **L.T.:** And so you were involved too?

11 **M. C.:** Our senior lawyer, Fergus MacKay. It was a ten-year case. Ten years of litigation. He has won several cases in the Court. We are very active in that court. We have a lot of different cases underway at the moment, as well. The Saramaka case was a famous case. What was particularly interesting was the government questioned the initial judgment and said "well, we have got the consent of the Granman, the headmen called *Gaamá* in the Saramaka language, who granted consent to this, so what's the problem?". So then the question was, well, is that the institution through which people control their land? And Saramaka with our legal assistance argued that, no, the land is held by matrilineal clans which are the legal, female persons which hold the land and the authorities over the land are the clan's elders. The institution is called the *lo*, in their language. So, the law helps us understand that even though this free, prior and informed consent is a right of peoples, the right needs to be articulated by the customary law authorities, who have jurisdiction over that property.

12 So, we know we do have this puzzle of who represents the people but then the question should be ok so what does customary law tell us, who under customary law does have rights and have a say about the disposal of assets.

13 Take for example, the case of the Minangkabau People of West Sumatra who have a dispute with Wilmar, the world's largest palm oil trading company. They have three different levels of collective rights in land: they have family land, they have lands held by the matrilineal clan, the second level, and then they have a collective mini republic, called the Nagari, which derives from the same word as the State, Negara in Indonesian. The Nagari is a mini Republic which is under the authority of the clan elders, a counsel of indigenous persons called *Ninik Mamak*, the clan elders if you like. Once you look into the customary law, you can identify those who are given authority over the land, it is not just anybody that the government or the company picks to represent the peoples. The idea, of course, is that free, prior and informed consent returns the authority of decision-making to the community to be framed through their customary law and not just decided through the decisions of the administration or the government. It is a way of trying to level what is a very uneven playing field, because we all know that government feels entitled to hand out these areas as concessions or as permits to companies without consulting, let alone with the peoples' consent. But by saying "no, these peoples have rights that precede the State" - because their rights are based on custom and custom is a source of rights under international law - therefore, you must respect these peoples who have rights and property and have rights of disposal, and

these rights must be respected through this procedural right of free, prior and informed consent. So, I think, there is a lot more there in the jurisprudence that guides us in how decisions should be made. It is not just "ok you say it is the people but that is not very easy, so it is a problem."

Collective rights, customary law and inclusiveness

14 **M. C.:** There are big advantages with this notion of free, prior and informed consent. Firstly, it does reinforce this notion that peoples have rights. Secondly, because they are collective rights, it could or should be more equitable because it should include all members of that society or that community. We just talked about two examples where the land is actually held by women. So, it is not immediately true that this process favors men, but it might. It might be that in such processes, men have much more say, and women get less. After all, it is something to be thoughtful about. But on the other hand, there are quite number of examples where women's rights are very much protected if collective rights are protected. For example if you look at the Dayak peoples of Borneo, under their custom, all lands are inherited equally by men and by women. They have equal rights over land. So, if you protect collective land you are protecting equally men and women's rights. In practice, because of the collision between customary law and national law, where national norms may prevail, then of course, you may find that, in negotiating these agreements, what they think is the recognition of customary rights, is actually turned into a recognition of a different kind of right. For example, when Dayak farmers negotiate to get rights to smallholdings in partial compensation for the lands that they have surrendered to the companies, it is usually the men who get titles to the small holdings, not the women...

15 I think that the point also that I forgot to make more clearly is that in recognizing that custom is a source of rights, the State does not have to do anything to actively recognize that right. That right endures so long as it has not been extinguished by any specific act or piece of law which should be fairly done through due process. People should be informed that now we are going to extinguish your rights in negotiating an agreement. That is what international law also says. So, that right endures even if the State does not say we recognize your customary rights, because these rights are already there. The State has to say that they don't exist and they have to do that by a fair process. There is some evidence that lands so allocated through customary law actually lead to more equitable development outcomes for people than when lands are titled and formally registered with individual owners. If you look at to some of the research done by the World Bank, in fact in Central Africa, they found you get less inequity where lands are allocated by custom. Too often, land markets of privatized property lead to rich people being able to buy land from poorer people, the poorer people not being able to manage during times of dearth, and then you get landlessness and land concentration. So, land markets are actually less equitable in some circumstances than customary law systems, whereby lands can be reallocated to people in need, because they are members of the community and it is a shared commons, which is administrated for the benefit of the commoners.

16 It is not always the case. I don't want to exaggerate but I think there is an important argument that customary law can be more inclusive and can be more equitable and indeed is often based on a different notion of what is a just outcome than western law. Western law is more about retribution and less about restorative justice. Many customary law systems are about restoring harmony in the community. That means

somebody who has got more has to give up some to those who've got less. That is a good thing. One is asked to give to people that have less, whereas in our form of law, you want revenge or you want retribution for the crime done by the individual. That may leave the individual much worse off rather being reintegrated into the society despite their wrongdoing.

17 I think this actually leads to an important point about what is being sought by indigenous peoples in negotiation, in terms of the decision. The companies want a decision that they can use the land, or they can take the land or buy the land, whatever. That is the main objective of most of the companies. BUT what the community wants is a relationship of trust. They feel that they are engaging with some new neighbors on the basis of a shared interest. That is very much how it has been explained to us by indigenous peoples in all these various decision-making forum that we have been engaged with like with the World Commission on Dams, where we led the engagement with indigenous peoples and the same with the World Bank's Extractive Industries Review. And then with the Forest Stewardship Council and now with the RSPO (Roundtable on Sustainable Palm Oil). These are all arenas where we have been helping indigenous peoples argue that their rights to free, prior and informed consent must be respected. In all of these cases, they have argued the same thing: "what we want is a relationship, not a one-off signing away of our rights". That is why in our Guides, we emphasize that free, prior and informed consent is an iterative process, developing this relationship requires give and take between the parties. It is not just "please sign the documents after we have told you what our plans are". So there is a big tension there because the companies having one understanding of the purpose of Free, Prior and Informed Consent and the communities having a quite different understanding of what they are trying to achieve.

"Repugnant" customs, international human rights: what are the consequences for Free Prior and Informed Consent?

18 **Emmanuelle Cheyns:** What kind of problems does it raise with the community customary norms, such as women's voices, or the need to reconsider some customary statements in contradictions to human individual rights?

19 **M. C.:** The answer to that is of course that there is such thing as 'bad custom'. That is recognized by indigenous peoples themselves. This was also something that was very much a concern of the colonials, because they often administered indigenous peoples through indirect rule by letting local people govern themselves through their customary laws and authorities. This was not so much in the French colonial system but in the British system. We had a cheaper form of colonialism where we left indigenous authorities to administer their own affairs. It was called 'indirect rule', much cheaper. You, as French, you tended to opt for direct rule, and to administer right down to the local level under French law. We did not have that degree of investment, if you like, in the administration. 'They can look after their own affairs'. It is a more practical way of dealing with the people, less intrusive and we leave the peoples to administer their own justice BUT we cannot accept all the things they practice.

20 I mean the classic example would be human sacrifice. You can administer yourselves but you cannot do human sacrifice. You cannot do "suttee", you cannot have widows being burnt on the funeral pyres of their husbands. That had been banned by the British. And slavery of course, came to be banned after we eventually decided that

slavery was wrong as well. That took a while... These things were considered under British colonial law as being 'repugnant'. So this notion of 'repugnancy' is the legal term that was used...

21 Today, what is often discussed are the rights of women, or castes, or things like genital mutilation, male and female. There are issues that are now considered 'repugnant' but which, during the colonial period, were not challenged so much. Well, there is a long story about scheduled castes and scheduled tribes in India, about how we British dealt with the Indian system of impurity and social exclusion. But maybe it is too much detail.

22 So, where do indigenous peoples stand on this issue about bad customs today? I go back to history actually. It also came up when the ILO Conventions were being revised. There was an indigenous caucus that came together to spell out their arguments to the International Labor Organization on how Convention 107 should be redefined as Convention 169. Because the International Labor Organization only has three parties - States, employers' and employees' organizations - the indigenous peoples did not have a direct voice in the process. I was the chair of this caucus for some reason, I was asked to be the chair. We all sat in a parallel room, which the ILO had arranged for us and we went through every text and came out with what was the indigenous aspiration for what this text should say. Then this draft was rushed over to the trades unions, some of whom had specially appointed indigenous persons on their delegations. The Sami in Scandinavia, the Maori from New Zealand and the Australians who had aboriginal persons on their delegation. And then we would be putting these papers into their hands and they would be going through to the main forum to argue for this in the negotiation.

23 **L. T.**: What is a caucus?

24 **M. C.**: "Caucus" is like an informal grouping of interested parties. So this was the indigenous caucus. Typically, in conferences people go into caucuses and talk about things and then come back to negotiate. This is called "caucusing".

25 So the question came up in the indigenous caucus: if we are appealing to international human rights law for our rights, do we agree that we are also subject to international law and therefore, don't international human rights laws also apply to us, as indigenous peoples? If so, then, what do we do about some of the contradictions that arise? In that meeting, there was a deep discussion and I was just listening really. They all agreed, "yes, we are subjects of international law, and we want international human rights norms to apply to us too. So, therefore, we do need to admit that some of our customs are not in line with international law and should be subject to review". But the question arises: if you have the right to self-determination, and if it is decided that some elements of your customs are repugnant or bad customs, WHO decides and HOW do you adjust? That is something that is still under discussion. There was an important declaration by indigenous peoples called the Manila Declaration, which particularly address the issue of the marginalization of women in many indigenous customary systems. They argued that indigenous women should be the ones to identify whether any system was 'repugnant', needed change, and that should be something that is changed through the society's own efforts rather something that is imposed by outside parties. Because otherwise you would back to a colonial kind of situation where outsiders would say, "Hey, we do not think you treat your women properly and you have got to change". And the women might not agree to that. So the women might say

"actually, we are quite happy, thank you very much, you stay out". I've read quite a lot of articles by indigenous women arguing. "Actually, we like to have our two different worlds. We think we are equal but different. So, do not go telling us we have to be all exactly the same as you westerners". It is a very complicated discussion.

26 It is very relevant for this issue of free, prior and informed consent, because when we develop our Guides on how we think this should happen, we are all arguing that it should happen under customary law, that is the key point. It is to shift the local decision-making back to the people. But it should be inclusive; it should seek to fully involve all members of the collective whose rights are being decided on. Then the question is, what happens when the women are not included because tradition does not do it. Now if outsiders now say "well, then it is not a legitimate FPIC process", basically the power is shifted back again to the outsiders having control and all these efforts to try to even things up will get lost.

27 So, I think we need to be honest; there is not AN answer. There have to be different answers for different circumstances and different peoples. The best we can do is to say that it is important to be as inclusive as possible, not just of women but also youth, elderly and lower castes, and other marginalized sections of society. So, this is something that really annoys companies, for obvious reasons: "what do you mean every process is different? We want something that is easy to do. We want to tick the box. We've done that and we've done that. Yes, we've done everything. So, now we got this?". I am saying, "no, no, you have got to talk to the peoples as it is their decision. You cannot have a standard operating procedure for how you do FPIC, because it is their operating procedure not yours". But, of course, in an ideal world that might be true but in the real world, companies are working at speed, you have to offer them a kind of checklist of the main elements of an adequate process, so that they get a bit nearer to doing it right. There is a compromise there which perhaps sometimes leads to the unsatisfactory outcomes that we do see.

Changes pushed forward for the revision of the RSPO standard in 2017

28 **E. C.:** The RSPO (Roundtable on Sustainable Palm Oil) revises its standards every 5 years, and is revising now the 2013 standard. What kind of changes did you push forward for the revision of the "Principles and Criteria" of sustainable palm oil in 2017, in terms of Free, Prior and Informed Consent and beyond? What was accepted and rejected by other parties during the negotiations?

29 **M. C.:** What we can say is that we were able to get included in the draft all the main elements that we could not get included into the draft last time, in 2012 to 2013. Those elements had then been included in the Palm Oil Innovators Group's standard (POIG's standard), which has an emphasis on "zero deforestation" that came out after the last negotiation. Because the major producer companies would not agree on adequate protection of forests from the market's point of view, some of the more progressive producers and NGOs created a sort a RSPO+ standard called the "Palm Oil Innovators Group" which included stronger protection of labor rights and stronger protection of free, prior and informed consent as well as a much stronger zero deforestation element that most of the producers were at that time in 2013 prepared to accept. Most of these elements that were in the Palm Oil Innovators Group's 2013 standard have now got into this 2017 draft, and went to the consultation and were very favorably received. In terms of this specific free, prior and informed consent issue, the much more

comprehensive engagement of the kind we were talking about is now there in the revised draft standard.

30 There are two things that there is still an argument about. One I think is a very fair argument, which is about who would fund the legal advisors or technical advisors that communities might want before they make these decisions. They may want someone to explain "what we are really signing, what are the implications for our rights in terms of the law, if we signed this agreement and what are the terms of our engagement as scheme smallholders, is it really as good as the company is saying, maybe we need some technical advice?" And then the question arises, ok, they have the right to get that advice, that is agreed, but the question is: who is paying for it? Because if the companies are paying for it, well they will send their lawyers but they have a conflict of interest in providing this information. So, maybe it is not even a good idea or a fair idea to ask the companies to help provide this advice. But on the other hand, the communities have not got the money. So, there are discussions now going on about whether a fund should be created to provide impartial advice. And then who would pay for the fund?

31 At the moment what happens is too little, too late. When a dispute arises, afterwards, then the people realize we need to bring in some NGOs or the NGOs bring themselves in. And then the NGOs go out and find some money to provide advice or bring in lawyers. So, there is an informal process going on whereby funds are identified and provided to help solve disputes. Now in the specific case of the RSPO's Dispute Settlement Facility - where it is recognized there is a need for this independent advice for conflict resolution - a fund has been established, called the "Dispute Settlement Fund" which has money from the RSPOs itself to provide this kind of advice. There is also a process, which got underway in 2014, for ensuring greater engagement of what are called "intermediary organizations" in the RSPO's process. Because the RSPO is a membership organization, but because communities or indigenous peoples are not, in advance, part of the palm oil sector, they are not members of the RSPO. They are just people on the land. Outside interests are suggesting that they should get into palm because it is lucrative. But that is down the way, that is a later development. So, well, they are still land owners, traditional landowners and not necessarily involved in palm and therefore not aware of the RSPO or the option of becoming members. So, the question then comes up, ok, so we cannot expect communities to be represented directly in the membership, although it is open to them. If they want to join, there is nothing to stop them but maybe they are also looking at other development options like rubber, sugar, maybe they are also looking at maize. Why would they only join a single sectoral scheme before they have chosen what if anything to develop of their lands? They are not members. That's the reality. So, it has been recognized that we need to somehow help them get connected through what we call 'intermediary organizations', like NGOs, religious groups, cooperatives, credit unions and trades unions and so on. There is a fund being set up now to encourage the involvement of intermediary organizations to create better links between the RSPO and communities, the peoples on the land.

32 So, that is the first issue that is being under discussion in the taskforce about Free, Prior and Informed Consent, which is controversial. The second one, that surprised me quite a lot, was that we had argued that companies should not take lands that have been expropriated from communities through a process that the Americans call

"eminent domain". It is a legal term meaning where the State expropriates your property in the national interest for a public purpose like for an airport or for railways. The argument is that as you cannot carry out such projects just anywhere, the State has to have that right of expropriation of privately owned land. But for oil palm it is not a public purpose, it is a private enterprise. It does not have to be done in an specific place here, it can be here or it can be there. There is no reason why you should argue it is a public interest to expropriate specific plots of land for palm. And, of course, eminent domain means that there is not consent, the State can override disagreement. And so we argued that no certifiable plantations should be on lands that have been taken through the process of the eminent domain, of expropriation in the national interest.

33 But then we had objections, even from civil society from Africa, saying: in Africa, all development is done in this way, by the State expropriating lands. And we said, that may be true but you cannot argue that development requires the abuse of human rights. It is against the Vienna Declaration and the Declaration on the Right to Development, article 1, of which says you cannot breach human rights in the name of development. So, we said, sorry, you may do that in Africa but it is not good practice under international human rights law. We cannot agree to that. It is how the argument is going on. I found it very puzzling that members of the RSPO, which has been applying the principle of Free, Prior and Informed Consent for 12 years, would still say "the State has the right to expropriate".

Free Prior and Informed Consent guideline 2015 and "national interpretations"

34 **E. C.:** When you proposed your Free, Prior and Informed Consent Guide in 2015, it was endorsed by the RSPO Executive Board. Did you meet some resistance from companies at the time of writing it, in relation with other RSPO stakeholders?

35 **M. C.:** It was a very very long process. It took two years from when we started – 2013 - to getting it finally adopted. Indeed, there was a lot of resistance from some of the companies who argued about certain elements of the Guide, and in the end it led to the Guide becoming much longer than we wanted. That was kind of difficult for us, because a lot of the companies had said "we want something short", but then they argued "well, you cannot say that" and said "should must explain why ii.2 says what it does, because that is already in the standard, in international best practices, and so on". Then eventually they accepted the Guide, but it required a lot more elucidation. As a result the text is somewhat expanded on and less than ideal, I think. But it was necessary in order for the companies to see the logic in it.

36 Then they argued, "Well, this is just a guidance, this is not binding". So, we had to say "Ok, these rules – the Principles, Criteria and Indicators related to Free, Prior and Informed Consent – are binding, they come from the standards that was agreed and that we are just restating" and then there is also this guidance that is just advisory, which recommends best practice. So, it was a long process.

37 In retrospect, you can see that some of the companies, those which were most critical, were also the ones that were having the most problems implementing free, prior and informed consent on the ground. Therefore, they were trying to protect their current practice rather than admit to having done anything wrong. It was connected to the fact that complaints were ongoing against those companies. If this Guide became a normative Guide, of course they would have been found to be in violation. There was quite a lot of defensiveness by the companies. But a very large number of the

comments on the draft were actually from the companies trying to puzzle out how does this standard apply in the national context where the law says this and that.

38 Under the RSPO process, you have the generic principle and criteria with the indicators. Then, there are what are called "national interpretations" developed by working groups of the members of these countries who meet together and decide how this works for us in Malaysia, in Indonesia or in Colombia, wherever, because our laws are very specific so then we have to work out how this voluntary standard fits with our narrower legal frameworks. One of the things that we have found ourselves, as Forest Peoples Programme, is that the national interpretations have a very poor understanding of free, prior and informed consent. They do not provide due consideration of the elements of law which make it very difficult to do it right in different countries.

39 For example, in Sarawak whenever the State declares a piece of land to be a 'reserved forest', then customary rights are extinguished. They do have a legal process in Sarawak that goes into effect when a piece of land is declared to be State Forest. A notice is posted in an official journal, called the Gazette, which is sent to all the district offices. A copy of the Gazette is nailed to the display board outside the district office for all to see and you have the right to object to proposed 'gazettement' of land as forest within two months. But if you live three days travel upriver, it is quite difficult to read the official journal. So, in fact, these peoples' rights get extinguished whenever an area is declared Permanent Forest Estate without having a real chance to object or clarify their rights. In the case of one ongoing case before the RSPO Complaints Panel, the Panel said, "well, no, they have still got customary rights because their rights derive from custom. So, the companies should respect their rights EVEN THOUGH the national law does not". And so the National Interpretation should find a way through that. And they don't do so.

40 The problem is somewhat the same in Indonesia. There is a very interesting process of law there for when a company gets an initial permit called an *Ijin Lokasi*, for a landholding, which can be for up to 20 000 ha. The permit (ijin), gives the company three years to develop its plans for the land. During this period of the initial license, you have to do a lot due diligence. You have to secure your investment. You have to come up with a business plan. You have to do an environmental impact assessment and you have to have your environmental mitigation plan. These are the things to do, to show you're a good company, with a realistic chance of developing the land.

41 One other thing is that you have to acquire 51% of that land as vacant possession. It is recognized by the administration that although they may consider all this area to be State land, it is State land that is encumbered with customary rights. So, when the companies apply for the longer-term business use permit (HGU)[1], they have to show that they have acquired the lands from the community. They have to show they have got land release documents, signed by the people. The question arises: do the people know, when they sign these land release agreements, that they have surrendered their lands? And it is not so.

42 If you look at all different case studies we have published, you find the local people have very different understanding of what they have agreed with the companies, because the people operate according to customary law and the companies apply statutory law. For example in the case of West Sumatra, under Minangkabau custom you cannot sell land, you can only lend it to people or lease it. But they were not told

that they were in fact surrendering their rights when they signed land release agreements. In other cases that we looked at, in different parts of Borneo, there is a customary payment that is made for using customary land. In Kapuas Hulu this payment is called "*simpak beliung*", meaning axe chippings. '*Simpak*' is the chopping of a traditional ax (*beliung*). The people are told they have signed a receipt for the payment of *simpak beliung* and so they consider that they have been compensated for the effort of having cleared the land of the trees, because it is farmland, but they did not believe they were surrendering their rights only that they were releasing the land to be used by the company for thirty or forty years, or something like that. So, they think they will get the land back eventually. But under statutory law (through the business use permit - HGU), once the customary rights are surrendered the land becomes vacant State land, and it becomes permanent. The land is then leased by the government to the company for a period of thirty-five years or even ninety-five if the permits are extended. When the lease expires, the land goes back to the State and not to the community. That is a crucial point.

43 We have been arguing that the RSPO National interpretation in Indonesia must look at this issue. How can we have a form of tenure for companies that does not extinguish rights? Do we need to talk to the government about some alternative tenure arrangement? The RSPO came out and said: "you have to have the business use permit (HGU)". But we said: "But how are you to do Free, Prior and Informed Consent"? They had no reply for it. Just in October this year, while we were pushing, pushing, pushing for the National interpretation to come up with a solution to this issue of the business use permit (HGU), the RSPO Secretariat sent a circular to all members saying that, in Indonesia, the business use permit is mandatory for certified operations. We wrote a letter to the RSPO Board saying, "You cannot do this. You've got three complaints already underway. You have had an adjudication from the Complaints Panel saying that if the community does not agree to a business use permit over their customary land, the company has to find an alternative. This is the Wilmar case. You cannot make this mandatory. You are ignoring the fact of the RSPO's own decision through the Complaints Panel and you are ignoring the fact there is an unfinished National Interpretation going on".

44 So, what is going on with that National interpretation? There was a consultation with the communities and smallholders, and with Sawit Watch, Setara-Jambi, and SPKS[2]. They were members of that working group. But then they got so disheartened with the process that, for their own reasons, they withdrew from active participation and then it was left only for Fauna and Flora International and WWF to carry on as the NGOs in the process. During 2015/2016, the only organization, which was saying "Sorry that's not good enough", was Forest People Programme. We did consult with our Indonesian colleagues and they say "Go ahead, go ahead, we do not have time for it or the patience". So, we objected to the Board, we said, "You cannot say this". The National Interpretation does not deal with how Free, Prior and Informed Consent really works in the Indonesian context. So, eventually, not with our agreement, the Board decided to accept the National interpretation, subject to what we called the "Bogor Accord" which said that they should look into this issue and come up with additional Guidance on Free, Prior and Informed Consent and High Conservation Values (HCVs)[3] and the business use permit (HGU) problem within a year. That means it should have been done by June 2017. Actually, the National Interpretation working group only started considerations in March 2017. It is very technical; it is very time-consuming. You get

sucked in theses working groups, going into more and more detail. But it is about something very fundamental: do you lose your rights or not if you agree to palm?

Negotiating with states

45 **L. T.:** Are they into negotiations with State agents? How does it happen? States are not part of RSPO, isn't it?

46 **M. C.:** Exactly. There was a previous example of this in which we were centrally involved which came up in 2009 when the companies came to FPP and they said: "Marcus, there is a problem, the government does not recognize the idea of High Conservation Values (HCVs). So, if we get our permit and then we decided that one third of the area is for High Conservation Values, then the government comes along and says "hey, we are giving you this land to develop not for conservation and we can take that unused area off you and give it to another company". So, they wanted studies done to explain the problem, which we did, several studies to show how the High Conservation Value requirements of the RSPO do not fit with the national law. The findings were taken to the Board and it was agreed that this was a problem for RSPO's members, that will affect the communities but also the companies; there was a joint interest in opening a discussion with the government about: could they not accommodate High Conservation Values in business use permit (HGU), for example by more broadly interpreting the value of protection through environmental impact assessment, or was there a need to change the law to allow High Conservation Value set-asides.?

47 The government's concern is that companies may take out permits over areas for speculative purposes on the international money market without really have the intention to develop the land. They create 'land banks' without actually investing in development. They can say "we control four hundred thousand hectares; we are a very valuable company". It attracts investments and boosts their shares on the stock market and so on. And yet they might not invest in the land. So, the government wants to ensure that, when they give companies land to be developed, they do develop it. There is a good argument that companies must do what they sign up to do. On the other hand, there is a good argument that they should also be allowed to develop the land sustainably, and that means setting aside areas important for conservation and community livelihoods.

48 I was actually asked to chair this working group where we tried to decide on how we would approach the government and engage them on this matter. For reasons that have to do with the broader politics of RSPO, we never got very far, because just at the time we were going through the protocol of arranging our first meeting with the Coordinating Minister of Economic Affairs, whom we were going to have our first meeting with to open discussions about this issue, the Indonesian palm oil board, GAPKI, pulled out of the RSPO. And so we were just at the wrong moment to get that dialogue with the government because GAPKI, which at the time was the body which included RSPO members as well as non-RSPO members, was having its own internal fight. And then the non-RSPO members pulled GAPKI out of RSPO. So those meetings about HCV did not happen. It was the first instance where the government and the RSPO started to try to talk about these issues.

49 Now, with this problem of extinguishing customary rights for HGU, we have got to the point where the government itself has realized that it has a problem. The National Land Bureau (BPN) admits that there are eight thousand conflicts over the land in its own

records, of which half are in the palm sector (so, four thousand). They have to do something to resolve these conflicts. A lot of them are about this issue of the conflict over the status of the land in these concessions. So, two years ago the Ministry of the Agrarian Affairs came out with a regulation on communal rights ("*hak komunal*"). Under this regulation, which is a very low level regulation, communities who can show that they have customary rights or who have been on the land for at least ten or twenty years – there are two versions of the regulation – and are in a forest or in a plantation, can make a claim for the land and then the land would become registered as "*hak komunal*". The community can then lease the land to the company. So, we have been arguing for two years that the National Interpretation working group should have been looking at this option as a way for RSPO members to lease the land and not have to extinguish customary rights.

50 Of course there are precedents. If you look at Papua New Guinea, where customary rights are respected, 97% of Papua New Guinea is subject to customary rights under the law. In that case, companies developing oil palm have to have free, prior informed consent, of course, but they have to lease the land. They cannot take the land. Under the law, customary land cannot be alienated. You can only get a lease. We are arguing that this would be the right way forward, to use the Papua New Guinea model in other parts of the world. Insofar, as Indonesian law does recognize such a thing as customary rights - that is in the constitution and in the agrarian law - then they should find a way of accommodating customary rights in the allocation of lands for palm.

Wilmar case in West Sumatra: criminalization of complainants

51 **M. C.**: So, that is one of the biggest problems we have had in the Indonesian case. A case in point is what happened in the case of Wilmar**,** which is one of the big complaints that we have at the moment in West Sumatra. Wilmar had been on the community's land with uncertain legality for seventeen years developing palm. But then they realized "maybe we need to legalize our presence here, as the ISPO (Indonesian Sustainable Palm Oil standard) now says that we have to have a business use permit (HGU)". So, they went along to the head of the Nagari, the collective republic of the village of Kapa, and they said to the Nagari head "please sign these documents agreeing to us getting a HGU". By that time the people understood what a HGU was. They understood that it would permanently extinguish their rights. They did not say "we haven't agreed to palm". They said "we do not want a HGU on our land". So, that is why they refused to sign. Then the company filed an application for a business use permit (HGU), even though the community had refused. So the community filed a complaint, in November 2015, with the RSPO saying, "Hold on, this company has been told that we do not give consent and yet they are trying to get a HGU without our consent". We arranged for the head of the village to come to Kuala Lumpur at the RSPO conference to negotiate with Wilmar (that was November 2015). In the meeting, minuted by the RSPO secretariat, Wilmar agreed to have a further discussion with the National Land Bureau, to see if they could find an alternative. They agreed to hold the meeting in December. But then in the intervening period, Wilmar went ahead and acquired a HGU. So, the community wrote again to the RSPO Complaints Panel saying, "Hold on! With the RSPO present, Wilmar made a promise to discuss alternatives". For us, it was a very clear case of disrespect of the principle of free, prior and informed consent. And then it got worse.

52 In January, the head of the village was called to the police station, thirty miles travel to the south. They arrested him. They asked him: "how did you pay to go to Kuala Lumpur? We think that you were using the smallholder funds that the company gives you to share out among all smallholder cooperative members. We are accusing you of misappropriating these funds to go to Kuala Lumpur". We knew that was not true, as we had paid for the journey and all the costs. But then, all the authorities of the village were called to the police station and the head was kept into custody for a long period (a month or two). He was asked by the police to dismiss his lawyer. He was asked to resign from being the official head of village, which he had to do. Then he was released. He was not formally charged at the time. Then for the next six months all the authorities of the village were called on a monthly basis to go down to Padang to report to the police station. It was a huge cost for them. It was very onerous. This is an example of criminalization of complainants.

53 Of course, it was impossible for us to prove why this happened, why the police suddenly picked on this man, but the circumstances made it obvious that it was because he was a complainant. We know that the person who raised the complaint against him within the community was somebody who works for the company. All the villagers were sure that this was something that Wilmar's local subsidiary company got the police to do. Of course, you cannot prove that very easily.

54 The RSPO Complaints Panel decided that they needed a legal study to be done to assess whether the company was in compliance with the law or there had been a violation. So, there was a long argument about who could be the lawyer, one whom both parties could accept. Eventually an academic of some repute was recruited, who made a report by the end of 2016. Finally, in February 2017, the Complaints Panel ruled that indeed Wilmar should give the land back, that they were in violation, so they should do a community mapping, they should work out the overlap between the HGU and the customary lands and various other details, and they should give back the land. Wilmar initially agreed to abide by the judgment, to uphold the Complaints Panel decision, and that was in the press, it was reported in Mongabay**,** when interviewed by the journalist, they said: 'Yes we will follow the decision'. But their lawyers advised that they have technical grounds to appeal as the RSPO had just set up an appeal process. So, this was the first appeal within RSPO, I think.

55 The appeal panel was then established. Wilmar appealed on technical grounds. They said that the Complaints Panel reached its decision on the basis that the lawyer's report was a final report, when actually it was a draft report. Therefore, their decision was not well founded. Anyway, surprisingly, because this year we arranged for the Kapa people to again come to RSPO to keep raising their case, this year Wilmar, just before the meeting – we had asked for another meeting - they told the Complaints Panel "we would like to withdraw our appeal". Then the appeals panel had to agree whether or not Wilmar could withdraw their appeal. Obviously, the appeal panel was very cross. They said that they considered this an act of bad faith, but they agreed that if the company would now guarantee to implement the decision by February 2017, and if in addition they would make a guarantee that there should be no harassment or intimidation, then they could withdraw the appeal and the process could go ahead. Therefore, they should do the community mapping in December and January and try to reach a decision on the return of the land. So, that process is underway. Very interesting for us, because it is the first time that somebody has been asked not to have

a business use permit (HGU), even though they want to do palm. The community had been very clear in the 2015 meeting, because they said to the company: "why do you have to have a HGU on our land, we don't want you to have a HGU?" The company said "we have to have a HGU to be legal". But the community said: "but you have been here doing palm for seventeen years without HGU, why do you have to have one now?", which was a kind of good point. The community representatives said "we are not asking you to leave, you have investments here we know. We are asking you to rent the land on a fair basis rather than take it and extinguish our rights". It was not about do we want palm or not, it was about do we release our land or not. The community's answer was: we can lease our land but not surrender our land.

Free Prior and Informed Consent implementation problems

56 **E. C.**: Did you achieve a stronger protection of Free Prior and Informed Consent?

57 **M. C.**: The revised draft of the P&C does now provide better protection. But in our view actually the biggest challenges to free, prior and informed consent are matters of implementation rather than just matters of the language.

58 The first problem is that although the legal terms say free, PRIOR and informed consent, in fact the companies always get their concessions first, they get their initial permit, their "Ijin Lokasi", and only then do they start discussions with the communities by which time they have already got a legal presence on the land. The question is: should there not have been a negotiation before you even get your Ijin Lokasi? But luckily because of the staged process, at least they cannot avoid engaging with the communities before they acquire a business use permit (HGU), but it is not ideal.

59 If you look at other sectors like the Forest Stewardship Council, which sets standards for timber production, their Principles and Criteria do not even say it should be prior to the permit, they just say that it should be prior to management, in other words to logging. The standard does not really challenge the presence of the company. Obviously, this tilts the playing field back in favor of the company because they've already got the right to be there on the community's land, it is just a negotiation with the communities about access. This is a matter of great difficulty.

60 The second issue is about the issue we have already talked about, the issue of self-representation: how do we make sure that the company respects the communities' right to choose how they are represented rather than it is just: we go to the village headman because that's the person the government says is the village leader. That is a problem. And many of the companies just go to the individual farmers and pay them for the land without going through the village customary law process. That is the typical method they use to acquire the land. They just think you can buy the land individually and so the whole collective protection of Free, Prior and Informed Consent, which is a collective right, is ignored. That is what happened with Golden Agri Resources [GAR] in the case in Kapuas Hulu. Every single piece of land was acquired individually and not collectively.

From consultation to consent, and the right to say no

61 The other problem that there has been with the Free, Prior and Informed Consent was with the meaning of the word CONSENT. During the 90s, when the World Bank was evolving its operational policy on indigenous peoples, they agreed to include the requirement for free, prior and informed consultation but not for free, prior and

informed consent. The meaning of this was that the World Bank staff would decide if a consultation had happened or not but it did not mean that the community had the right to say ‘no’. In 2000, we carried out a thematic consultation with indigenous peoples for the World Commission on Dams, which was a joint inquiry by the World Bank and the IUCN – the World Conservation Union. After working with the indigenous peoples who had been affected by dams we persuaded the Commissioners that indeed free, prior and informed consent should be a principle for the norms that they adopted but it was not clear from the outcome that this meant that people have the right to say ‘no’ and not just the right to say ‘yes’!

62 If you read the text of the International Labor Organization’s Convention 169 carefully, you see it says that governments must make a good faith effort to engage with the communities with the objective of obtaining consent – not with obtaining consent itself. Since then the language of the UN Declaration on the Rights of Indigenous Peoples is stronger and the jurisprudence of the UN treaty bodies is stronger still. But it took a long time for the right to say ‘no’ to be explicitly admitted. The argument about eminent domain is an example on how people can go back on something that you felt had already been agreed. We have now got the language into the RSPO Principles and Criteria saying, “including the right to say ‘no’”. Yet we are not convinced that companies have really accepted what that means. It’s just: we carry on asking until we can persuade them. For example, in the case of the GAR, which we investigated in great detail, there were several villages refusing palm. One in particular had rejected it strongly and yet they reported that on more than fifty occasions AFTER that they said ‘no’, agents working on behalf of the company to do the land expropriations, were coming in and trying to persuade them to change their mind. Now, this is part of the complaint. The company did not respect the community’s right to say ‘no’. This was in Kapuas Hulu, the PT KPC case.

The independence of Certification Bodies: "He who pays the piper plays the tune"

63 The fifth difficulty with implementation is the one we already talked about, on how it fits with national law. The sixth thing of why we think that free prior and informed consent is particularly difficult to be implemented is because of the certification bodies which do the audits of compliance by the companies, not just at the phase of the final certificate but at the stage of the new planting procedure which is before land clearance. We do not think the certification bodies really understand free, prior and informed consent or do an adequate check on the ground. There are several examples we can point to where the certification bodies have said that the FPIC is fine, and then you ask communities if it was fine, and they said no, we did not agree.

64 The credibility of a certification scheme like the RSPO depends on the credibility of the certification process, which the auditors are the core part of. They are meant to do ‘independent third party verification’. Now, how independent is an auditor who is paid by the companies who are audited? We have been raising this problem with the Forest Stewardship Council since 1998. We have been arguing that there should be an intermediary fund created which the companies should pay into and the fund should be administered independently. The direct link between certification bodies and the companies they audit needs to be broken. The resistance to this reform seems to be very strong. We say, "He who pays the piper, plays the tune", it’s an English saying. But then people respond, saying companies always pay auditors to check their finances, it is standard business practice, why should there be any difference for auditing

environmental and social values? However, there are academic studies, which show that indeed where the auditors and companies are delinked and separately chosen, then there is less collusion, there is more honesty and more robustness in the audits. So, we think it's very obvious that there should be this separation. But the battle is still ongoing. It is being raised again in what is called the Assurance Task Force, which is looking into various means for improving the quality of enforcement of the RSPO standard. So, for example, there is now a new guidance on what kind of free, prior and informed consent needs to have been achieved at the phase of new planting procedures. That guidance has been accepted. There is also going to be a new guidance on what are the minimum standards for High Conservation Value (HCV) assessments. There is more scrutiny now of how independent are the certification bodies. They have found a lot of irregularities, so they are beginning to tighten up. Quite a number of certification bodies have been dis-accredited and asked to improve their quality before they can be readmitted. So, there are some improvements going on.

65 One of the things that we asked for, as NGOs, is that all the companies should release their maps of all their concessions. That has now been agreed with the exception of Malaysia, which argues that release of maps is restricted by laws on national security. But all the other countries have now agreed to share their maps. Any company that is an RSPO member and that does not submit its maps - I think there are about twenty of them – are going to be expelled from the membership this year. This is a big achievement. Now what do you do with the maps? The idea is that there should be a GIS (Geographic Information System) team that looks at the maps, looks at the satellite images, and the team can see what is going on and say, "These companies did not submit an NPP (New Planting Procedure) yet we can see that they are clearing land". Then the Secretary would be able to stop companies earlier, because you cannot just rely on the NGOs to do all the compliance monitoring, which is the current situation.

66 **E. C.:** So you push for more guidance?

67 **M. C.:** And also more procedures to do checking. We think that new procedures should crack down on non-compliances. We would not have this arbitrary judgment by certification bodies that are allowing non-compliant companies to be certified. But it is not always easy. We all see that. Insofar as we are waiting for laws to be enforced by States and insofar as the laws of these States are not adequate anyway, we are using these voluntary processes as an alternative way to get justice and secure remedy, imperfect though it is. Sometimes, when companies get caught for non-compliance, they just leave the RSPO: so far we have had Heracles and Biopalm in Cameroon and Plantaciones de Pucallpa in Peru: they all left RSPO when they were caught out for non-compliance. We also have big companies saying that they are going to sell the subsidiaries that are in violation. We had Wilmar sell off PT Asiatic Persada. Just this year, we had Sime Darby saying they were going to sell PT MAS in Sanggau district in West Kalimantan. We just had IOI saying that they were going to sell IOI-Pelita in Sarawak. They announced they were considering selling. And there just has been an appeal by NGOs this week saying "if you do that, we can't trust you forever", and just today, IOI said, "Ok, we won't do it".

Enforcement, labor issues and auditors' limits

68 We are aware that while our focus is on the land issue, there needs to be an equal focus on labor. I am glad to say that, in the new Principles and Criteria, the language has been tightened up a lot and, if we get it through, that will be one step. But will the

Certification Bodies look into these things properly? This is a major issue that needs a lot more work.

69 We just had a discussion about this in an international conference in Pontianak. We co-hosted the seventh regional conference on human rights and agribusiness with Indonesian NGOs and the National Human Rights Commission - we hold an annual regional conference in South East Asia. This time we focused on labor. They were participants from the labor organizations, from Migrant Care and so on. Their view is that, actually, the law in Malaysia is not that bad. The problem is enforcement. In Sabah, in North Borneo (Malaysia), there are an estimated three hundred and thirty thousand undocumented workers working on lands in the State, not just palm. There are some forty-three thousand stateless children who were born out of wedlock because their parents are not documented, so they cannot legally have children or be married, they cannot register their children. Those undocumented workers are very vulnerable because they are there only through the tolerance of the company, illegally, and if they challenge anything for being unfair they can just be fired. They've got no recourse because they got there illegally.

70 The conclusions that we should draw from all this is that the certification bodies, the auditors, are not very good at disclosing the social aspects. It is easier for them to check if a company's permits are it is legal, it is easier to check whether they have got a business plan, whether they have cleared a piece of the forest or not. It is much harder to find out whether people are satisfied with the conditions of work, have they been fairly treated or are the women being abused or not, particularly that latter one.

How to guarantee the safety of informants and whistleblowers?

71 How do you guarantee the safety of your informants when you leave, after they have accused somebody of violating them? Is that woman protected afterwards or does she suffer even worse repercussions after the auditors have left? I know some auditors have a moral dilemma about this: how do we report allegations of sexual harassment and worse.

72 In the previous roundtable, we got the members to adopt a resolution for the adoption of a new procedure for the protection of human rights defenders, complainants, community spokespersons and whistleblowers. The idea is that the RSPO will adopt a mechanism for providing anonymity and protection for people who are making complaints. We made some progress evolving that procedure last year. But again there was resistance from the companies who said their needs to be a study of the liability of the RSPO and of the companies were this protocol to come into effect. What would happen if we as RSPO or as companies did not provide this protection or anonymity? Would there be legal liability? They argued for the need for a legal study. We had to agree to that but we said the study should look both into what is the liability of the RSPO if it adopts this procedure but also what is the liability of the RSPO if it does NOT adopt this procedure! And they are violations still. And so they agreed this should be in the terms of reference for the study. There was a legal study done by a lawyer named by the secretariat. We rejected the first study, as it did not look at the liability for the RSPO of not having such a protocol. So there was an international bidding process for the second study. A very competent U.S. legal firm bid for a contract and was chosen. They came out with very good advice. So, now we are in the process of finalizing a procedure to be accepted by the Board.[4]

The complaint against GAR (Golden Agri-Resources)[5]

73 **L. T.:** Your organization was recently involved in a complaint against GAR, at the "Complaint system" level of RSPO? What was your struggle?

74 **M. C.:** This investigation was initially undertaken to see how communities' rights are being addressed by companies seeking to comply with 'zero deforestation' commitments. When we went to investigate, we have found very big problems. The good thing was that GAR immediately admitted that there were problems and they should address them. They never said "we have not done anything wrong". They have disagreed on details, but there was always the expressed openness for reform. But the problem that there has always been, since we went in it in 2013, is to actually get them to act, to change things on the ground. Eventually, we had to file a formal complaint because although they admitted they had done things wrong in discussions with us, they filed notifications under the new planting procedures, arguing that everything was ok and therefore they should be allowed to do more clearance. So, as soon as we challenged them by filing the formal complaint, they pulled their new planting procedure notifications for all eighteen concessions. However, by that time the complaint was active and the complaints panel ruled "no, you have to freeze all land clearing in all eighteen concessions until you make remedy for these peoples' rights and provide them the promised small-holdings". We filed the complaint in 2014, and in 2015 we got the adjudication.

75 Ever since then there has been an argument about whether or not they have been doing enough to implement the decisions of the Complaints Panel. The faults were that they had not done free, prior and informed consent right. They had not informed the community of what was in the agreements they were entering into. Not a single one of the community members that had released their lands had been given a copy of what they had signed. The terms on what they released their lands were extremely unclear both in these agreements and from the point of view of the communities' understanding. They did not know where the smallholdings would be or how extensive these smallholdings would be. They did not know what their legal rights over these smallholdings would be. They did not know they would be encumbered with a debt that they would have to repay out of the incomes from the smallholdings. None of these things were made clear. And then, of course, they were not told that they were selling away their lands in perpetuity, that by signing the land release agreements they were extinguishing their rights. Basically there was a very, very poorly informed aspect of the consent. And there was no collective decision making, the company acquired all the land individually. There were some doubts about the legality of the operation as well.

76 In terms of did they make remedy, the answer is in two parts. In the case of the communities which had said 'no', the company provided assurance that those communities' lands are not in area of the business use permit (HGU). However, when we looked into the details, we found that, actually, one area of the concessions did overlap customary land. We were able to persuade the company that they should negotiate with that community and agree the boundary between the customary lands of the community, which was saying 'no' and the area for which the company was applying for a HGU. And then they should change the boundary of the business use permit, so that the community's lands were all outside it. And they did do that. That is a good precedent.

77 Now, for the people who had said 'yes', who had given up five thousand hectares of land without clear explanation of the implications, the remedy has been long delayed. They

had only got four hundred fifty hectares of smallholdings where they should have got a thousand – twenty percent of the land released – that problem still remains to be addressed. The other question is would they make remedy for the fact that they acquired lands in a way that did not give people a fair price or a fair understanding of what they were signing? In that aspect, we feel that the company has not done its job. They have done some participatory mapping, they ticked that box. They re-consulted the community, they ticked that box. They talked about what free, prior and informed consent means, they ticked that box. But they haven't actually renegotiated saying "Sorry, we made some bad agreements, we need to renegotiate them and come up with new agreements because you will have to give up this land forever and maybe you want more compensation than just for the land clearance that you thought was all we paid for." So that's where we are stuck.

78 We have been writing repeatedly to the Complaints Panel in the last eighteen months, saying that there has not been enough progress and you need to put more sanctions on the companies and should suspend their certificates or in some way put more pressure on them to comply. Then for the first time the Complaints Panel actually met with us as complainants to get our point of view[6]. We understand that they also met with GAR to get their point of view. So, now we are hoping they will finally come to a further decision. The basic story, from my point of view, is that the Complaints Panel is now getting quite good at making initial adjudications. It is getting faster at that 'though originally they were very slow. But then, their follow-through is problematic. You know, the Panel says "you must do this" but then they delay for a long time when the company does not make remedy. The companies regularly send in reports saying that they are making progress and we NGOs send in reports saying that they are not making progress. We call this 'email ping pong', and things get stuck because the Complaints Panel just relies on these reports to work out what is going on. What we think they need to do is go and have a look for themselves. The Panel members are not doing it, because they are all volunteers. They are all doing it as part time work, not paid. There is an argument: shouldn't the Complaints Panel personnel be paid professionals?

79 NGOs think that would be a good idea, at least for some of the Panel members. But the companies say that as RSPO is a voluntary scheme, we can accept the fact that we are being judged by our peers, but we are not sure or prepared to hand over our autonomy to be judged by some people whose interests we do not know what they are. It is quite interesting from the point of view of English law tradition, which is all about trial by jury.

80 **L. T.**: The companies' idea is that peers should have the same interests in spite of the fact that RSPO assumes to take into account a plurality of interests, and not only peers having the same interests.

81 **M. C.**: You are quite right. I should have used that argument!

Biography of Marcus Colchester

82 Marcus Colchester is English and received his doctorate in Social Anthropology from the University of Oxford. He was Founder Director of the Forest Peoples Programme and now acts as Senior Policy Advisor. Marcus has over 35 years' experience working with forest peoples in the humid tropics. His expertise is in indigenous peoples, social and political ecology, standard setting, human rights, environment, development, land tenure, policy reform advocacy, 'Free, Prior and Informed Consent' and conflict resolution. Marcus has worked intensively in support of forest peoples' rights in

relation to logging, plantations, palm oil, extractive industries, dams, colonisation and protected areas.

83 He has a long experience with multi-stakeholder processes, initially as an appellant using the International Labour Organisation's redress procedures in the 1980s and then representing Survival International on the Committee of Experts for the Revision of ILO Convention 107, which became ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries. He has been involved in standard-setting and accountability procedures with the Forest Stewardship Council, Roundtable on Sustainable Palm Oil, Roundtable on Sustainable Biomaterials, Palm Oil Innovators Group, High Conservation Value Resource Network, High Carbon Stocks Approach and The Forests Dialogue. He is also a member of the Commission on Economic, Environmental and Social Policy of IUCN. He has contributed to standard-setting on indigenous peoples' rights for the World Commission on Dams, Extractive Industries Review and the World Bank Forest Policy and Implementation Review and Strategy and made extensive use of the complaints procedures of the International Finance Corporation and the World Bank.

84 His human rights advocacy related to development and conservation has earned him a Pew Conservation Fellowship and the Royal Anthropological Institute's Lucy Mair Medal for Applied Anthropology. He has published extensively in academic and NGO journals and is the author and editor of numerous books including *The Struggle for Land and the Fate of the Forests* (1993) with Larry Lohmann, *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation,* and, with Sophie Chao, *Divers Paths to Justice: Indigenous Peoples and Legal Pluralism in South East Asia,* and is co-author of several, other recent books on the impacts of oil palm development in South East Asia. He is married with two children, and one grandchild, and lives in the Cotswolds in England.

NOTES

1. HGU (Hak Guna Usaha) is a legal permit in Indonesia which gives a long term « right to cultivate the land ».

2. Sawit Watch and Setara-Jambi are Indonesian NGOs. SPKS is an Indonesian oil palm small farmers union.

3. In the RSPO "Principles and Criteria" text, High Conservation Value (HCV) Areas are "the areas necessary to maintain or enhance one or more High Conservation Values (HCVs): HCV1 - Species diversity. Concentrations of biological diversity ; HCV2 - Landscape-level ecosystems and mosaics ; HCV 3 - Ecosystems and habitats ; HCV 4 - Critical ecosystem services ; HCV 5 - Community needs ; HCV 6 - Cultural values".

4. The procedure was adopted in September 2018.

5. Golden-Agri Resources (GAR) is a Singaporean palm oil company.

6. In principle the panel members do not hear the parties because they should stay anonymous. However, in this case, some members of the panel did meet the parties. In the interview (not transcribed here), Marcus Colchester specified that this was the first time he was heard directly by the Panel, but he did not know if the persons he was talking to were actually those on the Panel adjudicating the case.

ABSTRACTS

In this interview, Marcus Colchester spells out the dual origin of “Free, Prior and Informed Consent” in the human rights world, and the use of it as a collective right. He highlights the tensions that this use may generate between the human right framework, national laws, and community customary norms. Finally he comments on the benefits and difficulties he met when striving to introduce this collective right into sustainability standards such as the Roundtable on Sustainable Palm Oil standard, because of the pluralism of modes of normativity.

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