

# Reclaiming Free Prior and Informed Consent (FPIC) in the context of global land grabs

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The **Hands off the Land** project aims to raise awareness about land grabbing amongst the European public, politicians, policy makers, students and professionals. The project presents case documentation, fact sheets and thematic studies of transnational land grabs in Mali, Mozambique, Zambia, Colombia and Cambodia.

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## HANDS OFF THE LAND

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# 1. Introduction

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The principle of Free Prior Informed Consent (FPIC) is on the rise in land and natural resource governance initiatives across the globe. FPIC is appearing in initiatives "... ranging from the safeguard policies of the multilateral development banks and international financial institutions; practices of extractive industries; water and energy development; natural resources management; access to genetic resources and associated traditional knowledge and benefit-sharing arrangements; scientific and medical research; and indigenous cultural heritage".<sup>2</sup> FPIC was enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a result of indigenous peoples' struggles against intrusions by companies into their territories. It is also being used in situations beyond these specific settings. The new prominence of FPIC is remarkable. But in the era of global land grabbing, will it 'help' or 'hurt' the cause of agrarian justice? The jury is still out, but the dilemmas and challenges of using FPIC are already surfacing, and in addition to the idea itself, warrant closer attention – precisely because of what is at stake: what development, for whom and what purposes, how and where, and with what implications.

The FPIC phenomenon is unfolding within the broader context of a global rush for land and related natural resources amidst persistent widespread hunger and rural poverty across the globe. Widespread hunger and rural poverty itself did not simply materialise out of thin air; but arose since the 1960s from the cumulative effects of unequal distribution of land and resource control, extractive types of investments, 'green revolution' programs, structural adjustment policies (liberalisation, privatisation, and withdrawal of state support for small scale food producers and local markets), flawed agrarian reform policies, discriminatory land policies, and

exclusionary clientelist political systems, among others. FPIC is thus being introduced today in contexts where many once relatively resilient rural working peoples' households, now occupy deeply marginalised and vulnerable positions.

'Consent' to a proposed big land deal or development project under these circumstances should not be confused with marginalised and vulnerable working peoples having had a *real* choice to begin with – that is, where at least one of the options on the table is truly social justice-driven in the sense of explicitly prioritising and privileging their concerns, interests and aspirations. At the same time, consent to a land deal or project is not necessarily static or permanent. In some cases communities may resist at the start and later switch to acceptance, and in other instances initial acceptance can turn to opposition. This is partly because 'local communities' are socially differentiated and how different people experience a land deal is diverse and can vary over time. Amidst such complexity, conservative attempts to control the application and outcomes of FPIC processes may not always succeed, but at times under certain conditions, may end up generating unexpected political dynamics and leading in unintended and unanticipated directions. How such moments arise and whether they could be exploited to promote a greater degree of agrarian justice is an interesting question that ultimately invites deeper inquiry.

In this political brief it is argued that *FPIC is neither inherently 'good' nor inherently 'bad' from an agrarian justice point of view. Whether, how and to what extent FPIC processes can lead to outcomes that enhance agrarian justice will depend in part on the specific context in which they occur, and in part on whether and how pro-agrarian justice activists engage with them.*

## 2. Background: The global land grab

A major land rush is underway worldwide. Observers commonly refer to this trend of large-scale business deals that target land and associated resources as 'land grabbing'. Transnational and domestic companies, as well as deals anchored to different international finance capital ventures, are increasingly playing key roles in a process previously led and carried out almost exclusively by the state. Today, states are still playing a crucial facilitative role. This global trend has been unleashed by a convergence of multiple crises (food, energy, climate and finance) in a context of shifting views of how the state, the market, and civil society ought to function and interact.<sup>3</sup> Land grabbing today is spurred on by a belief that the solution to these crises lies in part in the existence worldwide of a huge amount of so-called 'marginal', 'idle', and 'degraded' 'wasteland', which on aggregate is being considered a vast reserve of land that could be converted into new economic enterprises for the benefit of companies, governments, and society at large.

The global land rush underway reflects an ongoing accelerated change in the meaning and use of land and associated resources (like water) – usually away from small-scale, labor-intensive uses like peasant farming, fishing and grazing for household consumption and local markets, and toward capital-intensive, resource-depleting uses such as industrial monocultures, raw material extraction, and large-scale hydropower generation for integration into a growing infrastructure linking extractive frontiers to metropolitan areas and foreign markets.<sup>4</sup> From this perspective, land grabbing is about 'control grabbing' – or the capturing of control over the resource along with the decision making power over how it will be used and for what purposes. The emphasis on 'control grabbing' enables us to focus on the main agenda of states and corporations, which is to profit from land deals regardless of the context in which they are made, the modality of acquisition, or the form of production involved.<sup>5</sup>

Research shows that there are two broad trajectories of agrarian change when a corporate land deal hits the ground. On the one hand, incorporation of marginalized and vulnerable rural poor into the emerging economic enterprise is more likely when both the land and labor is needed. On the other hand, as Tania Li argues,<sup>6</sup> expulsion is more likely when the land is needed but the labor is not. Where expulsion is the likely scenario, three further sub-trajectories are

possible. Each may occur with or without compensation: (i) the people are absorbed or absorbable into other productive sectors of the economy, either as wage workers or in various livelihood undertakings, (ii) the people are not absorbed or are not absorbable elsewhere, turning them into a 'surplus population' no longer central to the operation of capitalism, or (iii) the people are relocated, as is often the case in relatively land abundant countries, such as in many African countries today.

Each of these trajectories often involves devastating social and economic consequences for rural working peoples. There is no shortage of evidence on this point; even the most ardent supporters of big land deals acknowledge their potential and actual negative consequences, including especially expulsion of people from the land. Consequently, there is another global rush underway that is distinct yet related to the global rush for land – but this time the rush is to deploy 'land governance instruments' – or agreed upon rules and mechanisms – that would, ostensibly, 'govern' the business deals underpinning the global land rush. Prominent examples of these instruments include the World Bank's '*Principles for Responsible Agricultural Investment*' (PRAI); the UN Right to Food Special Rapporteur's 'Minimum Human Rights Principles'; the UN's '*Guiding Principles on Business and Human Rights*' (often commonly referred to as the Ruggie Principles); and the Food and Agriculture Organization (FAO) Committee for World Food Security's (CFS) '*Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*' (CFS Tenure Guidelines). Important differences exist between them over what ought to be the purpose of regulation, with three competing currents: regulate to facilitate capital accumulation; or, regulate to mitigate the potential social and environmental harms; or, regulate to prevent such deals altogether.<sup>7</sup> Each current offers a distinct perspective on land issues today, implying fundamentally different starting points on deeper questions about the meaning and purpose of development. These different starting points may be extremely difficult, if not impossible, to reconcile, which raises important questions about whose vision of development (and the future) ought to prevail and who gets to decide.<sup>8</sup>

Following earlier calls for good land governance and transparency and full disclosure in big land deals, a focus

on FPIC or its supposed 'functional equivalents' (such as 'community engagement'), is emerging as a key element in land governance initiatives. The principle of FPIC traces back to at least the 1989 adoption of International Labor Organization (ILO) Covenant 169, and even earlier to 1975 when an advisory opinion of the International Court of Justice (ICJ) specified consent as a basic requirement of relations between states and indigenous peoples.<sup>9</sup> As Motoc explains, ILO 169 specified FPIC for relocation of communities (Article 16); implied it for setting priorities and control of development (Article 7); and required it for national programs and institutions as well as use of land and resources (Articles 2, 6 and 15).<sup>10</sup> Later, the UNDRIP adopted in 2007 specified FPIC for relocation (Article 10), for historical and archeological sites (Article 11), for legislative and administrative measures (Article 19), for land and resources (Article 29), for military activities (Article 30), and for land, territories, and resources "particularly in connection with the development, utilization or exploitation of mineral, water or other resources" (Article 32).<sup>11</sup>

In today's discussions of good land governance in the context of land grabbing, according to researchers at the London-based International Institute for Environment and Development (IIED), FPIC is seen as having the potential to: (i) "help people claim and protect their rights over resources and knowledge using national and international law"; (ii) "strengthen communities own rules and regulations for conserving biodiversity and promoting natural resource management"; (iii) "help indigenous and local communities (ILCs) to negotiate agreements with commercial organizations for access to their resources and equitable sharing of benefits from the use of those resources, e.g. use of traditional crop varieties, medicinal plants"; and (iv) "strengthen community cohesion, organization and confidence to take action to improve livelihoods and defend rights".<sup>12</sup>

Each of these potential outcomes of FPIC is a valid aim depending on one's perspective. But they do not automatically or necessarily go well together. Communities are diverse and differentiated; we can expect many complications and contradictions. Helping communities to negotiate good agreements with companies for sharing resources and benefits of use is not automatically or necessarily

the same thing as promoting agrarian justice. Here, agrarian justice is understood as not only prioritising the land tenure rights of rural working people, who are often especially marginalised and vulnerable. Rather, agrarian justice is also about prioritising their human rights and own development visions, including in relation to the allocation and management of land, water and related natural resources. For those concerned about agrarian justice, a deeper interrogation of FPIC in the era of land grabbing is warranted. Does FPIC 'help' or 'hurt' the cause of agrarian justice in the era of land grabbing? How should agrarian justice advocates concerned about land grabbing and working to resist and roll it back, position themselves with regard to actual FPIC initiatives?

In this political brief it is argued that FPIC is neither inherently 'good' nor inherently 'bad' from an agrarian justice point of view. Whether, how and to what extent FPIC processes can lead to outcomes that enhance agrarian justice will depend in part on the specific context in which they occur, and in part on whether and how pro-agrarian justice activists engage with them. This is because FPIC is neither self-interpreting nor self-implementing. Rather, like any regulatory measure, FPIC is interpreted and implemented in specific historical-institutional contexts by an array of state and social actors whose perceptions and purposes, power resources and political strategies may vary considerably, if not clash completely.<sup>13</sup> In the context of contemporary global land grabs, conservative approaches to FPIC, where the aim is to facilitate or mitigate the negative impacts of corporate land deals without questioning the basic development model, are on the rise. Yet the meaning and purpose of FPIC – alongside the meaning and purpose of 'land' and 'development' — is contested. The question is whether conservative attempts to control FPIC and its outcomes *always* succeed, or whether *even constrained FPIC processes can take on their own dynamics to open up the possibility of moving change in unanticipated directions*. To understand whether or how FPIC might matter for agrarian justice in specific settings requires delving deep below the 'commanding heights' of global governance and global campaigning, and into the ongoing everyday politics of agrarian movement building, mobilization and resistance in specific local-national contexts.

### 3. FPIC in response to land grabbing today

FPIC's popularity today is linked to the larger context within which it is evolving: the global rush to capture control of land and its associated natural resources. The trend of land grabbing today is supported by three narratives: *first*, that so-called 'marginal' land or 'wasteland' is empty and/or unproductive; *second*, that poor people can and will benefit from these investments so long as they are properly regulated; and *third*, that land deals that do not violate established laws or regulatory standards are not land grabs at all. All three narratives are at least debatable, if not deeply contested. Evidence is growing that the areas targeted for these transactions are often populated and productive, usually with good water supply;<sup>14</sup> that in many cases the new economic arrangements have involved expulsion or incorporation; and that these 'grabs' are often 'perfectly legal' under official laws and regulations. People have been expelled, often in a manner that violates basic human rights, when the land is needed but their labor is not; and when the land and labor is needed they are being incorporated as laborers or contract growers into emerging enterprises but often under unfavorable, onerous terms.<sup>15</sup>

Yet despite the evidence, the narratives persist. They are serving to push regulation of large-scale land deals to the top of the political agenda for many governments, development actors including many non-governmental organizations (NGOs), and even many corporations. To illustrate, Coca Cola recently came out against land grabbing, perhaps spurred on by the 'Behind the Brands' global campaign of the international non-governmental advocacy organization Oxfam. To demonstrate their seriousness, Coca Cola committed to implementing FPIC and to supporting the FAO Tenure Guidelines.<sup>16</sup> Such moves may well be positive steps toward greater corporate social responsibility, but this still remains to be seen. Increased interest in corporate social responsibility by big companies (that until now have been assumed to be 'too big to fail') so far appears to be predicated on a narrowly defined business problem, an untested solution and several debatable assumptions. The problem is framed as how to strengthen their increasingly vulnerable supply chains, since according to Oxfam, "Companies are also now aware that the very supply chains they rely upon are now in jeopardy as competition for fertile land and clean water increases, climate change makes weather uncertain, and

farmers leave agriculture in droves due to low income and dangerous working conditions".<sup>17</sup> The solution is framed conditionally, in terms of if companies would "pay adequate wages to workers", give "a fair price to small-scale farmers", and "eliminate the unfair exploitation of land, water and labor", then their supply chains would be secured.<sup>18</sup> An implicit assumption here is that we all want (or ought to want) the same thing – for the underlying corporate-led economic development model to continue to operate and expand, only more fairly and efficiently. But *do* we all want the same thing and should there not be room for a diversity of development visions? And beyond that assumption, lies another one: that we can all agree on the same standard to be applied, for example, with regard to wages and prices or how land is to be used (and not abused) and that companies will voluntarily apply these. But *can* we all be expected to agree on what constitutes adequate wages, fair prices, and unfair exploitation? And underlying these assumptions are a whole set of deeper assumptions – and profound disagreements – about why people are poor (or not) in the first place and whether it's possible (or not) to fundamentally change the prevailing economic status quo.

For those alarmed by the land rush *and* still seeking a fundamentally different kind of economic development – namely, one that is fundamentally social justice driven and human rights-based – the new interest in FPIC is both welcome and disconcerting.

*On the one hand*, FPIC is a basic democratic right and principle that was enshrined in UN declarations and international human rights law and jurisprudence only after many years of hard struggle by community and indigenous organisations.<sup>19</sup> Despite this, much land grabbing occurs without ever consulting the affected people, much less giving them the chance to give or withhold their consent. Economic Land Concessions (ELCs) in Cambodia, military land confiscations in Myanmar, paramilitary land grabs in Colombia, legalist land deals in Guatemala (e.g., technically legal but not socially legitimate), and 'green grabs'<sup>20</sup> in Nigeria and Mozambique are all examples of denying this right. In such cases, FPIC is often invoked as part of the human rights-based resistance of local people and their allies to show that a land deal is illegitimate. The principle

of FPIC – and particularly the implied right to say ‘no’ and the power to veto a proposed project – establishes a high threshold for land deals to cross, and thus can serve to organize efforts to resist and roll back land grabbing.

*On the other hand*, FPIC is increasingly used as a mechanism to facilitate and legitimate large-scale land deals. Here, the ‘C’ in FPIC is increasingly redefined as ‘consultation’, precisely because the principle of consent, if taken seriously, does imply the right to say ‘no’ and the power to veto. It is becoming a default position uniting those who may be against such deals but believe they are impossible to stop, those who see them as necessary but not automatically beneficial, and those who pursue them regardless of their economic, social and environmental impacts. FPIC is being (re)imagined as a tool for averting social conflict, while providing ‘social license’ for deals to proceed (e.g., minus the social conflict and its disruptions and costs to developers). Redefining FPIC in this way can thus be also a means to check state and corporate behavior around land deals, without necessarily questioning (or vetoing) the underlying model of development.

FPIC seems to set a high bar by specifying that to be legitimate, consent must be given freely (not coerced); it must be given before the change in question starts (not after the fact); and it must be given on the basis of informed deliberation (not ignorance). In practice, FPIC, like many standards before it, can also be deployed by big capital to still do what it wants while making this seem more socially acceptable. While Coca-Cola could be lauded for its promise to ensure that FPIC is institutionalized throughout its supply chain, whether and how it does this and what interpretation of FPIC is applied remains to be seen. For now, this is unlikely to change the underlying economic model and its requirement for large-scale reallocations of water resources.<sup>21</sup> According to a recent study, food and agribusiness corporations have indeed been moving to “address water risks by assessing water stress in their supply chains and reducing their water footprints”; however, these moves are focused on reducing their “non-consumptive water footprint in their processing facilities”, which does not address “their role as managing the water security of the global agricultural water use”.<sup>22</sup> Similarly, it is perfectly possible for FPIC or some ‘functional equivalent’ of it to be deployed and result in expulsion or exploitation, since the FPIC phenomenon is unfolding within the broader context of ongoing widespread hunger and rural poverty across the globe.

It bears reminding that widespread hunger and rural poverty did not simply materialise out of thin air; it has a history – arising in part from the cumulative effects of persistent unequal distribution of productive resources, ‘green revolution’ programs and structural adjustment policies (liberalisation, privatisation, and withdrawal of state support for small scale food producers and local markets), in devastating combination with flawed agrarian reform policies, discriminatory land policies, and a long tradition of exclusionary clientelist political systems. It is no accident that the bulk of investment in agriculture today is by small-scale food producers themselves, who continue to produce most of the food consumed locally in many developing regions. FPIC is being introduced today in many long-standing historical-institutional contexts and socio-economic conditions which have slowly pushed many rural households into deeply marginalised and vulnerable positions.

So how real are the choices people are presented with in these big land deals? Marginalised and vulnerable rural working peoples might accept, acquiesce or consent to being expelled or exploited under a variety of terms. Such ‘consent’ when it occurs should not be confused with them having had a *real* choice to begin with – that is, where at least one of the options on the table is truly social justice-driven in the sense of explicitly prioritising and privileging their concerns, interests and aspirations. Moreover, ‘consent’ to a land deal is neither static nor necessarily permanent. In some cases communities may resist at the start and later switch to acceptance, as happened with fishers in the case of the Shell Malampaya project in the Philippines.<sup>23</sup> In other instances, initial acceptance can turn to opposition, as happened with farmers in the Chikweti case in Mozambique.<sup>24</sup> Communities are differentiated and so how people experience a land deal can vary within and between communities over time.<sup>25</sup> These and other cases suggest that conservative attempts to control FPIC processes and outcomes in the direction of consummating big land deals may not always or permanently succeed, and can at times lead to unintended dynamics and outcomes. Whether and how such moments could be exploited to promote a greater degree of agrarian justice is an interesting question that invites deeper inquiry, beginning with the principle of FPIC itself.

## 4. FPIC's rising star

FPIC's rise in popularity is against the backdrop of an emerging corporate social responsibility (CSR) agenda in response to public and activist criticism of "the impact of transnational corporations (TNCs) in developing countries and on the environment" since the 1990s (see Box 1).<sup>26</sup> One example is the World Bank's advocacy of 'good governance' as a "persuasive ethical power that allows for [corporate] self-regulation, making it possible for governments to intervene less intrusively and more efficiently in society".<sup>27</sup> Voluntary adherence by corporations to good business practices and ethical behavior is a cornerstone of this advocacy. Direct expressions in relation to land grabbing include proposals for a code of conduct for land deals (such as that was initially proposed by researchers at the International Food Policy Research Institute or IFPRI), the World Bank's PRAI, and increasingly, initiatives by some corporations and intergovernmental bodies alike to program FPIC into large-scale land acquisition and global value chain processes. The CSR agenda also had an impact on the CFS Tenure Guidelines (see Box 2).

### Box 2. Excerpt from the CFS Tenure Guidelines

"12.4 Responsible investments should do no harm, safeguard against dispossession of legitimate tenure right holders and environmental damage, and should respect human rights. Such investments should be made working in partnership with relevant levels of government and local holders of tenure rights to land, fishers and forests, respecting their legitimate tenure rights. They should strive to further contribute to policy objectives, such as poverty eradication; food security and sustainable use of land, fisheries and forests; support local communities; contribute to rural development; promote and secure local food production systems; enhance social and economic sustainable development; create employment; diversify livelihoods; provide benefits to the country and its people, including the poor and most vulnerable; and comply with national laws and international core labour standards as well as, when applicable, obligations related to standards of the International Labour Organization".

### Box 1. What is Corporate Social Responsibility (CSR)?

There is (as yet) no consensus on the meaning or significance of CSR.

For example, according to Vicky Bowman, former British ambassador to Myanmar who also once worked for multinational metals and mining company Rio Tinto, and now currently serves as director of the Myanmar Center for Responsible Business, "Corporate social responsibility is 'the responsibility of enterprises for their impacts on society'. Companies have positive impacts – they create jobs, and sell products which satisfy customers. But businesses can also have negative impacts on human rights – for example if their beauty products harm people, or their mine pollutes the water supply. And if they engage in bribery, they have a negative impact on society as a whole".<sup>28</sup>

Critics argue that CSR does not challenge corporate structure or legal obligations to maximize benefits to society, and that its proponents tend to ignore research showing CSR as having no or negligible impact. A major study launched in March 2010, with a 2,7 million budget provided by the European Commission (EC), and involving 5300 small and medium enterprises, 200 large firms based in Europe, and 500 experts on CSR impacts, resulted in the following findings:

"There is little empirical evidence which explains the concrete impacts of CSR activities and programmes on the organizational performance of companies, the wider economy, or the social and environmental fabric of Europe, its nations and regions. By implication, the aggregate CSR activities of European companies in the past decade **have not made a significant contribution to the achievement of the broader policy goals** of the European Union".<sup>29</sup>

One implication of this study and its findings is that, according to analyst David Sogge, "Now that CSR has been shown to be ineffective in Europe itself, those private sector development policies with CSR ambitions will have to go back to the drawing boards – unless CSR's success is demonstrable in developing country contexts, despite its failure in European contexts".<sup>30</sup>



The FAO has issued a 'technical guide' on how to implement FPIC (see Box 3). This guide, entitled *Respecting free, prior and informed consent: Practical guide for governments, companies, NGOs, indigenous peoples and local communities in relation to land acquisition*, is part of FAO efforts to "help develop capacities to improve tenure governance and thereby assist countries in applying the CFS Tenure Guidelines".<sup>31</sup> As such, the document "sets out practical actions for government agencies to respect and protect FPIC and for civil society organizations, land users and private investors globally to comply with their responsibilities in relation to FPIC, as endorsed by the Guidelines in Section 9.9. The guide also describes how consultation and participation can be carried out with those rights-holders affected by land-use changes, in line with paragraph 3B.6 of the Guidelines ...".<sup>32</sup>

Over the past few years, under the CSR agenda, big land deals have gone from being seen as a threat to

vulnerable rural working people and fragile ecosystems, to increasingly being recast as an opportunity for rural development *if* the deals can be regulated properly so as to minimize or avoid possible negative social and environmental effects – or as IFPRI put it, "making virtue out of necessity".<sup>33</sup> One aspect of this shift is increased emphasis by many actors on 'bringing multiple stakeholders together' – especially corporate investors and local communities – to jointly forge so-called 'win-win solutions' (see Box 4 and Box 6, for example). The idea is that by actively engaging with local people who could be adversely affected, companies can spot "potential showstoppers" early enough on to be able to make adjustments (whether this means altering project design or altering what is promised to affected people in exchange for acquiescence), and in that way ensure project success, where success is understood as avoidance of serious delays and costs.<sup>34</sup>

**Box 3. Excerpt from the FAO Technical Guide No.3 on how the CFS Tenure Guidelines raise the FPIC standard**

"The Guidelines lay out responsibilities in relation to FPIC in the following sections:

3B.6 Consultation and participation: engaging with and seeking the support of those who, having legitimate tenure rights, could be affected by decisions being taken, and responding to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

9.9 States and other parties should hold good faith consultation with indigenous peoples before initiating any project or before adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with indigenous peoples, through their own representative institutions in order to obtain their free, prior and informed consent under the United Nations Declaration of Rights of Indigenous Peoples and with due regard for particular positions and understandings of individual States. Consultation and decision-making processes should be organized without intimidation and be conducted in a climate of trust. The principles of consultation and participation, as set out in paragraph 3B.6, should be applied in the case of other communities described in this section.

12.7 In the case of indigenous peoples and their communities, States should ensure that all actions are consistent with their existing obligations under national and international law, and with due regard to voluntary commitments under applicable regional and international instruments, including as appropriate from the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries and the United Nations Declaration on the Rights of Indigenous Peoples. States and other parties should hold good faith consultation with indigenous peoples before initiating any investment project affecting the resources for which the communities hold rights. Such projects should be based on an effective and meaningful consultation with members of indigenous peoples as described in paragraph 9.9. The principles of consultation and participation of these Guidelines should be applied for investments that use the resources of other communities".

**Box 4. Excerpt from Rights and Resources Annual Report: 'how all sides could benefit'**

"What may be emerging is a showdown over land among old national elites, international corporations, and local communities. *This is a dangerous moment for community land rights, but it needn't be a zero-sum game.* The recognition of community land rights—as part of widespread land reforms—could bring benefits for all sides. A company whose reputation and brands have been damaged by association with rights abuses is a less valuable company. A company that does not pursue the sustainable supply of its raw materials is perpetually at risk. Communities with land and resource rights ensured by governments make happy citizens and potential partners in enterprise. Angry communities are bad for all involved' (emphasis added)".<sup>35</sup>

Corporate self-regulation initiatives, evolving relatively slowly in the shadow of ILO 169 and the UNDRIP, have nonetheless gained momentum in recent years. The Equator Principles (started in 2002, adopted in 2003, revised in 2006) are one example. These principles have been described as "a comprehensive voluntary banking industry framework to address environment and social risks in projects across sectors".<sup>37</sup> Stopping short of advocating FPIC, the Equator Principles nonetheless include consulting local people who might be affected by proposed projects (see Box 6). To date there are 79 Equator Principles Financial Institutions (EPFIs) in 35 countries covering over 70% of international project finance debt in emerging markets, according to the official website. More recently, in May 2011, the board of the World Bank's commercial lending arm, the International Finance Corporation (IFC), agreed to incorporate the principle of FPIC into its Policy and Performance Standards on Social and Environmental Sustainability.<sup>38</sup> This change, however limited, is described by some as a "watershed moment in international development history", since for the first time private actors that rely on IFC financing will be obliged "to obtain the consent of indigenous communities affected by their deeds".<sup>39</sup>

Meanwhile, some companies launched their own CSR initiatives even before the IFC. For example, in the Philippines, according to a 2007 report by the World Resources Institute (WRI), Royal/Dutch Shell "began to develop [the] Malampaya [Deep Water Gas-to-Power Project] in the mid-1990s, at a time when its record of environmental and social stewardship was being sharply

**Box 5. Vicky Bowman of the Myanmar Center for Responsible Business, on the costs and benefits of investing in CSR**

"There is a cost, because it requires senior management time to work out what to do and to communicate that to the workforce. Sometimes it requires additional spending, for example changing building plans to avoid damaging a cultural site, or training local people to work for the company when maybe it would be cheaper and easier to import labour from elsewhere. But it is an investment in obtaining and retaining the social licence to operate. The benefits are very difficult to measure because they come from avoiding blockades and demonstrations, court cases, etc. You can only really measure the cost of getting it wrong – lost time while your mine is closed, legal bills for your oil spill or court challenge, or getting your dam stopped half-way through construction due to public opposition. Benefits also come from developing intelligent strategic CSR programmes which grow your market, like soap companies teaching children in schools how to wash their hands, or publishers running adult literacy programmes".<sup>39</sup>

**Box 6. The Equator Principles on engaging affected communities**

"For Projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation process. The client will tailor its consultation process to: the risks and impacts of the Project; the Project's phase of development; the language preferences of the Affected Communities; their decision-making processes; and the needs of disadvantaged and vulnerable groups. This process should be free from external manipulation, interference, coercion and intimidation".<sup>40</sup>

criticized and intensely scrutinized. Activists had been criticizing Shell for its environmental and human rights record in the Delta region of Nigeria".<sup>41</sup> The WRI report explains that with big money and reputation at stake, Shell decided to "develop a set of sustainable development policies and to rethink its approach to community engagement" and as a result the Malampaya project became the "first project to incorporate this new approach".<sup>42</sup> At that time the project reportedly raised concerns for a

number of communities, including the indigenous Mangyan peoples of Mindoro and the indigenous Tagbanua peoples of Palawan. The case is now referred to by CSR advocates as a pioneering example for “making the business case for

community consent”, and was presented as the premier success case in a business administration course at the Manila-based Asian Institute of Management (AIM) in September 27-30, 2006 (see Box 7).<sup>43</sup>

**Box 7. Excerpt about the Shell Malampaya case from a 2006 Asian Institute of Management (AIM) course design**

“The \$4.5 billion project was the largest and most significant industrial investment in the history of the country. The Philippines traditional dependence on imported fuel would be reduced and would yield the government a valuable long-term stream of revenues amounting from \$8 billion to \$10 billion over the life of the project in addition to foreign exchange savings from decreased imports.

The development of the this energy resources requires harnessing and transporting of the natural gas through pipelines from western part of the country to the principal island of Luzon for generation and distribution. However, the full-scale operation would have environmental and cultural factors to take into consideration, as well as physical and geographical ones. Mr. J. Alfonso “Pons” Carpio the environmental advisor to the Malampaya Gas Project, was aware that big power projects were often controversial and problematic in terms of social acceptability.

Among the problems identified in the pre-implementation were the concern of the fisherfolk of Batangas, Mindoro and Palawan on the impact of the pipe-laying and operational activities on their fishing livelihood, potential fire and explosion resulting from a leak from the pipeline, pipeline integrity and mitigation measures. Further, the people of Batangas City were primarily concerned with the employment opportunities and multiplier effect on support activities generated by the Malampaya onshore gas plant and the environmental pollutants that would be discharged to the Batangas Bay. On the other hand the Mangyans of Mindoro were concerned that the onshore route of the pipeline would traverse on the virgin forests of Mindoro which was their main source of livelihood and the Tagbanuas and pearl farmers of northern Palawan revolved around safety and the potential damage to the environment by the project that would adversely impact their main source of livelihood.

Having identified the potential showstoppers Carpio suggested that SPEX incorporate social acceptability into the project by engaging the stakeholders that would be affected by the pipe-laying. He advised SPEX to approach the implementation of the Malampaya project following the DENR Administrative Order No.37 (DAO 96-37) that addressed the prevailing issues in the issuance of ECCs by the DENR. The application for the Environmental Clearance Certificate (ECC) was followed by the mandatory public hearings conducted by the DENR as part of the approval process. The Malampaya Gas Project was successful in securing the ECC in 118 days – the first big project ever to have achieved this under the new policies in time for the pipe-laying of the Solitaire.

As the pipe-laying progressed, a technical problem arose along the coast of Batangas that forced Shell to skip several kilometers and resume the work further along the designated route near the coast of Mindoro. The advance team of SPEX removed the bamboo fish traps belonging to fishermen in towns along the coast nearby, in the presence of the escorting Philippine Coast Guard, without the knowledge of their “owners.” The removal of the fish traps prompted the local communities and even the local counterpart of the militant leftist group to threaten a fluvial protest to stop the Solitaire.

Shell worked hard to resolve the problem. Gradually, confidence and trust was built and the gap between the parties again was bridged. When the crisis was at last defused, Carpio monitored the progress of the Solitaire and made sure that the external relations program was implemented as planned. The Shell Company’s previous experiences on Brent Spar and Nigeria, made important conclusions and realizations that the company had to rethink basic planning assumptions in light of public attitudes about the environment and human rights.

Among others, more open dialogue with a wider circle of stakeholders, particularly among non-government organizations active in the environment and human rights, was imperative”.

Source: Course Design for September 27-30, 2006 course on “CSR in Asia” for MBA students at the Asian Institute of Management (AIM), W. Sycip Graduate School of Business, Manila, Philippines, involving the following AIM faculty: Felipe B. Alfonso, Ma. Virginia Quintos-Gonzales, Ma. Elena Baltazar-Herrera, Ma. Milagros D. Lagrosa, Victoria S. Licuanan, Ricardo A. Lim, Gaston D. Ortigas, Jr., and Francisco L. Roman, Jr.

## 5. What does the 'C' in FPIC really mean?

Translating FPIC into practice cannot be easy, and a quick glance at how different actors and agents are doing it reveals competing approaches and interpretations. Different interpretations will define differently who gets what consequences when consent is *not* obtained, as well as how consequences are distributed when consent *is* obtained. In fact, what consent means is at the heart of a huge debate. For some, consent is more like consultation. In this view, consent is at best a process to express 'good faith aspiration' as opposed to an absolute requirement. The exemplary case here is the United States government, which, in its official explanation of the shift to support the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) under the Obama Administration, appears to both recognise and repudiate FPIC (see Box 8).

Indigenous peoples organizations have raised the alarm on this understanding, reading the US position as a rolling back of an established human rights standard. In a joint statement made at the 10<sup>th</sup> session of the Permanent Forum on Indigenous Issues in 2011, for example, some indigenous groups said that "replacing the established *standard of consent* with the lesser *standard of consultation* would mean that at the conclusion of such a process taking place, governments or corporations would continue to be free to act in their own interests and the interests of other powerful sectors of society – while unilaterally and arbitrarily ignoring the decision taken by Indigenous peoples. This is contrary to the very purpose of FPIC".<sup>44</sup>

Others interpret consent as the outcome of consultation geared toward achieving a 'win-win' solution even in terms of alterations to original project design and implementation processes, rather than simply a potentially hollow expression of good faith. From this perspective, FPIC is framed as "acknowledged 'best practice' that companies should use to avoid conflicts".<sup>45</sup> Protagonists of this approach point to cases such as Malampaya (Philippines), where in the two years leading up to the beginning of construction, Shell reportedly deployed a variety of means aimed at getting 'community consent', including consultations with key decision makers, informal interviews, information dissemination efforts, surveys and workshops, participatory planning exercises, town hall meetings and public hearings, among others.<sup>46</sup> These efforts led to some changes in project design, and ultimately had a role in determining the route of the pipeline in response to social and environmental concerns (see Box 7).

### Box 8. Obama Administration on UNDRIP and FPIC

"U.S. Government efforts to strengthen the government-to-government relationship with tribes cannot be limited to enhancing tribal self-determination. It is also crucial that U.S. agencies have the necessary input from tribal leaders before these agencies themselves take actions that have a significant impact on the tribes. It is for this reason that President Obama signed the Presidential Memorandum on the implementation of Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments," and directed all federal agencies to develop detailed plans of action to implement the Executive Order. In this regard, the United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, **but not necessarily the agreement of those leaders**, before the actions addressed in those consultations are taken" (emphasis added).<sup>47</sup>

This case is perhaps illustrative of FAO Deputy Director-General Maria Helena Semedo's observation that "[c]oncern about the long-term social and environmental implications of accelerated land acquisition has grown, and international human rights and standard-setting bodies have begun to explore and apply new norms and procedures designed to help regulate this process. The aim is not to discourage investment and prevent the development of new farmlands, but rather to ensure that such expansion occurs in ways that respect rights, secure favourable and sustainable livelihoods, and divert pressure away from areas that are crucial to local livelihoods and have high conservation value".<sup>48</sup> Corporate self-regulatory initiatives assume that there are economic risks to companies, banks and governments of *not* obtaining community consent, and that putting resources into consent building processes can better guarantee an outcome that is good for business as well.<sup>49</sup>

This is perhaps especially true when it comes to land and related resources, where conflicts over tenure rights are potential showstoppers and obstacles to capital accumulation. For this very reason, transparency and good governance have long been at the heart of World Bank advocacy for improved land tenure security, the ultimate goal being to ensure that an investment is clear of any legal impediments

related to land use and ownership rights. This concern is likewise reflected in the CFS Tenure Guidelines, and the FAO's new technical guide on FPIC, which gives particular guidance on processes to identify existing rights-holders and land users in targeted project areas, in order to determine "who has the right to be consulted and to give or withhold consent".<sup>50</sup> Its position on what consent means and its possible consequences, however, is ambiguous (see Box 9).

Of course, consent can also be interpreted in more absolute terms of "sharing or transferring decision-making authority to those who will be directly affected".<sup>51</sup> Consent in these terms includes not just the right to withhold consent or say no, but also to actually veto a proposal, a view which the Tebtebba Foundation, for example, takes in a legal commentary submitted to the Working Group on Indigenous Populations of the UN Commission on Human Rights in July 2005 (see Box 10). In this view, FPIC is closely tied to a collective right to self-determination. The distinction between withholding consent (right to say 'no') and exercising veto power is important because projects often go ahead anyway, even when some people in the communities to be affected say 'no'. Indeed, the implications of this interpretation of FPIC are clearly not lost on others. In its 2004 Management Response Report, the World Bank, fearing that "consent would open the doors to veto power for individuals and groups" embraced mere consultation instead, which only requires sharing information among stakeholders.<sup>52</sup>

**Box 9. Excerpt from the FAO Technical Guide No.3 on how to implement FPIC**

**"Respect for the right to say 'no'.** Companies and governments engaging in good-faith negotiations with communities must recognize that even when a thorough information and negotiation process has been carried out, indigenous peoples and local communities have the right to say 'no' to development or to a project on their customary lands. The specific limitations of an indigenous decision to say 'no' vary according to the circumstances. In general, any project that has a direct, significant impact on the lives and fundamental rights of indigenous peoples should not go forward if they withhold consent. In particular, no relocation of indigenous peoples and local communities, and no storage or disposal of hazardous materials on their lands should take place without FPIC. In deciding to say 'yes', indigenous peoples and local communities can negotiate the terms under which they may agree to a proposed development on their lands. Agreement at any one stage of the process does not automatically imply consent as the final outcome".<sup>53</sup>

**Box 10. FPIC as the right to withhold consent**

"Self-determination of peoples and the corollary right of free, prior informed consent, is integral to indigenous peoples' control over their lands and territories, to the enjoyment and practice of their cultures, and to make choices over their own economic, cultural and social development. This right, in order to be meaningful, must include the right to withhold consent to certain development projects or proposals. These rights, while fully consistent with norms of democratic consultation, are not equivalent to and should not be reduced to individual participation rights. Self-determination and FPIC, as collective rights, fundamentally entail the exercise of choices by peoples, as rights-bearers and legal persons about their economic, social and cultural development. These cannot be weakened to consultation of individual constituents about their wishes, but rather must enable and guarantee the collective decision-making of the concerned indigenous peoples and their communities through legitimate customary and agreed processes, and through their own institutions".<sup>54</sup>

If one takes seriously each of the elements of FPIC separately and together, the result is actually a very high standard. If we accept that FPIC should set a high bar for practice, then what are the requirements for people on the ground to make a high quality FPIC process possible in practice? The answer is not obvious and is likely to require a process of consultation that is much longer, more extensive, and therefore more complicated than many are ready to admit. Caught between social and political complexities on the one hand, and the weight of economic imperatives, it may be very tempting to short-cut longer and more thorough processes and to downplay the possibility that some people may not want what is proposed at all.

This may well mean lowering the standard. During the intensely contested 'transitions to democracy' that unfolded in many countries in Latin America and Asia in the 1980s and 1990s, the mere holding of elections implicitly became the main democratic threshold to be crossed (and backed by the international community in order for new aid, loans and investments to begin flowing in). A surprising irony emerged where democracy scholars "favor[ed] a procedural definition of democracy because freedom and fairness of elections can be observed and tested ... [but] devoted very little effort to the actual assessment of freedom and fairness".<sup>55</sup> For sure, the policymakers were not far behind the scholars in this, and it is therefore no wonder that we see a similar thing happening with FPIC today.

## 6. Whose consent is required?

Another core controversy in FPIC has to do with whose consent is required. Closely associated with the UNDRIP, some have interpreted FPIC as applicable only to indigenous peoples. Among indigenous peoples organisations this narrow interpretation may understandably result from the frequency with which large-scale industrial and extractive projects undertaken in the name of development are located in their territories, and thereby informs the political strategies adopted by the threatened people in response. Yet it is not indigenous peoples organisations alone that can carry this view. Some of the biggest mainstream development agencies do as well. For example, the UN International Fund for Agricultural Development (IFAD) says it “cannot apply Free Prior and Informed Consent (FPIC) in all projects everywhere”, but rather “FPIC must be specific to indigenous peoples’ territories and refer to wording of the IFAD Policy on Engagement with Indigenous Peoples itself”.<sup>56</sup>

The problem is that “indigeneity—its content, philosophy and aspirations—is not self-evident”, and limiting FPIC in this way can have divisive impacts and risks legitimising the political exclusion of poor, vulnerable and marginalized groups and individuals, who might not (self-) identify as indigenous but who would be prioritised if a comprehensive human rights approach was fully applied.<sup>57</sup>

The IFAD policy, as Baker argues, by its use of legal language creates a culture that can reinforce dispossession: “the very act of introducing standards into the domain of ethnicity—where collective claims of cultural identity, self-determination, and control over territories and resources abound—promotes a culture of legality. The culture of legality in turn promotes process versus substance and brackets certain issues, such as power asymmetry”.<sup>58</sup> This ‘culture of legality’, and its effects, is a core feature of land grabbing more generally. Liz Alden Wily has shown how the strategy of ‘legal manipulation’ that is still shaping how land grabbing is occurring today, originated in an earlier era of land grabbing.<sup>59</sup> Core ideas established in past episodes of dispossession that currently serve to justify and facilitate land grabbing today include: (i) the utility of justifying which lands can be grabbed using the discursive device of ‘vacant’ or ‘empty’ land; (ii) the value of establishing an overriding legitimacy in taking over someone’s land for reasons of ‘public purpose’ or ‘public interest’; and (iii) the efficiency of seizing land and securing it as exclusive ‘property’ through legal means.

In the current ongoing revaluation and reallocation of land and associated resources by state-capital alliances across the globe, a great danger arises where, as Sawyer and Gomez argue, “the rigid delineation of land in the name of precise individuals deemed authentically indigenous and worthy by the state often leads to conflicts within and between indigenous communities over authenticity, history, authority and exclusion. And perhaps more insidiously, it can become a perverse mechanism through which the state and multinational corporations codify, fix and control the goals and aspirations of what were fluid and mobile collectivities”.<sup>60</sup> As momentum grows behind conservative narrow interpretations of FPIC, it risks enshrining yet another (quasi-) legal means to secure ‘property’ through exclusion and dispossession.

One illuminating example here involves a giant wind power project on indigenous Saami reindeer herding territories in northern Sweden, financed by the German KfW IPEX-Bank. In this case, the affected Saami communities argue that the project was socially unsustainable, unviable in the area targeted, in breach of Saami rights, and therefore, also in breach of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises. Both the UN Committee on the Elimination of Racial Discrimination and the UN Human Rights Committee criticised the Swedish government for failing to give Saami communities “the opportunity for effective participation in the decisions that affect them”. Yet while acknowledging that one quarter of all Saami herding pastures would be destroyed by the project, the Swedish government allegedly argued that renewable energy development was more important. For its part, the KfW IPEX-Bank reportedly argued that their commitments do not apply to projects in OECD countries, saying that following Swedish law was enough to guarantee that Saami rights would be respected.<sup>61</sup>

If FPIC is to truly have social justice significance, its application should prioritise *any and all* marginalized and vulnerable people among all those who could be affected by any proposed project or land deal regardless of its proposed geopolitical location or purpose. This deeper interpretation of whose consent is required in FPIC should be consistent with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural rights (ICESCR), whose references to ‘all

peoples' encompasses all peoples within existing states and indigenous peoples.<sup>62</sup> Where land and associated resources are involved, coverage should be far-reaching – e.g., extending beyond those who may be dispossessed most directly by a project, to include those whose lives and livelihoods could be disrupted *indirectly* as well. Changing the use of land, water, fisheries and forests can have many social and environmental spillover effects that can, in turn, affect many more people outside the 'target' areas. Social and environmental effects can and do spill over a land deal's envisioned time and spatial boundaries. For instance, water pollution moves downstream; monocropping depletes soils over time. And beyond these kinds of spillover effects, are other kinds as well, which likewise warrant consideration in FPIC processes. More notably, no land deal is ever just about the land alone. Rather, today's land deals are also about a particular development model, which necessarily raises the deeper question of who gets to decide what development model is acceptable or not and which alternatives might be preferable.

On this point the Malampaya case (Philippines) raises pertinent questions. While the company arguably put good faith effort into community engagement in order to secure community consent prior to the start of construction of the pipeline, to what extent was the focus on just some groups and not others at that time? Who might this have left out (inadvertently or not)? What alternative energy projects might have been considered for addressing energy/ development needs? How might public opinion have changed since then in response to how the project and its presumed benefits have actually hit the ground?

In contrast to the earlier painted picture of the project as a 'best practice' example, today the project is under fire from many quarters. First, claiming that the project was implemented in Palawan without their FPIC, a group of Tagbanua (indigenous peoples of Palawan), filed a case in 2011 against Shell, Chevron and the Philippine National Oil Corporation (which together comprise the project consortium) for 'unlawful intrusion' into their ancestral domain.<sup>63</sup> Second, the head of the Catholic Church in

Palawan, Bishop Pedro Arigo, is leading an effort to expose "what he called the 'damning evidence of corruption' that is the second Commission on Audit report on projects implemented by the Palawan government from its share of the funds from Malampaya".<sup>64</sup> Third, Bishop Arigo took the lead in this campaign in 2011 after the murder of Dr. Gerry Ortega, a veterinarian-turned-journalist who spoke out against the alleged corruption involving the Malampaya Fund.<sup>65</sup> Fourth, news reports are now emerging that the same fund has been plundered not just by local government officials, but also by national government officials as well.<sup>66</sup> Although the huge amounts of money reportedly generated by the Malampaya Deep Water Gas-to-Power Project were supposed to have been shared by the national and provincial governments and used to benefit the people of Palawan, the project has allegedly become a huge milking cow for certain powerful national and provincial elites. Finally, at a time when ordinary Filipinos in general continue to suffer from some of the most expensive electricity rates in the world, a situation that the Malampaya project was supposed to alleviate, the project instead is being used to justify new rate hikes.<sup>67</sup>

If anyone knew then what is known now about how this project's lucrative benefits and heavy costs would be distributed, would it have gotten the 'social license' to proceed? Is it enough to invest in targeted 'community engagement' as Shell did? For many people the answer is 'clearly not' and with hindsight, at minimum, there should have been a much fuller, wider and deeper public debate on this project and all its possible effects before it began. Asking whose consent is required opens up a Pandora's box of difficult and complex issues and further questions. Applying FPIC too narrowly risks leaving out many of those whose lives depend most on having access to this right, while applying it too widely risks getting bound up in a process of consultation and deliberation that never reaches the point of decision. Either way it's worth considering whether and how the actual process might generate enough 'friction' to disrupt the status quo in ways that could be exploited by those seeking social justice.

## 7. Deploying FPIC unites *and* divides

Like any law or regulatory measure FPIC is neither self-interpreting nor self-implementing; instead, how a given FPIC process actually unfolds will depend in part on which actors become involved when and with what strategies. However, the challenge of implementing FPIC is often taken to be less about the political interactions of key actors, and more about 'state capacity'. For example, Colchester argues that "... the problematic reality in many developing country situations particularly on the 'resource frontiers' is that the administrative capacity of the State is quite limited and there may be an absence of the rule of law. Opportunities for free assembly and freedom of expression can be limited and intimidating, bodies exercising extra-legal powers may be commonplace and may be linked to non-state actors, such as gangs, religious or political insurgencies and rebel movements, as well as state agencies and corporate interests".<sup>68</sup> Real constraints on freedom of expression and assembly certainly prevail in many situations. However, an approach based around 'state capacity' fails to grasp the politically contested and socially constructed character of the 'living law' itself. It is competing actors in society and in the state who construct (and reconstruct) law and other regulatory measures, in an ongoing manner through their continuing interactions and political conflicts.

FPIC is (and will be) deployed to regulate land grabbing in societies differentiated by class, ethnicity, gender, generation, and political status, and where real people are differentially constrained or empowered by actually existing institutions and structures. Land deals when they hit the ground have differentiated impacts between various social groups, as well as within and between communities. This is largely because local communities are made up of social classes and groups who have different interests and stakes linked to land property, labour, capital and political power – a point that has been poignantly revealed by filmmaker Geoff Arbourne, who traces the social-political impact of the establishment of tree plantations in Niassa province in Mozambique (see Box 11). A land deal may offer great opportunities for some, but may ruin the livelihoods of others. For this reason, on many occasions, local communities are actually divided – *and rarely united* – in their political reactions to land deals, at least at first and until community (re)organising efforts take hold. Land deals are issues that can simultaneously unite *and* divide people in local communities.

### Box 11. Description of film *Seeds of Discontent*

In the northern province of Niassa, Mozambique, one company, Chikweti, set up with investments by Swedish and Norwegian churches and the Dutch pension fund, ABP is establishing large tree plantations. Chikweti not only promised their investors a large financial return, but also claimed it would deliver jobs, environmental protection and community development to the region. It seemed a win-win for everyone. This documentary follows the story of one of the plantation workers, Amado. He wants to improve the conditions of his fellow workers in the Chikweti plantation of Licole, Mozambique. He's frightened and often intimidated in pursuit of this goal, while facing an apathetic union, a hardnosed manager, and a group of elders determined to halt his actions. But will Amado achieve the support he needs from his fellow workers and local peasant farmers while facing up to the company management? We discover the answer when he and a new local union confront Chikweti by rallying the local peasant farmers and plantation workers to stand together.

> Watch full feature film (23 minutes)

[www.seedsofdiscontent.net/the-film/watch-full-film](http://www.seedsofdiscontent.net/the-film/watch-full-film)

> Visit the film website: [Seedsofdiscontent.net](http://Seedsofdiscontent.net)

Wherever it is deployed in relation to a land deal, FPIC will become entangled in the existing political and organisational dynamics of communities. Some people may invoke FPIC in their clamor for inclusion into the enterprises, or in their demands for better terms of their incorporation. Others may invoke FPIC as part of an effort to reject land investments. These competing uses of FPIC might occur simultaneously in the context of a single land deal, giving elite actors an opportunity to employ 'divide and rule' tactics to try to marginalize and exclude anyone who may be against a proposed project or land deal. Interestingly, in the IFC's version of the standard, "FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree".<sup>69</sup> This interpretation clearly favors going ahead with a project, while also raising challenging questions about the nature of democracy and consent. For consent to be democratic can it be based on majority rule, or must it be based on consensus, and if consensus, what kind of consensus is acceptable?



**Box 12. CSR advocate Vicky Bowman, on the current 'culture of protest' in Myanmar citing the Letpadaung copper mine controversy<sup>70</sup>**

"For a company, it comes back to having built that solid relationship with the community, because if you understand community dynamics, you know whether the voices that you're hearing are of the community or are issue protestors who have come in from outside, and it the community has confidence in you then they are more likely to say to activists who they don't see as pursuing their interest, 'It's fine, please go away.' Again it all comes back to getting that strong relationship with the communities—which takes time, and that is one of the key things to watch out for on Wanbao Letpadaung. You cannot solve community outrage in the space of a year or six months, it requires a lot of going and being shouted at for several years—and listening".<sup>71</sup>

Regardless of what one thinks of CSR and its foray into today's burning land issues, at least it can be said that the

perceptions, interests and intentions of powerful business and government elites are becoming more transparent. For many agrarian justice activists, this may make it even more tempting to impute (unfavorable) outcomes in conflicts over land deals from their stated intentions, especially when they seem to be practically omnipotent. But analysing the world by way of elite intentions will not help much in shedding light on unexpected opportunities for resistance and struggle. By contrast, if one accepts that even constrained processes – including corporate led FPIC processes – can have unintended and unanticipated impacts, then the challenge is to detect such moments and determine whether and how they might be pried open, converted into small but significant disruptions to the status quo, or even strategic political turning points that push the balance of power in favor of those seeking agrarian justice. To determine whether or how FPIC might matter for agrarian justice in specific settings will require delving deep below the 'commanding heights' of global governance and global campaigning, and into the ongoing everyday politics of agrarian movement building, mobilization and resistance in specific historical and local-national contexts.

## 8. Conclusion: Key challenge is political, not technical

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Deploying FPIC will not in itself determine the outcomes of land deals. Instead, it is the immediate and broader context of political contestations between various social and state forces over the nature, pace, scope, and trajectory of land deals that will ultimately determine whether a deployment of FPIC will serve the interest of big capital, or the state, or the agrarian working class. This struggle is likewise related to the wider terrain of policies undergirding contestation over particular land deals and projects, such as land policies, investments policies, and mining policies. It is the political struggle between various state and social forces that ultimately interpret and implement such policies – and here FPIC becomes a necessary administrative adjunct of such policies, and thus a necessary bone of contention among political contenders.

One way or another, FPIC will matter. But making FPIC matter for agrarian justice (rather than corporate profit) in the era of rampant land grabbing will require relevant *and calibrated* radical political strategies that can effectively engage and exploit the openings in those specific contexts in a way that transforms them into opportunities for positive agrarian change. From this perspective, a strategy of 'rightful resistance' appears to be relevant and potentially powerful. Inspired by a study of the mobilization of Chinese peasants in the 1990s, 'rightful resistance' refers here broadly to the creative use of national law and international human rights standards by social movement organizations as leverage in collective campaigns to claim their rights in the face of recalcitrant and 'erring' elites and authorities.<sup>72</sup> For our purposes, the strategy places peasants' rights-based collective claims – and their actions in support of those claims – at the very center in interpreting FPIC and other such initiatives. This means recognising the

true potential of peasant political action – both as defiant acts of disobedience against 'unlawful' exclusion and marginalization by 'erring' state and corporate elites, *and* as expressions of the democratic desire for real inclusion and real access to the universal 'right to have rights'. And it means sizing up even highly constrained FPIC processes for their potential to unintentionally create openings for such radical constructions of rural citizenship 'from below' – and for them to be recognised, respected and fulfilled.

A proactive, integrated political-legal strategy could be crucial in: (1) activating and sustaining a full and meaningful interpretation of FPIC, (2) exploiting independent initiatives of state actors, and (3) resisting legal and extra-legal land grabbing initiatives of state and societal elites.

Initially, much may depend on rural working class people having access to a support structure for political-legal mobilisation, especially a rights advocacy organization with the interpretative resources to identify and exploit the possibilities of using law and other regulatory measures to counter land grabbing. But in the end, as long as there is a significant gap between what is promised and what is delivered by the state, there will always be cause for poor people to engage in rightful resistance. The current global rush to cloak land grabbing in FPIC may ultimately end up sparking such resistance. The conservative deployment of FPIC is unlikely to result in empowerment of rural working classes, but neither will it automatically lead to dispossession and disempowerment. In between, much depends on agrarian justice forces not defaulting on reclaiming FPIC. In the end we will not be able to activate a radical interpretation of FPIC unless we try, and failure to try could end up being disastrous.

## Notes

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- 2 Noted by Antoanella-Iulia Motoc and the Tebtebba Foundation in a legal commentary submitted to the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, at the 23<sup>rd</sup> session, 18-22 July 2005.
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- 8 This question, posed by American scholar Jonathan Fox among others, is more relevant than ever.
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- 10 A.-J. Motoc and the Tebtebba Foundation (2005). Legal commentary submitted to the Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, at the 23<sup>rd</sup> session, 18-22 July 2005: 5.
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