

Turning Point

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**Fighting Land Grabbing:
Grasp on the Rights Weapons**

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Fighting Land Grabbing: Grasp on the Rights Weapons

The sharp increase in private investment and interest in the last five years involving significant use of agricultural land, water, grassland and forested areas has precipitated land grabbing in developing countries in an unprecedented scale. Private investment in land and natural resources thus has become almost synonymous with a wide range of human rights violations, such as displacement, food insecurity, abrogation of existing rights, environmental damage, and even killings of resisting communities.

In Asia, legality is tilted in favor of foreign investors, including minimum international standards, breakdown of trade barriers, and changes in environmental and labor laws. National laws are amended to favor the private investors upon the 'recommendation' of multilateral institutions like the World Bank. All these have reversed progress in human rights issues. Communities are not consulted; indigenous people are simply driven away from their ancestral lands; and communities' access to natural resources is affected.

The phenomenon has provoked different responses internationally. But discussions have remained largely dictated by those who seek to address the host of social and environmental issues while continuing to promote big corporate investment. They cite the threats of global food crisis, fuel crisis and climate change to justify increasing agricultural investment and the proposal for the Third World to shift from smallholder

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to corporate farming. Led by the World Bank, Food and Agriculture Organisation (FAO), International Fund for Agricultural Development (IFAD), and the UNCTAD, they propose models or principles of ‘good’ or ‘responsible’ agricultural investment and argue that mutual benefits for the corporation and the community are possible. In other words, they do not propose to stop land grabbing but only to make it ‘responsible’.

In the context of agriculture and the global economic crisis, however, ‘responsible’ and ‘investment’ have become an oxymoron. Agricultural capital has invariably sought to maximize profits out of cheap resources abundant in developing countries, without due regard to economic and social benefits that should redound to the communities. All benefits have so far gone solely to the investors, while the communities have borne all the risks. The more private investment in the rural areas is infused, the more land grabbing and violations of community rights are committed.

This paper seeks to find meaningful human rights perspectives and mechanisms in order to reject private agricultural investment entirely, assert the rights of farmers, fisherfolk and indigenous peoples’ communities, and hopefully bring perpetrators of land grabbing and related human rights violations to justice.

LAND GRABBING IN ASIA

Much of secondary literature is confined to mapping and counting incidences of land grabbing, and much is focused on Africa. The quantity of land implicated in Asia is relatively less than in Africa, but it is still significant in the global context, and in some specific countries (e.g. Cambodia, Indonesia, Philippines, Malaysia) it represents a major development problem.¹

The World Bank promotes the false concept of ‘potential land availability’,

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which it currently pegs at 1.725 billion hectares, 76 million hectares of which is in East and South Asia. The data further shows that more than China, Indonesia accounts for 62% of the ‘potential land’ with 47.2 million hectares. **(See Table 1)**

Table 1: Potential land availability by region (all areas are in thousands of ha)

Regions	Total area	Forest area	Cultivated area	Suitable non-cropped, non-protected			
				Forest < 25/sq. km	Non-forest with population density of		
					< 25/sq. km	< 10/sq. km	< 5/sq. km
East and South Asia	1,932,941	493,762	445,048	46,250	14,341	9,496	5,933
- China	935,611	167,202	136,945	10,514	2,176	1,383	843
- Indonesia	183,897	95,700	32,920	24,778	10,486	7,291	4,666
- Malaysia	32,243	21,171	7,184	4,597	186	119	50
Sub-Saharan Africa	2,404,224	509,386	210,149	163,377	201,540	127,927	68,118
Middle East and North Africa	1,166,118	18,339	74,189	209	3,043	843	236
Eastern Europe and Central Asia	2,469,520	885,527	251,811	140,026	52,387	29,965	18,210
Latin America and the Caribbean	2,032,437	933,990	162,289	290,631	123,342	91,576	64,320
Rest of the World	3,318,962	863,221	358,876	134,700	50,971	45,687	41,102
World Total	13,333,053	3,706,457	1,503,354	775,211	445,858	305,711	198,064

Source: World Bank (2010: 110)

Note: ‘Suitable’ means that at least 60 percent of possible yield can be attained for any of the 5 rainfed crops considered here (wheat, oil palm, sugarcane, soybean, maize). Countries are included if they have a total of at least 3 Mn ha of forested or non-forested suitable area where the population density is < 25/sq. km. Suitable ha per cultivated ha area based on non-protected, non-forest suitable area where the population density of the grid cell is < 25/sq. km., < 10/sq. km., Or < 5/sq. km. Original source: Fisher and Shah (2010).

The principal crops targeted are oil palm (most significant in Southeast Asia) and wheat (high expectations for Southeast Asia but also significant for South Asia). Others include maize, sugarcane, and soybean. **(See Table 2)**

Table 2: Land availability by region for different crops (< 25 persons/sq.km. and < 6 hrs. to major market), All area in thousands of ha.

Region	Total	Maize	Soybean	Wheat	Sugarcane	Oil Palm
East and South Asia	3,320	465	443	1,045	500	867
- Southeast Asia	2,918	425	415	712	499	866
- South Asia	402	39	28	333	1	1
Sub-Saharan Africa	94,919	44,868	38,993	3,840	6,023	1,194
Latin America and Caribbean	93,957	28,385	37,716	11,043	15,021	1,793
Eastern Europe and Central Asia	43,734	3,851	419	39,464	0	0
Middle East and North Africa	2,647	0	10	2,637	0	0
Rest of the World	24,554	5,741	5,289	12,747	722	55
World Total	263,131	83,310	82,870	70,776	22,266	3,909

Source: World Bank (2010: 111, original source: Fisher and Shah, 2010).

China is the single biggest buyer of palm oil, with its importation dramatically increasing between 1996 (1.07 million tons) and 2007 (5.2 million tons). India is the second biggest importer (from 1.1 million tons in 1996 to 3.5 million tons in 2007), followed by European Union (EU) states specifically Germany, The Netherlands, UK, and Italy. Malaysia and Indonesia are the biggest exporters, also seeing their exports dramatically increasing between 1997 and 2007 from 7.4 million tons

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to 13 million tons for Malaysia and from 2.9 million tons to 8.8 million tons for Indonesia. Palm monocropping is now significantly expanding in Thailand, Philippines and Cambodia, especially since the World Bank has declared that there is ‘available’ land in these countries.²

But ‘available land’ includes community-occupied lands declared as ‘non-private’ or ‘idle’ lands by host governments, which make an official claim over these lands, and include them in a ‘land bank’ for offer to private investors. Host governments create investment promotion agencies that provide informational, technical and bureaucratic support to the private sector. They offer public-private partnerships (PPP) with numerous incentives to private investors including the possibility of foreigners directly owning the land. Although normally the projects involve large-scale, export-oriented plantations, they also include mines, hydroelectric dams, special economic zones, tourist resorts, and other projects. In any case, they cause conflicts with the occupants – the smallholder farmers, fisherfolk, indigenous peoples, foresters, and resource-dependent communities – who must be relocated so that the land can be improved for commercial use.^{3 4} ***(See Box 1)***

BOX 1

PPP: ANOTHER PLATFORM FOR FURTHER LAND GRABBING

One significant development is how proponents of private investment in agriculture have been actively pushing for PPP as platform. The World Bank, being the chief advocate, along with the IFAD, FAO, World Economic Forum (WEF), G20 and the Canadian, American and German governments have included PPP and private sector investment in their agricultural aid strategies.⁵

The FAO defines PPP as formalized partnerships between public institutions and private partners, where the anticipated public benefits are clearly defined, risks are shared, and active roles exist for all partners at various stages throughout the PPP project lifecycle.⁶

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PPP proponents defend PPP in agriculture by citing the shortcomings of the public sector, specifically the inefficiency of centrally planned development projects. They also observe that public capital is scarce and foreign investor appetite in agriculture infrastructure is low, especially during crises, unless risks are shared by the State.⁷

International financial institutions (IFIs) such as the World Bank and donor agencies have designed various financial facilities to support national government programs to engage the private sector in agri-food projects. These facilities provide assistance that governments can avail of, whether in terms of PPP design or resources.

Today, PPP in agriculture may be found in five intervention areas, namely: farm-to-market roads, wholesale markets, water for irrigation, seed technology, agriculture research and innovation, and value chain development.⁸

Three main issues may be raised against agricultural PPP, which have implications in people's sovereign rights: the introduction of user fees; the rising regime of intellectual property rights (IPRs); the weakening of governance; and the direct participation of private corporations in farmers' production.⁹

Farmers have to pay user fees now for public resources, including seeds, land and natural resources, whereas there was none before. This has escalated the marginalization of farmers from availing of public resources and at the same time physically displaced several farming communities during the cycle of project construction.

PPPs in technology and innovation are strict on the IPRs of private corporations and prevent any technology transfer from happening and the free use of technology by farmers. This is even if the host government has practically ceded all the public resources; the host country in the end even has to pay for TNC IPRs and patents. In addition, the technologies being developed do not actually

favor the farming communities. The more active innovation by agri-chemical TNCs is on genetic engineering (GE) and the sales of genetically modified (GM) crops and corresponding chemicals.

Meanwhile, host governments have shelled out or invested large amounts of national budgets in order to implement the partnership. In a lot of cases, the States have invested much and more than it could afford, especially with the facilitation of IFIs and donors. The FAO, in its an appraisal on current agricultural PPPs, concludes that the government partners “usually made larger contribution if translated into actual revenues/finances”.¹⁰ These are delivered in various forms instead of direct cash, such as provision of land, railway siding, electricity, water, roads, ferry services, taxes, and credit line for the farmers.¹¹ This has increased debts and taxes to be shouldered by the general public.

IFIs and donors have instructed governments how to create a PPP enabling environment. The UN Economic and Social commission for Asia and the Pacific (UNESCAP) for example is explicitly saying that national governments should provide financial support in the form of: project development facilities (legal, technical, financial); tax incentives such as tax exemptions and reduction of customs duties; guarantees such as sovereign guarantees and “covering the risk the partner is not ready to bear”; and capital grants such as ‘viability gap funding’.¹²

Viability gap funding means that if the economic benefit is higher than economic cost, or if the economic cost is higher than the project cost, or if the project cost is higher than the project revenues, the government should cover for the gaps.¹³

Lastly, PPP projects in so-called value chain development have facilitated private corporations to directly participate in farmers’ production. These typically utilize ‘contract growing’ as the arrangement and organize smallholder farmers into contiguous ‘farmers groups’ under contractual arrangements. These modes have served as instruments for eventual land grabbing.

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Often the process of relocation is violent as the farmers resist relocation and are forcibly removed by “investment defense forces”, a.k.a. military and para-military agents who may be taking orders from the local government or under the employ of the corporation. Often government officials collude with the local landlords and traders to wield power over the peasant community, at times taking advantage of weak or inadequate regulatory and legal frameworks to simply pass local ordinances in favor of private investment. The national government meanwhile defends the project by simply invoking ‘national interest’ of economic development, making the community’s dislocation look like a marginal concern.

Land grabbing in Asia seems to have been initiated by the domestic elites who are represented in their respective governments, unlike in Africa for instance where the foreign corporation or government explicitly seeks to transact land deals. It appears thus that the new phenomenon of “cross-border mega land deals” is relatively less in the region.¹⁴ On another note, it may also be the lack of transparency of transactions that has hidden the foreign governments from public scrutiny. Openly, Asian government officials, including presidents and ministers, have gone on roadshows to pitch their agricultural and natural resource sectors to foreign investment.¹⁵

But current trends are best understood in the historical context of the region where land grabbing has long existed along feudal structures. Asia has post-colonial history where its elites have maintained control over large landholdings and are focused on supplying tropical and indigenous crops to the global markets. Asian agriculture has been restructured to serve global business through the import-export of agribusiness transnational corporations (TNCs) and as a market of agrochemical TNCs. On a wide scale, the region has implemented the Green Revolution program of the World Bank and the Agreement on Agriculture (AOA) of the World Trade Organization (WTO) that have both intensified foreign and corporate domination of otherwise smallholder agriculture. The most crucial aspect of this restructuring has been the

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State circumvention of genuine land reform in order to maintain landlord hold.

In several cases, governments are able to acquire land for eventual private investment through existing unjust structures further entrenched by fake land reform programs. In the Philippines for instance, decades of bogus land reforms as well as early globalization of the country's agriculture sector have ingrained a culture of land grabbing long before the new wave.¹⁶ Likewise in Pakistan, despite several land distribution programs, the richest 4% of rural landowners own over half of all cultivated land, while 50% of rural families are landless.¹⁷ Previous neoliberal instruments that have already opened up land frontiers to foreign and domestic corporations also facilitate Land grabbing. This is the case in Indonesia where government has previously issued timber concession rights (HPT or hutuan produksi terbatas) to private corporations, making current land grabs easier.¹⁸

Current land transactions therefore are not new in Asia. They remain in the spirit of neoliberal restructuring of agriculture, but are brought about this time by the current pursuit of a globally integrated food-feed-fuel complex, renewed interest in natural resource extraction, or promotion of agri- or eco-tourism. They are new in the sense that looser forms of foreign control over natural resources such as joint venture, contract growing or even PPP may have to be amended to be more open to virtual foreign ownership. In Sri Lanka, for instance, foreign tourism corporations are allowed to own land and water resources for eco-tourism.¹⁹

In order to facilitate land grabbing, governments in Asia often issue new enabling laws, investment plans and policy guidelines, which usually go against existing ones or customary laws. In Indonesia, for example, various investment laws were passed beginning in 2009 to legitimize the allocation of 2.8 million hectares of ancestral land of the indigenous people of Merauke Regency, Papua Province for the Merauke Integrated

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Food and Energy Estate (MIFEE). In Pakistan, the government issued an Investor Information Guide in 2007 mentioning the land availability with data for every province and guidelines for foreign and local agriculture investors. Since then, deals have been negotiated including land lease agreements for 150,000 hectares near Mirani Dam, 324,000 hectares with a Dubai-based investment group, and 12,140 hectares in Shikarpur, Larkana and Sukkur districts of Sindh province.²⁰

Another striking feature of land grabbing in Asia is how unilateral government decisions are being made, oftentimes accompanied with the use of deception and force. For instance, the Pakistani government initially offered one million acres for under-50 or 99-year lease, which was later changed without consultation whatsoever to 6 million acres.²¹ The so-called post-war period (beginning in 2009) in Sri Lanka also illustrates this feature, where the military has been grabbing lands North and East, apparently upon government's permission.²² While some are confused about the intentions of these land grabs, especially at such time of 'peace and reconciliation', the Sri Lankan government is not so discrete about its plans. In Kalpitiya peninsula in Puttlam district, for instance, a planned 'grand tourism project' has acquired approximately 1,700 hectares of the isles of Puttlam lagoon. This has been done by the military and by removing families from the government's land registry.²³

The impact of land grabs on the communities has been tremendous and shows that land grabbing at its core is a human rights issue. Water rights have shifted from the traditional users to the foreign or corporate users in all cases. Food security along with water security has been immediately and directly threatened. In some cases (Indonesia, Sri Lanka), land grabbing has actually led to increased local food prices. The building of infrastructure on natural habitats, use of inorganic chemicals in farming, deforestation, and commercial farming have caused environmental destruction and degradation. Violation of labor rights, and even of political rights of workers including migrant agricultural workers, is also evident such as in the Philippines and Indonesia.

LAND GRABBING AND HUMAN RIGHTS

Some analysts have assumed private investments in agriculture if managed well shall bring about triple wins – one for the local communities from job creation and food security; one for the host government from revenues; and one for the investor from stable supply of agricultural commodities. This has been the assumption of the World Bank, FAO, IFAD and UNCTAD in proposing the Principles on Responsible Agricultural Investment (PRAI) to guide investors.²⁴

The PRAI however misses the whole point. The main issue is not how to regulate large investments in land to get the maximum benefits, but to know if indeed large investments are needed. In a lot of cases, what is more favorable and beneficial is the simple redistribution of land to small farmers. Land availability is finite and shrinking in reality, and opportunity costs of ceding land to foreign investors can be high. As noted by the UN Special Rapporteur on the Right to Food, landlessness in South and Southeast Asian countries such as India, Bangladesh, Cambodia, Philippines and Thailand is increasing because of population growth as well as the acquisition of land by local elites and foreign investors.²⁵

The idea of ‘available’ land may be true in Sub-Saharan Africa or parts of Latin America. But in Asia where farmers have been marginalized to small plots and rural poverty is widespread, there is no further land available for cultivation. Decades of Green Revolution, inorganic farming methods and large-scale mining, among others, have also degraded the land and decreased productivity. Several land grabbing cases in the region now involve clearing of forests to expand cultivated areas, and this raises opportunity costs further. Immediately, the argument for food security and employment opportunities is negated. In short, in Asia, large-scale land use is not what the region needs.

But the more pressing concern about the push for private (and often

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foreign) investment in land is what will happen to the access of people whose livelihoods depend on it. This makes more problematic the situation in Asia where a large portion of the farmers and farm workers are landless and must pay rent or become waged labor. In the case of government lands, farmers and indigenous people do not hold titles or claims over these lands that they have historically farmed. The substantive issue therefore with regard to governments allowing foreign investors (taking advantage of legal uncertainties including lack of laws or when they exist, circumvention or outright disregard) take over land from tillers is the impact on long-held rights of land users.

There is a growing body of literature on land grabbing and human rights impacts. Although the biggest challenge at the moment is to substantiate these with available evidences, it is useful to identify the specific rights issues that are at stake. Much of the discourse has indeed focused on loss of access to land and resources, and this has to be supported by data on land dispossession and evictions. Several factors, however, can underestimate the extent of dispossession, such as: national law does not recognize that the land belongs to affected people; the law conditions legal protection only upon proof of productive use (e.g. land for grazing is unproductive); or development projects although not exactly on occupied land may block community access (e.g. tourism project hindering fishery). Dispossession may entail lack of transparency and consultation, forced evictions, and inadequate or inaccessible compensation. There may also be significant disruption and trauma.²⁶

However, existing international human rights law does not seem to recognize a human right to land, as the ongoing debate of human rights scholars goes. There are land rights granted to certain legal or natural persons or groups by national or local (so-called customary) tenure systems. On the other hand, there are human rights that are basic to human dignity and recognized by international and national laws. Several human rights are relevant to the protection of land rights, but as yet, there is no recognition of a human right to land.²⁷ There is clamor

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by farmers' organizations and advocates for the recognition of rights of peasants and the human right to land as a mechanism to respect, protect and fulfill existing or prospective land rights (e.g. agrarian reform). But until such historic moment is achieved, the efforts for accountability may as well be focused on linking the protection of land rights to the realization of several human rights.

One of these is the right to adequate food. The UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 12 on the right to adequate food specifies that States have obligations to respect existing access to food, to ensure that third parties including agribusiness corporations do not deprive people of their access to adequate food, and to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security.²⁸ There is no doubt therefore that land grabbing violates the right to food if people who rely on the land for their livelihoods are denied of their land. The right to food is part of the right to an adequate standard of living, which is contained in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Another human right linked to the protection of land rights under ICESCR's Article 11 is the right to adequate housing.

Land grabbing also violates the right of minorities to enjoy their culture under Article 27 of the International Covenant on Civil and Political Rights (ICCPR) as well as the rights of indigenous peoples under the 1989 Indigenous and Tribal Peoples Convention (Convention No. 169) of the International Labor Organization (ILO) and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007. These rights include, among others, the principle of good faith consultation to secure free, prior and informed consent (FPIC) for developments affecting these people.

Beyond land rights, land grabbing has also demonstrated in several cases that it can infringe on the right to water (as contained in UN CESCR

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General Comment No. 15 and part of ICESCR's Article 11, on right to adequate standard of living, and Article 12, on right to highest attainable standard of health) and can undermine the enjoyment of other important human rights, including the right to a healthy environment (explicitly recognized in the 1972 UN Conference on the Human Environment or Stockholm declaration, and the 1992 UN Conference on Environment and Development or Rio declaration); and right to respect for private and family life (Article 8 of the European Convention on Human Rights or ECHR).

While indirectly caused by land grabbing itself, labor rights of agricultural or farm workers, many of whom are displaced tillers, are another major concern. Land grabbing, along with increasing corporatization as well as financialization of agriculture, are restructuring farms and driving out farmers to increasingly rely on wage labor. The current trends have also placed downward pressure on labor costs, leading to more informal and flexible employment.²⁹ Large-scale private investment in agriculture has pressured as well national governments to exempt agribusiness from recognizing unions and collective bargaining. It has also promoted contract growing arrangements with independent farmers, which are usually outside the coverage and protection of labor laws.³⁰

Expectedly, land grabbing has intensified social conflicts in the rural areas as affected communities of peasants and indigenous people fight back to defend their land. Corporations and even the State often respond with various forms of repression. Global Witness, a human rights group that focuses on the exploitation of natural resources, reported that at least 185 people across 16 countries were killed in 2015 alone, 59% more than in 2014 and the deadliest year on record. A total of 1,209 people were killed from 2002 to 2015 in resource conflicts, or almost two persons every week, based on Global Witness data. The group observes that a culture of impunity pervades, meaning few convictions were made. The forms of killings range from clashes between community and State forces to assassinations of those who spoke against unjust

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natural resources deals. Brazil, Peru, Colombia and the Philippines had the highest numbers of reported killings.³¹ PAN Asia Pacific's (PANAP) own monitoring shows that 4,641 farmers, indigenous peoples, and activists in 25 countries have been victims of civil and political rights violations related to land conflicts from January 2015 to June 2016. The violations include killings, frustrated killings, abduction, arbitrary arrest and detention, displacement, etc.

In a lot of cases, the violation of political rights is the most obvious rights issue against land grabbing. Authorities have used force to crush local resistance and silence activists. Apart from killings and physical harm, there have been numerous cases of repression, intimidation and harassment of land rights defenders.³²

IN SEARCH OF HUMAN RIGHTS MECHANISMS

There have been several approaches to addressing land grabbing and human rights issues. One approach is the proposal of some sort of code of conduct for the agricultural investment, such as the PRAI, which aims to spread the benefits and balance opportunities with risks in investment.³³ This approach assumes agricultural investment as already a given and seeks to simply discipline the investment. Another approach is finding human rights instruments that would secure the rights of the land users in order to protect them from land grabbing. Still one more approach is the search for redress mechanisms for people whose lives have already been affected by land grabbing. These approaches may overlap one another, but the most radical approach so far is the promotion of the primacy "rights of the direct producers" over private investments and the people's sovereignty to pursue rural development.

There are several industry initiatives, such as the Extractive Industry Transparency Initiative (EITI), the Equator Principles and the Santiago Principles, which have already come up with standards for specific

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subsectors or investor categories. Institutions and large enterprises have also formulated their own internal codes. Private initiatives have involved a mix of guidelines, codes of conduct, lists of best practices, and independently verifiable performance standards or benchmarking. But there is no existing industry agreement, particularly in agriculture and the use of land and water, much less the adoption of voluntary self-regulation.³⁴

There are also industry-based roundtables and certification schemes. These are the multi-stakeholder initiatives that promote environmental and social standards and schemes to certify commodities and products. These initiatives bring together the major corporations involved in production, processing and sale, alongside consumer groups, non-government organizations (NGOs), and banks. The objective is to design, implement and monitor principles that guarantee that production meets environmental and social needs. There is usually a certification process and independent audit to ensure credibility.³⁵

Example is the Roundtable on Sustainable Palm Oil (RSPO). It has the following sustainability standards:

1. Commitment to transparency
2. Compliance with applicable laws and regulations
3. Commitment to long-term economic and financial viability
4. Use of appropriate best practices by growers and millers
5. Environmental responsibility and conservation of natural resources and biodiversity
6. Responsible consideration of employees, and of individuals and communities affected by growers and mills
7. Responsible development of new plantings
8. Commitment to continuous improvement in key areas of activities³⁶

However, like most international principles and guidelines, roundtables

are voluntary in nature thus have limited coverage. For instance, it is estimated that certification schemes cover around 10% of global supply across sectors such as timber, tea, coffee, cocoa and bananas. The figure is much lower for some of the relatively new roundtables, such as 4% for palm oil.³⁷

There is also the challenge of certain national governments not supporting regional or international roundtables, especially if they have vested interests in the commodity. For instance, the RSPO has had challenges in obtaining support from the Indonesian government that has initiated its own Indonesian Sustainable Palm Oil (ISPO). RSPO's growth has been limited by this and its best practices have not been scaled up because some of these are not recognized under Indonesian law. One example of such best practices is the recognition of high conservation value forests.³⁸

On the other hand, there are national laws, regulation and institutions that govern foreign investment in land and agriculture. One fundamental concern is land and property rights, which are often weak or practically non-existent in developing countries. In Asia, for instance, some countries have weak land rights and administration policies. National governments often simply assert underlying ownership of all resources, which leaves smallholders vulnerable to dispossession. There are positive experiences, such as Vietnam's Doi Moi, which show the advantages of having undergone comprehensive land reform and distribution thereby of land to the farmers.³⁹

Another important national policy pertains to environmental and social impact assessments. These ensure that governments prioritize the environmental and social consequences when allowing a project, conducting thorough studies and public consultations on the potential project impacts. Finally, one national policy that may be considered carefully is the imposition of taxes and subsidies on land and agriculture. These mechanisms have been proven historically to be effective in controlling prices, increasing mechanization and productivity, increasing

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capitalization and enhancing government revenues, but may also be crucial in placing much favor on large, capitalist farms rather than smallholder farmers.

Meanwhile, there are UN efforts to focus on human rights abuses committed by businesses. One such initiative is the Guiding Principles on Business and Human Rights, endorsed by the UN Human Rights Council in June 2011. Its foundational principles are to avoid infringing on human rights through business activities and to mitigate adverse human rights impacts linked to business operations including business partnerships and the value chain.⁴⁰ Land and resource grabbing is a key issue in so-called value chain development.

However, the focus of the guiding principles on the most ‘vulnerable groups’ within a value chain has the tendency to limit the coverage of the guidelines. For instance, focusing on the impact of land grabbing on the indigenous peoples and asking governments and businesses to provide the corresponding remediation processes may deflect concerns from the myriad of human rights issues arising from land grabbing itself.

The Oxfam proposes mapping of vulnerable sectors, setting-up of grievance mechanisms, and strengthening of interaction between governments and businesses.⁴¹ However, there is the undue emphasis on the roles and initiatives of non-government actors (NGOs) and victims and corporate responsibilities rather than on the protection and realization of community rights.

When it comes to the UN’s land-related human rights instruments, the issue of tenure systems seems to be at the core. The Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, adopted in November 2004 by the Council of the FAO, provides guidelines on land tenure choices. It emphasizes securing access to productive resources as a key part of the realization of the right to food. The UN Special Rapporteur on the Right

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to Food also outlined in 2009 the minimum human rights principles applicable to land acquisitions or leases, focusing on informed local participation and benefit sharing.⁴² In May 2012, the Committee on World Food Security (CFS) of the FAO adopted the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Governance of tenure, the FAO believes, is crucial in determining rights and duties to use and control land, fisheries and forests.⁴³ The non-binding FAO document, however, has stopped short of granting land grabbing-affected local communities a right to veto land deals by invoking meaningful prior consultations.⁴⁴

Meanwhile, formal individual land titling has been recommended by multilateral institutions specifically the World Bank as a precondition for the modernization of agriculture. This view has been the basis for large-scale promotion of land markets at the height of the neoliberal era. The World Bank has also abandoned support for communal and collective tenure systems assuming that they are not compatible with market-based systems.⁴⁵

But individual titling is problematic, being basically a “transplantation of Western property rights”.⁴⁶ It is susceptible to manipulation by local elites, ignores interests of herders, fishers and others who depend on land communally, and paradoxically increases social inequality. The former UN Special Rapporteur on the Right to Food, Olivier de Schutter, cites three reasons for social inequality being a controversial issue. One, titling does not address land concentration where the local landed elite has simply taken over colonial control. Two, titling often requires the payment of fees, which poor farmers cannot afford and places bias for rich landowners. Third, even if registration fees are minimal, titling may lead to land reconcentration to the landlords or investors who have access to capital to make the land productive.⁴⁷

Policy-makers and activists have explored alternatives to individual titling. One viable option is the adoption of anti-eviction laws combined

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with registration of use rights. In Africa recently, some countries have provided formal legal recognition to existing customary and collective rights. In terms of evictions, one relevant instrument is the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles), especially the concepts of security of tenure and forced evictions.⁴⁸ Development projects are included in the scope and application of the Pinheiro Principles.⁴⁹ In terms of collective rights, the most relevant at this point are the ILO Convention No. 169 and the UNDRIP. International law recognizes the rights of the indigenous peoples over their traditional lands and territories, and relocation is only allowed under narrowly defined circumstances and with FPIC. These instruments in principle should protect the indigenous peoples from encroachment on their land, whether for industrial projects or large-scale investments in agriculture.⁵⁰

In sum, FPIC means free from force, intimidation, manipulation, coercion or pressure by any government or corporation; prior to government allocation of land for specific use or prior to project approval, information must be provided; informed, the project-affected communities must be given all relevant information (including access to independent and expert information) in understandable language; and consent requires that the people involved in the project allow indigenous communities to say “yes” or “no” to the project.⁵¹

FPIC has been in use in international and domestic legal instruments in the context of international human rights, environment and development laws. Examples are the ILO Convention No. 169, Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Convention on Biological Diversity (CBD), as well as other UN conventions on TNCs, forests and climate change, among others. On the national level, countries such as the Philippines, Malaysia, Australia, Venezuela and Peru have legislation on the FPIC for all activities affecting their lands and territories.⁵²

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But the FPIC principle has found explicit recognition in the consolidation and adoption of the UNDRIP. The UNDRIP clearly, and in several places, refers to the right to FPIC and in itself provides considerable guidance on how such a right shall be effectively recognized.

Article 32 of UNDRIP, on free prior and informed consent, states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Other key articles in the Declaration are: on indigenous peoples' rights to land and territories (Articles 20 and 26); on no removal and right to restitution and redress (Articles 10 and 28); on representation (Articles 5, 18 and 19); and on consent based on custom (Articles 3, 4, 5, 33 and 34).⁵³

FPIC has been widely accepted in private sector policies of 'corporate social responsibility' in sectors like dam building, extractive industries, forestry, plantations, conservation, bio-prospecting, and environmental impact assessment. It has also been endorsed by the RSPO as a key principle. For instance Criterion 2.3 of the RSPO states that the "use of land for oil palm does not diminish the legal rights, or customary rights,

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of other users, without their free, prior and informed consent.” FPIC is also presumed in new plantings (Criterion 7.5) and in compensation of local people for any land acquisitions and relinquishment of rights (Criterion 7.6). Likewise, ‘free (prior?) and informed consent’ is a requirement of the Forest Stewardship Council, an international non-profit multi-stakeholder organization set up in 1993 to promote responsible management of the world’s forests.⁵⁴

Although the UNDRIP is not a convention and non-binding, the obligation to respect indigenous peoples’ right to FPIC is upheld by international laws that governments have ratified (e.g. Convention on the Elimination of all Forms of Racial Discrimination) as well as business best practices. This requires that even where national legal frameworks may give weak or no protection of customary rights to land, the right to FPIC is recognized by project developers.

Some NGOs like Oxfam are advocating for expanding the coverage of the right to FPIC to non-indigenous, project-affected people. The point however is to extend the interpretation of customary rights of indigenous peoples over the lands and territories they have traditionally occupied – their right to have their communal lands demarcated – to other sectors or groups that are dependent on the commons for their livelihoods. The existing regime of individual property rights is the systemic basis of land grabbing and the current “global enclosure movement”.⁵⁵ It has historically fenced off fisherfolk who have to access fishing grounds, pastoralists who need grazing grounds for the animals they rear, and millions of rural households who hunt, gather, farm and fetch water in the commons.

There are two ways in order to achieve the shift from individual property rights to the recognition of customary rights of not only indigenous populations but also all groups that are dependent on the commons. One way is by invoking two covenants of the UN Declaration on the Right to Development, particularly the people’s right to self-determination

and the right of all peoples to freely dispose of their natural wealth and resources, as also stipulated under Article 1 of the 1966 Universal Declaration of Human Rights. Article 1, Paragraph 1, Sentence 2 stipulates: “In no case may a people be deprived of its own means of subsistence”. Another way is the Right to Property, as protected under Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination. This states that the right to property includes the “rights of indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources.”⁵⁶ Article 21 of the American Convention on Human Rights recognizes this as well; the Inter-American Court of Human Rights notes explicitly that property should not be understood in a restrictive sense but can be an attribute to the group or the community.⁵⁷

Here, the human rights discourse has come full circle as it goes home to the radical approach of using the concept of ‘sovereignty’ to discursively work against the status quo. The bearer of sovereignty in this broad sense is not the state but a collective entity – the people or the nation. This collective dimension has for the longest time not been integrated in the jurisprudence of the UN Human Rights Committee.

BOX 2

RAI, POST-MORTEM

Before the more progressive approach is articulated, a closure of the failure of the ‘responsible agricultural investment’ (rai) process is in order. The rai was the most relevant multilateral effort before it got watered down and civil society organizations rendered its usefulness.

In 2009, the World Bank started the process of coming up with a set of principles for responsible agricultural investment (called PRAI) and in cooperation with the FAO, IFAD and the UNCTAD came up with seven principles. These principles pertained to: respecting land and resource rights; ensuring food security;

ensuring transparency, good governance and a proper enabling environment; consultation and participation; responsible agro-enterprise investing; social sustainability; and environmental sustainability. The institutions involved also agreed that they would jointly carry out and expand a consultative process to gather inputs from broad swath of stakeholders.⁵⁸

But in 2010, during the 36th session of the CFS, civil society groups blocked the World Bank-endorsed PRAI, citing it to be legitimizing the take-over of farmlands and natural commons by corporate and state investors. In 2012, the CFS launched a supposedly broad and inclusive process to formulate the principles that would govern rai.⁵⁹ In October 2014, the CFS endorsed the rai principles, defining responsible investment in agriculture and food systems as “the creation of productive assets and capital formation, which may comprise physical, human or intangible capital, oriented to support the realization of food security, nutrition and sustainable development, including increased production and productivity.”⁶⁰

The rai combines some of the aforementioned instruments and guidelines plus other existing ones as foundation of its principles. These are:

1. Universal Declaration of Human Rights - Adopted by the UN General Assembly on 10 December 1948 and other human rights treaties which are binding for the respective State Parties;
2. ILO Declaration on the Fundamental Principles and Rights at Work – Adopted by the International Labour Conference in June 1998;
3. Voluntary Guidelines on the Progressive Realization of the Right to Adequate Food in the Context of National Food Security – Adopted by FAO in 2004;
4. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) – Adopted by the United Nations General Assembly on 7 September 2007;

5. Guiding Principles on Business and Human Rights – Endorsed by the UN Human Rights Council in June 2011;
6. Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security – Adopted by the CFS in May 2012; and
7. Voluntary Guidelines for Securing Sustainable Small-scale Fisheries in the Context of Food Security and Poverty Eradication – adopted by the UN Committee on Fisheries (COFI) during its Thirty-first Session in June 2014.

Civil society groups were not contented with the outcome of the CFS process. Among the issues not mentioned, which are important to farmers and agrarian advocates are: protection of genetic resources and indigenous knowledge, food price control, agro-ecology and agricultural systems primarily based on the use of local resources and natural interactions of ecosystems instead of external inputs, farmer-led bottom-up approach, and the concerns of agricultural workers and indigenous peoples.⁶¹

But the more fundamental flaw of the *rai* and reason for its demise pertains to its failure to justify large-scale agricultural investments in relation to the development needs of the affected communities. For the World Bank and other institutions, the point from the start was to regulate the conflicts arising from land acquisition, such as: between the formal rights granted to investors and informal rights of communities; lack of clarity on the conditions and process for land acquisition; lack of consultation including on resettlement; and lack of assessment and monitoring of environmental impact.⁶² With this unbending objective of ‘regulation’, the *rai* ended up legitimizing land grabbing and the neoliberal policies, such as the regime of the open multilateral trading system and promotion of PPP projects, which have facilitated the impoverishment and exclusion of small farmers.⁶³

Lastly, the *rai* principles and other efforts to regulate investments are

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voluntary self-regulation, often in the context of corporate social responsibility (CSR) publicity, while corporations push for legally binding instruments and mechanisms to protect their investments. The accountability of government and corporations has remained elusive in the whole discourse, while people's democratic participation continues to be a marginal concern.

LEVELING UP: ASSERTING PEOPLE'S RIGHTS

One positive thing that is coming out of the failed rai process is the ongoing pursuit by some civil society organizations including farmers' organizations and peasant advocates of the more radical framework of 'people's rights'.⁶⁴ This pursuit is being placed against the onslaught of neoliberal policies including the phenomenon of land grabbing.

People's rights are collective rights that go beyond individual rights and freedoms, recognizing that the individual's dignity and well-being is mainly shaped by the conditions of the social class or group to which the individual belongs. The concept of people's rights recognizes that people would want to develop their conditions individually as well as collectively. On the contrary, the concept of 'human rights', specifically the right to freedom, has been historically ingrained in the individualist right to private property.

The mainstream concept of human rights has also been dominated by the first-generation rights, the civil and political rights, which are the only justiciable rights at the moment at the UN and enforceable mostly within national borders. Only through workers and people's struggles had the concept of human rights developed into second-generation rights, the economic, social and cultural rights, which no matter how closer these are to defining class contradictions remain non-justiciable.

The upheavals of the national liberation movements beginning in the

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1950s have launched the third-generation rights, the people's rights. The right to peace, right to humanitarian assistance, right to healthy environment, rights of sexual minorities, ethnic, religious, linguistic, etc., right to self-determination, and right to development are recognized as collective rights. The UNDRIP is also an example of third-generation rights. Anti-colonial and anti-imperialist struggles, for instance in China, Cuba, Vietnam, Philippines, African continent, Latin America, etc., the Bandung Conference in 1955 in Indonesia of the non-aligned movement, then culminating in 1976 with the Universal Declaration of the Rights of Peoples (Algiers Declaration) pushed the rights discourse to the next level.

People's struggles for adequate food, land, shelter, education, health care and freedom from oppression predate the Universal Declaration of Human Rights. In fact, the entire rights discourse is an expression of people's yearning for social justice and freedom – the codification of these into laws are the products of popular mobilizations and struggles. People have claimed and asserted their rights amid repression and exerted enough political pressure for the rights to be legally recognized, whether *de facto* or *de jure*. People's struggles, including armed struggles, have been crucial in advancing the cause of civil rights and decisive in enriching human rights declarations after the Second World War to include positive rights to employment, shelter, welfare and others that constitute economic justice.

Two noteworthy declarations in relation to land and people's assertion of their access to the commons are the Algiers Declaration and the UN Declaration on the Right to Development. Both are directly confrontational with neoliberalism, which has paved the way for unbridled land grabbing and the privatization of the commons.

The Algiers Declaration affirms and recognizes seven inter-related rights, namely: Right to Existence; Right to Political Self-Determination; Right of Rebellion; Social and Economic Rights; Right to Culture; Right

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to Environment and Common Resources; and Rights of Minorities. It affirms people's right to self-determination against foreign intervention and their own corrupted or repressive State. What is important when it comes to land grabbing is that the Declaration challenges the monopoly of State governments over law making and provides a framework for examining grievances.

The Algiers Declaration founded the Permanent People's Tribunal (PPT) in Bologna, Italy on 24 June 1979, The PPT, an international opinion tribunal, publicly examines cases of violations of human rights and rights of peoples. Ordinary citizens not bound to any state institution or vested party but known for their independence, probity and integrity, run the PPT. The Declaration does not have enforcement capacity thus cannot compel States to change policies that violate people's rights. But its enforcement is in the people's fight for liberation. Likewise the enforcement of PPT does not rely on the technical pronouncements of dominant legal system but rather through the politics of social action and struggle.

The Right to Development, on the other hand, was adopted by the UN in 1986 after more than a decade of struggle by Third World States to rectify the inequities in the rules and mechanisms of global economic governance. The 1966 ICESCR provided the starting point to call for greater economic self-determination beyond formal or nominal independence from colonial powers. In the 1970s, Third World States proposed a New International Economic Order, but none of the proposals materialized. The UN adoption of the Right to Development is a milestone in more than a decade of struggle of Third World peoples and their governments.

The Right to Development is comprehensive as it encompasses economic, social and cultural rights as well as civil and political rights; it recognizes people's collective rights; and imposes obligations on individual states to ensure equal and adequate access to essential resources and on the international community to promote fair development policies

and effective international cooperation. The Right to Development is explicitly anti-imperialist, thus not surprisingly only eight industrialized states voted in favor of adopting the Declaration, while another eight abstained and the US voted against it. A subsequent resolution that tried to lay out a detailed plan of action to put it into practice faced even stiffer opposition with 11 advanced countries led by the US voting against it.

What is noteworthy with the Right to Development is that it recognizes extra-territorial dimension to rights and provides extra-territorial obligations of States, which are crucial with neoliberal globalization. This is important in the international operations of TNCs and multilateral institutions, trade and investment deals including land acquisitions, international migration, transboundary resource conflicts such as shared river systems and land, and climate change.

In a controversial decision on 24 June 2014, the Human Rights Council adopted resolution “to establish an open-ended intergovernmental working group on transnational corporations ... to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.” It was sponsored by Ecuador and supported by African Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela, and Peru. It was opposed by the US, United Kingdom, Germany, Japan, Austria, Italy, South Korea, among others. Although it is indeed an uphill climb, it is an indication of the ground that the Right to Development is gaining.

One final theme that provides the backbone of the people’s rights discourse is the reclamation of the genuine meaning of sovereignty. In the so-called modern world, people’s sovereignty remains illusory as States, wherein sovereignty supposedly resides, are representing the dominant classes. Under neoliberal restructuring, sovereignty is eroded as the State is rendered powerless, in the case of land grabs,

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for instance, to defend the farmers and their communities. States are simply beholden to multilateral institutions and food and agrochemical TNCs to liberalize foreign trade and investment. With land grabs, the question on the State selling the commons and national patrimony is quite stark.

The assertion of people's sovereignty reaffirms the role of autonomous and militant action and people's power to challenge and overthrow a system. People's sovereignty is a normative framework of people's democratic movement, militant mass struggles and campaigns. Cases of land occupation by farming communities, uprooting of GM corn and other crops of corporate agriculture, and other direct actions and armed struggles are victorious not because of a legalistic approach but because of the exercise of people's sovereignty. In advocacy, the assertion of people's sovereignty and people's rights is important in exposing the State and the lack of genuine democracy. Farmers and project-affected communities can intervene and have voice in governance and participate in exposing government. In reality, they form the grassroots base of people power, have the sovereignty to form organizations that build up into movements, which truly form the foundation of people's governance that challenges the State and builds alternatives even outside the State.

In the human rights discourse, farmers and agrarian advocates defending their life, livelihood and resources remain trapped in the maze of instruments and processes of the UN system. Constitutional amendments, national laws and implementation of new restrictions can even take away the legal status of their rights that they have historically fought for. Only by unwavering assertion of people's rights framed within the struggle for liberation from foreign and local oppressors and exploiters as well as the establishment of people's governance can farmers and all marginalized sectors truly enjoy the guarantee for their rights.

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PAN Asia Pacific (PANAP) is one of the five regional centres of PAN, a global network dedicated to eliminating the harm caused to humans and the environment by pesticides and promoting biodiversity-based ecological agriculture.

PANAP's vision is a society that is truly democratic, equal, just, and culturally diverse; based on the principles of food sovereignty, gender justice and environmental sustainability. It has developed strong partnerships with peasants, agricultural workers and rural women movements in the Asia Pacific region and guided by the strong leadership of these grassroots groups, has grown into a reputable advocacy network with a firm Asian perspective.

PANAP's mission lies in strengthening people's movements to advance and assert food sovereignty, biodiversity-based ecological agriculture, and the empowerment of rural women; protect people and the environment from highly hazardous pesticides; defend the rice heritage of Asia; and resist the threats of corporate agriculture and neo-liberal globalization.

Currently, PANAP comprises 105 network partner organizations in the Asia Pacific region and links with about 400 other CSOs and grassroots organizations regionally and globally.



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