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## LARGE-SCALE LAND ACQUISITIONS AND APPLYING A GENDER LENS TO SUPPLY CHAIN REFORM

Mina Manuchehri<sup>†</sup>

*Abstract:* In recent years, multinational corporations, in particular food and beverage companies, have committed to “zero tolerance for land grabs” throughout their supply chains. To achieve this end, companies have also committed to international legal norms, including Free, Prior, and Informed Consent (FPIC) and the United Nations Guiding Principles on Business and Human Rights (UNGPs). Although these commitments were unprecedented, no company explicitly requires the consideration of women’s use of and rights to land when remedying land grabs or acquiring land. To guarantee that women are included and consulted throughout land acquisition processes, companies should explicitly require the application of a gender lens to such decisions, as women throughout the developing world are less likely than men to have decision-making authority over land acquisitions. If women are included in land acquisition processes, communities are less likely to be adversely impacted by land acquisitions, as women tend to serve different and unique community roles in relation to land than men—from growing subsistent crops and fetching water to ensuring that settlement locations are capable of providing basic necessities to communities. Through a textualist and purposivist analysis, this paper will argue that FPIC and the UNGPs require the application of a gender lens to land acquisition processes in order to comply with the international norms enumerated in each of these instruments.

### I. INTRODUCTION

Beginning in 2008, there was an increase in reports of “land grabs” occurring throughout the Global South, which claimed that rising food prices were fueling an increased demand for large-scale land.<sup>1</sup> The term “land grab” is used to refer to the acquisition of large-scale land from poor communities in developing nations by wealthy private investors of food-secure nations; the land is often used to produce export crops in substitution of food crops for domestic consumption.<sup>2</sup> Criticisms of such land grabs include the manner in which land acquisition processes are carried out and the adverse impacts on communities. For example, developing countries where large-scale land acquisitions occur generally do not have in place

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<sup>†</sup> Mina Manuchehri is a J.D. Candidate at the University of Washington School of Law. I am grateful to Professor Melissa Durkee for her valuable guidance and input throughout the drafting of this comment. I am also grateful to the entire *Washington International Law Journal* editorial staff, in particular Jack Brumbaugh, Benjamin Byers, Elisabeth Forsyth, Maria Hoisington, Harrison Owens, and Claire Sullivan.

<sup>1</sup> SHEPARD DANIEL & ANURADHA MITTAL, THE OAKLAND INST., GREAT LAND GRAB: RUSH FOR WORLD’S FARMLAND THREATENS FOOD SECURITY FOR THE POOR 1 (2009), [http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/LandGrab\\_final\\_web.pdf](http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/LandGrab_final_web.pdf).

<sup>2</sup> *Id.*

effective “legal or procedural mechanisms to protect local rights and take account of local interests, livelihoods and welfare.”<sup>3</sup> This subsequently raises concerns regarding corruption, lack of transparency, inadequate compensation, and whether public interest (i.e., food security) is being prioritized over financial gain.<sup>4</sup> Although reports of land grabs have been common in industries ranging from palm oil, to rubber, to tourism, a significant amount of attention has focused on the sugar industry. For example, the Oxfam America “Behind the Brands” campaign demanded that leading food and beverage companies, as major purchasers of the world’s sugar supply, adopt a “zero tolerance for land grabs” commitment throughout their supply chains.<sup>5</sup> Several industry leaders made such a commitment while also committing to international legal norms including Free, Prior, and Informed Consent (FPIC) and the United Nations Guiding Principles on Business and Human Rights (UNGPs) to further emphasize their commitment to ending land grabs.<sup>6</sup>

Although these commitments are an unprecedented step in the right direction with regard to ensuring responsible land-based investments, no company explicitly requires taking gender into consideration when acquiring land, which would include consulting with affected women, receiving their consent before land is acquired, and requiring their participation in processes designed to ensure that business operations do not harm, but rather respect, human rights. Companies will be unable to comply with their commitments to FPIC and the UNGPs if they fail to apply a gender lens. In the communities affected by the increased global demand for land, women frequently serve an integral role in the management of land and therefore have a unique understanding of community needs in relation to land. Although women often play a pivotal role in their communities, it is often an informal one. Women rarely hold community positions that allow for their participation and consultation with government officials and companies, let alone have the authority to consent to the acquisition of land. As such, a

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<sup>3</sup> LORENZO COTULA ET AL., LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA 7 (FAO, IIED, IFAD, 2009), <http://www.landcoalition.org/sites/default/files/documents/resources/12561iied.pdf>.

<sup>4</sup> *Id.*

<sup>5</sup> See generally Oxfam Am., *About*, BEHIND THE BRANDS, <http://www.behindthebrands.org/en-us/about> (last visited Jan. 24, 2016).

<sup>6</sup> Several industry leaders also committed to the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT). This comment will not analyze this international norm because the VGGT explicitly addresses the importance of women’s land rights, all of which have been thoroughly analyzed by other academic papers.

gender lens must be applied to each commitment aimed at the remedying of land grabs, as the exclusion of women is in direct conflict with each commitment's text and would result in the evisceration of each commitment's intended purpose.

Part II of this comment will set the scene by explaining the following: 1) the alleged impetus behind the rise in land grabs, with special attention given to the high prevalence of land grab accusations in the sugar industry; 2) how the "Behind the Brands" campaign resulted in companies taking action to address land grabs throughout their supply chains; and 3) how women serve a unique role in relation to land and why companies cannot assume their inclusion in land acquisitions. Part III will argue that companies should prioritize compliance with FPIC and the UNGPs, despite both being "soft law." Through a textualist and purposivist argument, Parts IV and V will then argue that FPIC and the UNGPs require companies to apply a gender lens to land acquisition processes in order to comply with the international norms enumerated in each of these instruments.

## II. BACKGROUND

### A. *The Proliferation of Land Grabs*

In March 2015, the European Parliament released a resolution detailing how Tanzania is experiencing high rates of land grabs in response to a "new wave of large-scale land acquisitions," which are fueled by several factors including the demand for agricultural commodities, high commodity prices, tourism, and land speculation.<sup>7</sup> In the biofuel industry alone, the resolution reveals that 640,000 hectares of land were acquired between 2005 and 2009.<sup>8</sup> The resolution further reports that Tanzanian communities, as well as communities throughout the rest of Africa, are experiencing a variety of adverse impacts, including: selling or leasing land without a legal or practical understanding of the consequences, forced displacement and eviction, destruction of villages, confiscation of property (e.g., livestock), inadequate or no compensation, bodily harm, inadequate access to redress, and a lack of access to basic necessities like food, water, and housing.<sup>9</sup>

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<sup>7</sup> Resolution on Tanzania, Notably the Issue of Land Grabbing, EUR. PARL. DOC. T8-0073/2015 (2015), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2015-0073>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

For a majority of people living in developed countries, the issue of land grabs, as exemplified by the European Parliament's resolution on Tanzania, is almost unheard of. For people living in developing countries, however, accusations of land grabs are occurring with increasing regularity. Although land grabs have occurred since the height of colonialism,<sup>10</sup> there has been a pronounced proliferation of documented land grabs over the past decade.<sup>11</sup> This proliferation is largely due to the 2008 surge in food prices and subsequent increase in foreign investor demand for agricultural land.<sup>12</sup> From mid-2008 to 2009, the number of foreign investor large-scale land deals grew by 200 percent and over the past decade, foreign investors have acquired "an area of land four times the size of Portugal" in developing countries.<sup>13</sup>

Three additional facts exacerbate the dangers posed by the increased rate of foreign investment in large-scale agricultural land. First, over sixty-five percent of investments in large-scale agricultural land occur in countries unable to feed their populations.<sup>14</sup> This is problematic because taking away arable land for foreign investment purposes means even less is left for meeting community needs, such as relieving hunger through growing subsistence crops and providing additional household income by growing crops for local markets.<sup>15</sup> Second, more than sixty percent of foreign investors intend to use agricultural land to grow solely export crops.<sup>16</sup> This means land that was once used to grow subsistence crops is being replaced with crops the local population will not be able to access. Consequently, these countries often fall even further into poverty. Although land owned or controlled by foreign investors often employs local labor forces, the employment opportunities and wages rarely compensate affected communities for the total value lost from their lands.<sup>17</sup> Third, a majority of

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<sup>10</sup> Julia Behrman et al., *The Gender Implications of Large-Scale Land Deals*, 39 J. OF PEASANT STUD. 49, 49 (2012).

<sup>11</sup> Oxfam Int'l, *Nothing Sweet About It: How Sugar Fuels Land Grabs* 3 (Oct. 2, 2013), <https://www.oxfam.org/sites/www.oxfam.org/files/nothingsweetaboutitmediabrief-embargoed2october2013.pdf> [hereinafter Oxfam Int'l, *Nothing Sweet About It*].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Oxfam Int'l, *Our Land Our Lives: Time Out on the Global Land Rush* 2 (Oct. 2012), [https://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en\\_1.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/bn-land-lives-freeze-041012-en_1.pdf) [hereinafter Oxfam Int'l, *Our Land Our Lives*].

<sup>15</sup> Behrman et al., *supra* note 10, at 66–67.

<sup>16</sup> See Oxfam Int'l, *Our Land Our Lives*, *supra* note 14 (citing WARD ANSEEUW ET AL., TRANSNATIONAL LAND DEALS FOR AGRICULTURE IN THE GLOBAL SOUTH: ANALYTICAL REPORT BASED ON THE LAND MATRIX DATABASE 6 (2012), [https://www.oxfam.de/system/files/20120427\\_report\\_land\\_matrix.pdf](https://www.oxfam.de/system/files/20120427_report_land_matrix.pdf)).

<sup>17</sup> Behrman et al., *supra* note 10, at 54.

the occupants of land acquired by foreign investors have insecure or informal land rights that are often overlooked and neglected when land is seized.<sup>18</sup> This is because many rural communities have customary rights to their lands rather than formal title, and thus their land rights are rarely registered formally.<sup>19</sup> Some countries attempt to circumvent this issue through recognizing both customary and formal tenure rights; however, this still does not guarantee that communities will be able to acquire land titles or register their rights.<sup>20</sup> As such, foreign investors or the government departments responsible for acquiring land for foreign investment purposes may be less likely to consult with communities before acquiring land.

When considering these adverse effects and the intense vulnerability of affected communities, the following questions must be asked. First, are the communities that occupy and depend upon these lands truly consenting to the selling and leasing of their property to foreign investors? And second, when considering these communities' considerably weaker bargaining power in relation to foreign investors and government bodies, are consenting communities receiving just compensation for the economic, social, and cultural value lost as a result of these acquisitions?

#### B. *The Relation Between Sugar and Land Grabs*

Sugar is a major crop fueling the demand for large-scale agricultural land, closely followed by soybeans and palm oil.<sup>21</sup> Of the approximately 800 large-scale land deals that have occurred since 2000,<sup>22</sup> 100 were for investments relating to sugar, totaling more than four million hectares.<sup>23</sup> Leading food and beverage companies require a large amount of sugar in many of their products, so it comes as no surprise that accusations of land grabs throughout their supply chains were made.<sup>24</sup>

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<sup>18</sup> See generally *Issue Brief: Land Rights and Food Security: The Linkages Between Secure Land Rights, Women, and Improved Household Food Security and Nutrition*, LANDESA RURAL DEV. INST. (Mar. 2012), <http://www.landesda.org/wp-content/uploads/Landesda-Issue-Brief-Land-Rights-and-Food-Security.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Oxfam Int'l, *Nothing Sweet About It*, *supra* note 11, at 3.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 51 percent of the world's sugar is used in "processed foods such as soft drinks, confectionery, baked goods, and ice cream." Oxfam Int'l, *Sugar Rush: Land Rights and The Supply Chains of the Biggest Food and Beverage Companies* 4 (2013), <https://www.behindthebrands.org/~media/Download-files/bn-sugar-rush-land-supply-chains-food-beverage-companies-021013-embargo-en.ashx>.

For example, a 2014 report detailed how a Brazilian sugar company, Trapiche, forcefully evicted fifty Brazilian families from their fishing community along the Sirinhaém River with help from paramilitary forces.<sup>25</sup> Trapiche's main buyers are the Coca-Cola Company and PepsiCo.<sup>26</sup> Even though this community had lived in this location for over a century, it is alleged that Trapiche did not receive the community's consent or even consult with them prior to acquiring the land.<sup>27</sup> It is further alleged that Trapiche refused to compensate community members for the loss of their homes and livelihoods, and did not plan or pay for the community's resettlement.<sup>28</sup> To date, many of these community members remain homeless and mired in uphill legal proceedings, which are complicated by a biased judicial system and a lack of formal title to the land.<sup>29</sup> Furthermore, community members report that the river is now unfishable for half the year due to polluted runoff from Trapiche's sugar mill and cog.<sup>30</sup>

Accusations of land grabs are not just occurring in South America, they are occurring throughout the entire developing world. In fact, the prevalence of land grab accusations in Southeast Asia's sugar industry is so extreme that media and activists refer to sugar sourced from this region as "blood sugar."<sup>31</sup> In Cambodia, for example, reports claim that over 12,000 people have been forcibly displaced since 2006 to make way for over 75,000 hectares of sugar cane plantations in the provinces of Koh Kong, Kompong Speu, and Oddar Meanchey.<sup>32</sup> People report having their crops razed, their livestock shot, and their homes burned until they are forced to accept little to no compensation for their land.<sup>33</sup> Even if people are able to secure jobs on sugar plantations, they claim to be paid wages as low as USD 2.50 per day.<sup>34</sup> With such low wages, it is often impossible for families to make up for the lost livelihoods they once earned from their land (e.g., cash crops and subsistence crops); thus, they are often left with no choice but to send their children into the workforce as well.<sup>35</sup> To make matters worse, it is reported

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<sup>25</sup> Thomas Peele, *Can Pepsi and Coke End Land Grabs for Sugar?*, THE GUARDIAN (Jun. 3, 2014), <http://www.theguardian.com/sustainable-business/pepsi-coke-sugar-land-grabs-conflicts-oxfam>.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Oxfam Int'l, *Nothing Sweet About It*, *supra* note 11, at 2.

<sup>31</sup> Clothilde Le Coz, *Blood Sugar*, RUOM (Jan. 8, 2013), <http://www.ruom.net/portfolio-item/blood-sugar/#sthash.TQhyOjTr.dpbs>.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*



that those who protest these unethical business practices are often imprisoned.<sup>36</sup> In 2010 alone, Tate & Lyle, a major U.K. sugar supplier, purchased approximately 10,000 tons of sugar valued at USD 3.13 million from plantations linked to Cambodia's egregious land grab trends and practices.<sup>37</sup> Tate & Lyle is a major supplier to food and beverage companies, including The Coca-Cola Company and PepsiCo.<sup>38</sup>

Although this comment will primarily highlight the prevalence of land grab accusations throughout the sugar industry, as well as food and beverage companies' subsequent commitments to ending land grabs throughout their supply chains, it is important to note that accusations of land grabs are not occurring solely in the sugar industry. For example, non-governmental organizations (NGOs) like Global Witness have detailed the high rate of land grabs throughout the rubber industry in Cambodia,<sup>39</sup> Laos,<sup>40</sup> and Myanmar,<sup>41</sup> while NGOs like the Oakland Institute have released reports detailing land grabs in Papua New Guinea's forestry industry<sup>42</sup> and in Cameroon's palm oil industry.<sup>43</sup> However, to date, food and beverage companies have arguably been the most responsive to addressing land grab accusations.

### C. Name and Shame Campaigns and Companies' Responses

In response to reports detailing the pervasiveness of land grabs throughout leading food and beverage companies' supply chains, in 2013 Oxfam America launched a "name and shame" campaign called "Behind the

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<sup>36</sup> *Id.*

<sup>37</sup> Oxfam Int'l, *Nothing Sweet About It*, *supra* note 11, at 6.

<sup>38</sup> *Id.*

<sup>39</sup> GLOBAL WITNESS, RUBBER BARONS: HOW VIETNAMESE COMPANIES AND INTERNATIONAL FINANCIERS ARE DRIVING A LAND GRABBING CRISIS IN CAMBODIA AND LAOS 3 (2013), [https://www.globalwitness.org/documents/10525/rubber\\_barons\\_lores\\_0\\_1.pdf](https://www.globalwitness.org/documents/10525/rubber_barons_lores_0_1.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> GLOBAL WITNESS, GUNS, CRONIES, AND CROPS: HOW MILITARY, POLITICAL AND BUSINESS CRONIES CONSPIRED TO GRAB LAND IN MYANMAR 4 (2015), [https://www.globalwitness.org/documents/17852/exec\\_summarygunschroniescrops.pdf](https://www.globalwitness.org/documents/17852/exec_summarygunschroniescrops.pdf).

<sup>42</sup> See FREDERIC MOUSSEAU, THE OAKLAND INST., ON OUR LAND: MODERN LAND GRABS REVERSING INDEPENDENCE IN PAPUA NEW GUINEA (2013), [http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OL\\_Report\\_On\\_Our\\_Land.pdf](http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OL_Report_On_Our_Land.pdf).

<sup>43</sup> See *Herakles Farms is Destroying Rainforests and Local Livelihoods in Cameroon for Palm Oil Plantations*, THE OAKLAND INST., <http://www.oaklandinstitute.org/herakles-farms-destroying-rainforests-and-local-livelihoods-cameroon-palm-oil-plantations> (last visited Feb. 9, 2016); FREDERIC MOUSSEAU, THE OAKLAND INST., UNDERSTANDING LAND INVESTMENT DEALS IN AFRICA—MASSIVE DEFORESTATION PORTRAYED AS SUSTAINABLE DEVELOPMENT: THE DECEIT OF HERAKLES FARMS IN CAMEROON (2012), [http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Land\\_deal\\_brief\\_herakles.pdf](http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Land_deal_brief_herakles.pdf).



Brands.”<sup>44</sup> The campaign scores the ten largest food and beverage companies across seven human rights categories on a scale of one to ten. The ten companies included in the campaign are Nestlé, Unilever, The Coca-Cola Company, PepsiCo, Mars, Danone, Mondele, General Mills, Kellogg Company, and Associated British Foods. The seven scored human rights categories are land rights, women’s rights, farmer’s rights, worker’s rights, climate, transparency, and water.<sup>45</sup> Oxfam’s first scorecard, released in February 2013, scored no company above a three (“poor”) and scored seven companies a one (“very poor”) in respect to land rights.<sup>46</sup> In regards to women’s rights, only two companies scored above a three (“some progress”), while five companies scored a two (“poor”) and three companies scored a one (“very poor”).<sup>47</sup> The campaign also released a petition demanding that food and beverage companies eliminate land grabs throughout their supply chains or else face a consumer boycott. To date, over a quarter-million consumers have signed the petition.<sup>48</sup>

Several food and beverage companies were responsive to Oxfam’s name and shame tactics, and implemented unprecedented commitments to remedy the issue of land grabs throughout their supply chains. For example, in November 2013, The Coca-Cola Company committed to zero tolerance for land grabs by implementing a variety of policies, including: 1) requiring adherence to the principle of FPIC<sup>49</sup> across its operations, including its suppliers; 2) requiring respect for the land rights of communities and traditional peoples; 3) committing to 100 percent sustainably sourced sugar cane by 2020; 4) encouraging industry-wide commitment to sustainably sourced sugar cane; and 5) advocating for governments and suppliers to contribute towards the elimination of land grabs.<sup>50</sup> In March 2014, PepsiCo

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<sup>44</sup> Oxfam Am., *Scorecard*, BEHIND THE BRANDS, <http://www.behindthebrands.org/en-us/scorecard> (last visited Mar. 25, 2015) [hereinafter Oxfam Am., *Scorecard*].

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Anna Kramer, *These 10 Companies Make a Lot of the Food We Buy. Here’s How We Made Them Better*, OXFAM AM., (Dec. 10, 2014), <http://www.oxfamamerica.org/explore/stories/these-10-companies-make-a-lot-of-the-food-we-buy-heres-how-we-made-them-better/>.

<sup>49</sup> FPIC is derived from the United Nations Declaration on Indigenous Peoples, which states, “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation, and where possible, with the option of return.” FPIC will be discussed in greater detail in the next part of this comment. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, at 10 (Sept. 13, 2007) [hereinafter UNDRIP].

<sup>50</sup> *The Coca-Cola Company Commitment: Land Rights and Sugar*, THE COCA-COLA CO. 2–4, <http://assets.coca-colacompany.com/6b/65/7f0d386040fcb4872fa136f05c5c/proposal-to-oxfam-on-land-tenure-and-sugar.pdf> (last visited Feb. 9, 2016); Journey Staff, *Sourcing Sustainably: Coke Takes*

announced a similar commitment to zero tolerance for land grabs when it released the following new policies: 1) requiring adherence to FPIC across its business operations, including its suppliers; 2) increasing the transparency of its sugar cane supply chain; 3) promoting industry respect for land tenure rights; and 4) advocating for governments and suppliers to contribute towards the elimination of land grabs.<sup>51</sup> In April 2014, Unilever also committed to zero tolerance for land grabs and implemented the following policies: 1) “periodic training” on FPIC for all staff members; 2) carrying out due diligence assessments of risks to and impacts on communities; 3) conducting impact assessments with community participation; and 4) advancing women’s land rights and increasing their access to land.<sup>52</sup> Nestlé followed suit in June 2014 when it announced a commitment to zero tolerance for land grabs by adopting the following policies: 1) respecting relevant national laws and international human rights standards; 2) requiring adherence to FPIC for indigenous peoples affected by business operations; and 3) working with governments, communities, and farmers to strengthen land rights.<sup>53</sup> The Coca-Cola Company, PepsiCo, Nestlé, and Unilever also committed to the UNGPs.<sup>54</sup>

In January 2014, the Kellogg Company included land rights-related provisions in its Global Supplier Code of Conduct, but did not commit to zero tolerance for land grabs like The Coca-Cola Company, PepsiCo, Nestlé,

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*Leadership Role to Protect Land Rights of Farmers and Communities*, THE COCA-COLA CO. (Nov. 7, 2013), <http://www.coca-colacompany.com/stories/sourcing-sustainably-coke-takes-leadership-role-to-protect-land-rights-of-farmers-and-communities/>.

<sup>51</sup> *PepsiCo Land Policy*, PEPSICO INC. 1–2 (Mar. 18 2014), [https://www.pepsico.com/Assets/Download/PepsiCo\\_Land\\_Policy.pdf](https://www.pepsico.com/Assets/Download/PepsiCo_Land_Policy.pdf).

<sup>52</sup> *Responsible Sourcing Policy: Working in Partnership with Our Suppliers*, UNILEVER 23 (2014), [https://www.unilever.com/Images/slp-unilever-responsible-sourcing-policy-2014\\_tcm244-409819\\_en.pdf](https://www.unilever.com/Images/slp-unilever-responsible-sourcing-policy-2014_tcm244-409819_en.pdf) [hereinafter *Responsible Sourcing Policy*].

<sup>53</sup> *Nestlé Commitment on Land & Land Rights in Agricultural Supply Chains*, NESTLÉ 1–2 (July 2014), [http://www.nestle.com/asset-library/documents/library/documents/corporate\\_social\\_responsibility/nestle-commitment-land-rights-agriculture.pdf](http://www.nestle.com/asset-library/documents/library/documents/corporate_social_responsibility/nestle-commitment-land-rights-agriculture.pdf).

<sup>54</sup> The UNGPs require business enterprises to respect human rights and do no harm to human rights; they also provide guidance regarding what human rights fall within its scope. See U.N. Office of the High Commissioner of Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04, at 1 (2011) [hereinafter UNGPs]. See *Human Rights: Code of Conduct*, PEPSICO INC., <http://www.pepsico.com/Purpose/Talent-Sustainability/Human-Rights> (last visited Mar. 25, 2015); Ed Potter, *How to Implement the UN Guiding Principles on Business and Human Rights*, THE COCA-COLA CO. (Oct. 2, 2013), <http://www.coca-colacompany.com/coca-cola-unbottled/how-to-implement-the-un-guiding-principles-on-business-and-human-rights#TCCC>; *Nestlé to Pilot New Reporting Framework on UN Human Rights Principles*, NESTLÉ (Feb. 24, 2015), <http://www.nestle.com/media/news/nestle-pilots-new-reporting-framework-on-un-human-rights-principles>; *Responsible Sourcing Policy*, *supra* note 52.

and Unilever did.<sup>55</sup> The Kellogg Company's Global Supplier Code of Conduct includes the following policies: 1) supplier respect for affected women and communities' land rights; 2) transparency surrounding operating permits and/or concession agreements to affected communities; 3) fair negotiation; 4) prohibition of participation in unjust compulsory acquisition by host governments; 5) adherence to FPIC; and 6) identification of small-scale producers to guarantee "fair market value for their crops, goods or services."<sup>56</sup> Kellogg Company also committed to the UNGPs.<sup>57</sup>

These food and beverage industry leaders' commitments to zero tolerance for land grabs are unprecedented. However, it is important to note that the five other leading food and beverage companies targeted by Oxfam's campaign have yet to acknowledge the prevalence of land grabs throughout their supply chains and have failed to commit to zero tolerance for land grabs.<sup>58</sup> For example, Associated British Foods refused to develop policies demonstrating a commitment to zero tolerance for lands grabs because it claims it is already "hugely sensitive to the issues of land ownership" and pledges for zero tolerance for land grabs are "cheap and plentiful." It insists instead that "the true test of any organization is what it actually does."<sup>59</sup> Associated British Foods has yet to offer evidence to support its alleged efforts to prevent and remedy land grabs.<sup>60</sup> However, it is notable that in March 2015, Illovo, an Associated British Foods subsidiary and Africa's largest sugar producer, committed to zero tolerance for land grabs by implementing the following policies<sup>61</sup>: 1) conducting impact assessments; 2) engaging with affected communities regarding land rights; 3) providing assistance and financial support to affected communities in collaboration with other stakeholders; 4) participating in land redistribution

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<sup>55</sup> *Kellogg Company Global Supplier Code of Conduct*, KELLOGG CO. (Jan. 15, 2014), [https://www.kelloggcompany.com/content/dam/kelloggcompanyus/PDF/Kellogg\\_Company\\_Global\\_Supplier\\_Code\\_of\\_Conduct\\_January\\_2014.pdf](https://www.kelloggcompany.com/content/dam/kelloggcompanyus/PDF/Kellogg_Company_Global_Supplier_Code_of_Conduct_January_2014.pdf).

<sup>56</sup> *Id.* at 3-4.

<sup>57</sup> *2015 Year-End Sustainability Milestones*, KELLOGG CO. (Dec. 15, 2015), [https://www.kelloggcompany.com/content/dam/kelloggcompanyus/corporate\\_responsibility/pdf/2015/2015YearEndSustainabilityMilestones15Dec2015.pdf](https://www.kelloggcompany.com/content/dam/kelloggcompanyus/corporate_responsibility/pdf/2015/2015YearEndSustainabilityMilestones15Dec2015.pdf).

<sup>58</sup> Oxfam Am., *Scorecard*, *supra* note 44 (evidencing that the remaining five companies' scores have not increased considerably).

<sup>59</sup> Annie-Rose Harrison-Dunn, *Associated British Foods Responds to Oxfam Land Grab Criticism*, FOOD NAVIGATOR (Oct. 3, 2013), <http://www.foodnavigator.com/Market-Trends/Associated-British-Foods-responds-to-Oxfam-land-grab-criticism>.

<sup>60</sup> *Id.*

<sup>61</sup> Illovo's land rights policies are extensive, so only the most notable policies are listed. For additional details, see *Illovo Group Guidelines on Land and Land Rights*, ILLOVO SUGAR, <https://www.illovosugar.co.za/Group-Governance/Group-Guidelines-on-Land-and-Land-Rights> (last visited Jan. 24, 2016).

programs; and 5) adherence to FPIC.<sup>62</sup> Illovo also committed to the UNGPs.<sup>63</sup>

Despite this recent proliferation of land rights policies, none of the companies targeted by Oxfam's campaign—including The Coca-Cola Company, PepsiCo, Nestlé, Unilever, and the Kellogg Company—have included explicit and robust commitments to addressing and enhancing the role of women in relation to land rights; all their commitments use gender neutral language.<sup>64</sup> In particular, these policies omit requiring the direct participation of women in the following circumstances: first, when foreign investors or government officials negotiate and receive consent for the leasing and buying of land from local communities; and second, when companies develop processes to ensure respect for human rights throughout their business operations.<sup>65</sup>

*D. Understanding the Unique Role of Women in Relation to Land and Why Companies Cannot Assume the Inclusion of Women in Land Acquisitions*

Although companies have committed to international norms like FPIC and the UNGPs as means for achieving the elimination of land grabs throughout their supply chains, they have still failed to apply an explicit gender lens to these commitments. This is problematic, as women throughout the world tend to have a unique understanding of community needs in relation to land yet rarely hold community positions that ensure their participation, consultation, or consent when their land is acquired.

It is unlikely that communities will involve women in land acquisition proceedings without companies explicitly requiring it because, although women are the world's largest producers of food, they own less than one percent of the world's land.<sup>66</sup> In countries such as Cameroon, Kenya,

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See *The Coca-Cola Company Commitment: Land Rights and Sugar*, *supra* note 50; *PepsiCo Land Policy*, *supra* note 51; *Nestlé Commitment on Land & Land Rights in Agricultural Supply Chains*, *supra* note 53 (mentioning women, but not in specific relation to FPIC processes); *Responsible Sourcing Policy*, *supra* note 52; *Kellogg Company Global Supplier Code of Conduct*, *supra* note 55.

<sup>65</sup> See *The Coca-Cola Company Commitment: Land Rights and Sugar*, *supra* note 50; *PepsiCo Land Policy*, *supra* note 51; *Nestlé Commitment on Land & Land Rights in Agricultural Supply Chains*, *supra* note 53 (mentioning women, but not in specific relation to FPIC processes); *Responsible Sourcing Policy*, *supra* note 52; *Kellogg Company Global Supplier Code of Conduct*, *supra* note 55.

<sup>66</sup> Sanjoy Patnaik & Sarita Pradhan, *Securing Land Rights for Women Through Institutional and Policy Reforms*, LANDESA RURAL DEV. INST. 2 (2013), <http://www.landes.org/wp-content/uploads/Securing-Land-Rights-for-Women-through-Institutional-and-Policy-Reforms-264-Pradhan.pdf>

Tanzania, and Nigeria, it is estimated that women “undertake more than seventy-five percent of agricultural work and own less than ten percent of the land.”<sup>67</sup> As such, women’s names rarely appear on formal land titles, making it unlikely that they will be consulted or placed in bargaining positions equal to men.<sup>68</sup> Furthermore, many rural communities tend to follow patriarchal customs that view men as solely responsible for dealing with foreign investors and deprioritize women’s opinions.<sup>69</sup> This exclusion of women from land acquisition processes could stem from their overall “lack of participation in decision making at all levels of government and society” in many developing countries.<sup>70</sup>

The exclusion of women is especially concerning because women and men’s relationship to and use of land is vastly different. Each gender typically serves different community roles.<sup>71</sup> This causes women and men to assess the economic, social, and cultural value of land differently. For example, numerous studies show that women tend to utilize resources—including land—in a manner that improves their community’s childhood health, nutrition, and allocation of resources for education.<sup>72</sup> In fact, recent studies indicate a positive correlation between women’s land and property rights and “sustainable human development goals, including women’s social and economic empowerment, poverty eradication, food security, and sustainable agriculture.”<sup>73</sup>

For example, the International Land Research Institute found that “equalizing women’s status would lower child malnutrition by thirteen percent (13.4 million children) in South Asia and by three percent (1.7 million children) in Sub-Saharan Africa.”<sup>74</sup> Furthermore, women and men’s actual utilization of the land tends to be vastly different. In Sub-Saharan Africa, men are generally in charge of growing and selling lucrative cash

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(unpublished paper prepared for the Annual World Bank Conference on Land and Property, Washington D.C. April 8–11, 2013).

<sup>67</sup> Behrman et al., *supra* note 10, at 55.

<sup>68</sup> *Id.*

<sup>69</sup> Zoey Chenitz, *The Impact of the Global Land Rush on Women*, LANDESA RURAL DEV. INST.: LAND ACQUISITIONS BLOG (Sept. 26, 2011), <http://www.landesia.org/impact-global-land-rush-women-blog/>.

<sup>70</sup> Elizabeth Daley & Sabine Pallas, *Women and Land Deals in Africa and Asia: Weighing the Implications and Changing the Game*, 20 FEMINIST ECON. 178, 184 (2014).

<sup>71</sup> Behrman et al., *supra* note 10, at 51.

<sup>72</sup> *Id.*

<sup>73</sup> Mayra Gomez & D. Hien Tran, *Women’s Land and Property Rights and the Post-2015 Development Agenda 2* (Oct. 2012), [http://globalinitiative-escr.org/wp-content/uploads/2012/10/28102012-FINAL-Inequalities-Paper-on-Womens-Land-and-Property-Rights-GI\\_\\_\\_\\_.pdf](http://globalinitiative-escr.org/wp-content/uploads/2012/10/28102012-FINAL-Inequalities-Paper-on-Womens-Land-and-Property-Rights-GI____.pdf) (unpublished paper prepared for the Global Thematic Consultation Conference: Addressing Inequalities).

<sup>74</sup> Behrman et al., *supra* note 10, at 51.

crops, while women are generally in charge of growing subsistence food crops for household consumption and crops for the local market.<sup>75</sup> As such, if only men are consulted regarding land use, then companies are more likely to assess the value of the land in relation to cash crops. However, even though subsistence food crops may be not sold on the formal market, they still hold immense value for households and communities.<sup>76</sup> In fact, failure to consider subsistence crops is “detrimental to local food security” and makes it more likely that communities will lack access to staple foods and vitamin and nutrient rich crops.<sup>77</sup>

Women also generally hold the responsibility for supplying water to the community,<sup>78</sup> as well as collecting firewood and medicinal plants.<sup>79</sup> For example, women in Tanzania and Ghana spend 700 and 500 hours a year, respectively, on water provision-related tasks.<sup>80</sup> Consequently, if women are not consulted in the land acquisition process, communities are less likely to have access to vital resources like water, firewood, and medicinal plants because such resources may not be prioritized when developing resettlement plans. A case study conducted in Ethiopia highlights how a large-scale land acquisition resulted in particular, adverse impacts on women because it required them to walk longer distances to retrieve water for household and livestock consumption and because local water sources dried up.<sup>81</sup> As a result, women’s labor burden associated with collecting water significantly increased,<sup>82</sup> which likely had adverse ripple effects on their ability to complete their other duties. In Kenya, a large-scale land acquisition also obstructed a community’s access to water by fencing off a river and canal, which resulted in women being unable to harvest papaya and sisal.<sup>83</sup>

While employment opportunities stemming from foreign investment in large-scale land grabs are often minimal and inadequate regardless of gender, they are especially so for women.<sup>84</sup> This is because women and men have different employment qualifications, and women may not be consulted during negotiations regarding their education levels and skillsets.<sup>85</sup> Instead,

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<sup>75</sup> *Id.* at 53.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 66.

<sup>78</sup> *Id.* at 63.

<sup>79</sup> *Id.* at 53; Daley & Pallas, *supra* note 70, at 181.

<sup>80</sup> Behrman et al., *supra* note 10, at 63.

<sup>81</sup> Daley & Pallas, *supra* note 70, at 186.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 180.

<sup>84</sup> *Id.* at 182.

<sup>85</sup> *Id.*



foreign investors may be more likely to consider men's education levels and skillsets when developing new job opportunities.<sup>86</sup> This is problematic because many rural communities do not have enough resources to send both female and male children to school, so female children are often not sent to school.<sup>87</sup> This human capital disparity between women and men extends to their differential access to agricultural extension services.<sup>88</sup> Consequently, women may not be qualified for new job opportunities if they require skills more commonly held by men or relatively high educational attainment (e.g., familiarity with new agricultural technology).<sup>89</sup> In a case study from the Philippines, an investor offered seasonal employment to men, but did not extend this employment opportunity to women. Furthermore, in India, although a large-scale land acquisition stripped women of access to 1,000 hectares of land they depended on for growing food for the community, less than five percent reported receiving paid employment from the investor.<sup>90</sup>

Women are also likely to play a crucial role in resettlement and compensation decisions. For example, if a community agrees to lease or sell its land to a foreign investor, then the community will need to pick a new location to resettle.<sup>91</sup> When picking a new location, women are more likely than men to consider several factors based on their unique community roles, including proper housing, adequate toilet facilities, sewage systems, health facilities, availability of land for subsistence crops, the level of pollution, education facilities, access to childcare, distance from the workplace, proximity to kin, and safety.<sup>92</sup> Furthermore, men are more likely than women to spend monetary compensation quickly and solely on their personal needs.<sup>93</sup> In fact, research indicates that men often view monetary compensation as a means to improve their personal status, while women view monetary compensation as a way to ensure or improve the well-being of their community.<sup>94</sup> The different ways that women and men respond to monetary gain provides another example of the aforementioned points regarding the different community roles of women and men.<sup>95</sup>

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<sup>86</sup> *Id.*

<sup>87</sup> Daley & Pallas, *supra* note 70, at 186.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 190.

<sup>91</sup> *See generally* GENDER CHECKLIST: RESETTLEMENT, ASIAN DEVELOPMENT BANK (Feb. 2003), <http://www.adb.org/sites/default/files/publication/28731/gender-checklist-resettlement.pdf>.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 13.

<sup>94</sup> *Id.*

<sup>95</sup> *See supra* Part II.D.



### III. SOFT LAW VS. HARD LAW

Before delving into greater detail regarding what FPIC and the UNGPs mandate, it is important to first determine how such international legal norms differ from other forms of law. International legal norms are commonly referred to as “soft law.” “Soft law” is defined as “normative statements in non-binding political instruments such as declarations, resolutions, and programs of action.”<sup>96</sup> Under such instruments, “compliance is expected”<sup>97</sup> because it represents the “expressed preference for certain behavior,”<sup>98</sup> but it is not required. These instruments are in contrast to “hard law,” which includes legally-binding treaties and international custom.<sup>99</sup> State and non-state entities alike delineate the divide between soft law and hard law on their respective enforcement power.<sup>100</sup> For example, failure to comply with hard law is considered to have “legal consequences” (i.e. litigation), while soft law is considered to only have “political consequences” (i.e. reputational risk).<sup>101</sup> As such, it is not uncommon for scholars, states, and non-state actors to view soft law as inferior to hard law.

Despite the different enforcement mechanisms of soft law and hard law, it is important to recognize that the two are far from mutually exclusive. For example, as notable scholars have discussed, it is exceedingly “rare to find soft law in isolation” from hard law; instead, soft law is more often used “as a precursor to hard law or as a supplement to a hard law instrument.”<sup>102</sup> In fact, it may be more accurate to think of soft law as representing how the international system is strengthening, evolving, and maturing.<sup>103</sup> This makes more sense when coupled with the fact that, because of soft law’s unique enforcement mechanisms, it can be developed “more rapidly,”<sup>104</sup> and before state and non-state actors have reached a consensus on the issues it addresses.<sup>105</sup> For example, soft law tends to “crystalize a trend towards a

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<sup>96</sup> Dinah Shelton, *Soft Law*, in ROUTLEDGE HAND BOOK OF INTERNATIONAL LAW 68, 68 (David Armstrong ed., 2008) [hereinafter Shelton, *Soft Law*].

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 69.

<sup>99</sup> *Id.* at 68.

<sup>100</sup> *Id.*

<sup>101</sup> Dinah Shelton, *Law, Non-Law and the Problem of Soft Law*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 1, 11 (Dinah Shelton ed., 2000) [hereinafter Shelton, *Law, Non-Law and the Problem of Soft Law*].

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.* at 12.

<sup>104</sup> *Id.* at 13.

<sup>105</sup> *Id.* at 17.

particular norm,” “fill in gaps,” and “provide guidance and a model” for later binding law.<sup>106</sup> It is thus likely that international soft law, like FPIC and the UNGPs, will eventually evolve into international hard law or be implemented as binding law at the domestic level.<sup>107</sup>

Soft law is also unique in comparison to hard law in that it gives non-state actors, such as transnational companies, “a role in the law-making processes.”<sup>108</sup> This is because soft law often targets transnational companies or recognizes their contribution to evolving international norms.<sup>109</sup> Hard law, on the other hand, does not provide an analogous role for non-state actors because it rarely “imposes direct obligations on entities other than states.”<sup>110</sup> As a result, companies should engage in a due diligence review of the requirements of each international norm to which they commit to. Furthermore, although soft law may not have traditional legal ramifications for companies, this does not mean that it is devoid of consequences.<sup>111</sup> For example, Oxfam’s “Behind the Brands” campaign and consumer-driven petition show the possible detrimental impact on a company’s brand reputation if land grabs are present throughout its supply chain. This is evidenced by companies’ responses to the campaign to adhere to and endorse soft law. These soft law principles are likely to become even more influential as more companies follow suit because they will reinforce the evolving international norm and, subsequently, increase the likelihood that soft law will become binding international or domestic law.<sup>112</sup>

#### IV. THE PRINCIPLE OF FREE, PRIOR, AND INFORMED CONSENT REQUIRES THE APPLICATION OF A GENDER LENS

FPIC is derived from Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>113</sup> The UNDRIP is considered “soft law” because it is a non-binding international declaration.<sup>114</sup> Article 10 reads as follows:

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<sup>106</sup> *Id.* at 8.

<sup>107</sup> Shelton, *Law, Non-Law and the Problem of Soft Law*, *supra* note 101, at 17.

<sup>108</sup> *Id.* at 13.

<sup>109</sup> Shelton, *Soft Law*, *supra* note 96, at 70.

<sup>110</sup> *Id.*

<sup>111</sup> Shelton, *Law, Non-Law and the Problem of Soft Law*, *supra* note 101, at 11.

<sup>112</sup> *Id.* at 12.

<sup>113</sup> UNDRIP, *supra* note 49, art. 10.

<sup>114</sup> Shelton, *Soft Law*, *supra* note 96, at 68.

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation, and where possible, with the option of return.<sup>115</sup>

As previously discussed, five leading food and beverage companies and one subsidiary—The Coca-Cola Company, PepsiCo, Nestlé, Unilever, Kellogg Company, and Illovo—have committed to FPIC as a means of improving their respect for land rights. It is worth noting that although The Coca-Cola Company, PepsiCo, and Nestlé require adherence to FPIC throughout their entire supply chains,<sup>116</sup> Unilever only requires “periodic” training on FPIC.<sup>117</sup> As such, Unilever’s commitment to FPIC in regards to communities affected by sugar production is unclear. For purposes of this comment, however, it is assumed that Unilever’s commitment to FPIC extends to such communities. Despite these companies’ unprecedented commitments, none of them have explicitly stipulated that they require the inclusion of women in regard to FPIC. As previously discussed in Part II(D), it may be unlikely that communities will include women on their own accord due to entrenched patriarchal customs that rarely place women in decision-making positions.<sup>118</sup> As such, companies must explicitly require the inclusion of women, not only because of their unique understanding of community needs in relation to land, but also because FPIC cannot be adhered to if half of the population is excluded. This is supported through a textualist analysis of Article 10 of the UNDRIP, through a purposivist analysis of the UNDRIP as a whole, and through consideration of how leading international organizations and NGOs define FPIC.

The necessary inclusion of women is supported by the text of the UNDRIP. Article 10 of the UNDRIP stipulates that “no relocation shall take place without the free, prior and informed consent of the indigenous people *concerned*” and only after there is “*agreement on just and fair compensation.*”<sup>119</sup> When considering women’s unique understanding of community needs in relation to land and the extreme impact that foreign

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<sup>115</sup> UNDRIP, *supra* note 49, art. 10.

<sup>116</sup> See *The Coca-Cola Company Commitment: Land Rights and Sugar*, *supra* note 50; *PepsiCo Land Policy*, *supra* note 51; *Nestlé Commitment on Land & Land Rights in Agricultural Supply Chains*, *supra* note 53.

<sup>117</sup> *Responsible Sourcing Policy*, *supra* note 52.

<sup>118</sup> See *supra* Part II.D.

<sup>119</sup> UNDRIP, *supra* note 49, art. 10, (emphasis added).

investment in agricultural land will have on their livelihoods, they are unequivocally included in the phrase “indigenous peoples *concerned*.”<sup>120</sup> Along this same line of reasoning, it is difficult to comprehend how “agreement on *just and fair*” compensation can be reached without the inclusion of women.<sup>121</sup> This is because there is no way to determine “just and fair” compensation when half of the “concerned” indigenous peoples are excluded from negotiations determining compensation.<sup>122</sup> For example, if women are excluded from such negotiations, then it is unlikely that compensation will include the particular economic, social, and cultural value they attach to the land.<sup>123</sup> In addition, women’s valuable input may not be taken into consideration when determining an adequate resettlement plan.<sup>124</sup>

In addition to analyzing Article 10 of the UNDRIP in isolation, one can look to the UNDRIP as a whole to determine that a primary purpose is to respect and promote the “economic, social, and cultural rights” of women.<sup>125</sup> For example, Article 21(2) requires that “[p]articular attention shall be paid to the rights and needs of indigenous . . . women,”<sup>126</sup> while Article 22(1) elaborates on Article 21(2) by stating that “[p]articular attention shall be paid to the rights and needs of indigenous . . . women . . . *in the implementation of this Declaration*.”<sup>127</sup> Article 22(2) also states that the UNDRIP “guarantees against all forms of . . . discrimination,”<sup>128</sup> while Article 44 states that “all rights and freedoms recognized herein are equally guaranteed to male *and* female indigenous individuals.”<sup>129</sup> When taking into consideration Articles 21(2), 22(2), and 44, it becomes apparent that all of the UNDRIP’s articles, including Article 10, need to be implemented and respected in a gender sensitive and inclusive manner, despite the gender-neutral language.

Recognizing that many soft law interpretations originate from non-state actors, such as international organizations,<sup>130</sup> it is important to also look to how non-state actors have interpreted FPIC and whether they have implemented a form of “guiding principles” or “best practices.” For

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<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> *Id.* (emphasis added).

<sup>122</sup> *Id.* (emphasis added).

<sup>123</sup> *See supra* Part II.D.

<sup>124</sup> *Id.*

<sup>125</sup> *See generally* UNDRIP, *supra* note 49, arts. 3, 10.

<sup>126</sup> *Id.* art. 21(2).

<sup>127</sup> *Id.* art. 22(1) (emphasis added).

<sup>128</sup> *Id.* art. 22(2).

<sup>129</sup> *Id.* art. 44 (emphasis added).

<sup>130</sup> Shelton, *Soft Law*, *supra* note 96, at 68.

example, Forest Peoples Programme (FPP), a U.K. NGO, states that both men and women must be consulted because “they tend to use land and resources differently,” and thus the entity conducting FPIC will not be able to understand the full value of land without both genders’ participation.<sup>131</sup> FPP also states that the inclusion of women is necessary in order to adhere to the UNDRIP’s principle of non-discrimination,<sup>132</sup> as Article 22(2) of the UNDRIP “guarantees against all forms of . . . discrimination.”<sup>133</sup> The International Fund for Agricultural Development (IFAD) also claims that it is “essential” for women to be included in FPIC processes.<sup>134</sup> Furthermore, the United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation (UN-REDD) states that women’s involvement in these processes needs to be considered in the following ways: 1) whether they have access to formal or informal land rights;<sup>135</sup> 2) through requiring the presence of female representatives at consultations;<sup>136</sup> and 3) through requiring the inclusion of women during decision-making processes.<sup>137</sup> Through analysis of FPP, IFAD, and UN-REDD’s guidance on FPIC, it is apparent that applying a gender lens to FPIC is the evolving international norm.

#### V. COMPANY ENDORSEMENT OF THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (UNGPs) INADVERTENTLY REQUIRES THE APPLICATION OF A GENDER LENS

In addition to The Coca-Cola Company, PepsiCo, Nestlé, Unilever, Kellogg Company, and Illovo’s commitment to FPIC, all six companies have also endorsed the UNGPs.<sup>138</sup> The UNGPs are based on the following three-pillar framework: 1) states’ duty to protect human rights; 2) business enterprises’ responsibility to respect human rights; and 3) providing effective remedies for victims of human rights violations.<sup>139</sup> This comment

<sup>131</sup> Marcus Colchester, *Free, Prior and Informed Consent: Making FPIC Work for Forests and Peoples*, THE FOREST DIALOGUE 20 (July 2010), <http://www.forestpeoples.org/sites/fpp/files/publication/2010/10/tfdfpicresearchpapercolchesterhi-res2.pdf>.

<sup>132</sup> *Id.* at 21–22.

<sup>133</sup> See UNDRIP, *supra* note 49, art. 22(2).

<sup>134</sup> *Engagement with Indigenous Peoples: Policy*, INT’L FUND FOR AGRIC. DEV. 22 (Nov. 2009), [http://www.ifad.org/english/indigenous/documents/ip\\_policy\\_e.pdf](http://www.ifad.org/english/indigenous/documents/ip_policy_e.pdf).

<sup>135</sup> U.N. Reducing Emissions from Deforestation and Forest Degradation Programme, *Guidelines on Free, Prior and Informed Consent* 32 (2013).

<sup>136</sup> *Id.* at 29.

<sup>137</sup> *Id.*

<sup>138</sup> See *Human Rights: Code of Conduct*, *supra* note 54; *How to Implement the UN Guiding Principles on Business and Human Rights*, *supra* note 54; *Nestlé to Pilot New Reporting Framework on UN Human Rights Principles*, *supra* note 54; *Responsible Sourcing Policy*, *supra* note 52.

<sup>139</sup> UNGPs, *supra* note 54, at 1.

will focus on the second pillar of the UNGPs, as it specifically relates to what the international expectations are regarding food and beverage companies' respect for human rights. By endorsing the UNGPs, companies acknowledge a definition of human rights that includes the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and "fundamental rights" in the International Labor Organization's (ILO) "core conventions."<sup>140</sup> It is important to note that this definition and scope of "human rights" applies regardless of whether food and beverage companies are domiciled in countries that have signed or ratified the abovementioned human rights instruments.<sup>141</sup>

Although none of the previously mentioned human rights instruments recognize the right to land, let alone women's right to land, the ICESCR includes human rights aimed towards the promotion and protection of women's economic, social, and cultural rights.<sup>142</sup> Such rights may be adversely affected by a failure to consult women or receive their consent before a land acquisition is carried out. For example, Article 3 of the ICESCR recognizes "the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the . . . Covenant."<sup>143</sup> This means that a gender lens should be applied to each Article of the ICESCR.<sup>144</sup> Article 5 also states that no "State, group or person" has "any right to engage in activity or to perform any act aimed at the destruction of any of the rights."<sup>145</sup> Based on the potential adverse effects stemming from a foreign investor's failure to consult with women or receive their consent before acquiring their community's land,<sup>146</sup> as discussed in Part II(D), companies could violate several of the human rights enshrined in the ICESCR if they fail to apply a gender lens to UNGP commitments.

Pursuant to Article 10(1) of the ICESCR, "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly . . . while it is responsible for the care and education of dependent children."<sup>147</sup> As such, to

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<sup>140</sup> *Id.* at 13–14 (UNGP § 12).

<sup>141</sup> *Id.*

<sup>142</sup> International Covenant on Economic, Social, and Cultural Rights art. 3, Dec. 16, 1966, S. 993 U.N.T.S. 3 (1966) [hereinafter ICESCR].

<sup>143</sup> *Id.* at art. 3.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at art. 5.

<sup>146</sup> *See supra* Part III.

<sup>147</sup> ICESCR, *supra* note 142, art. 10(1).

ensure that land acquisitions do not harm “the family unit,” women need to fully participate in all processes. This is because, as previously mentioned in Part II(D), numerous studies show that women tend to utilize resources—including land—in a manner that improves their community’s childhood health, nutrition, and allocation of resources for education.<sup>148</sup> Furthermore, in rural communities worldwide, women are generally in charge of growing subsistence crops for household consumption.<sup>149</sup> Therefore, by not consulting women and receiving their consent, the strength of the “family unit” could be compromised due to men’s tendency to pay less attention than women to childhood health and subsistence crops.

Article 7(a)(i) also states “women should b[e] guaranteed conditions of work not inferior to those enjoyed by men;”<sup>150</sup> when women are not involved in land acquisition processes, it is more likely that their employment qualifications and needs will not be taken into consideration. This is detrimental because women often have different educational levels and skillsets, which could result in them being considered as less qualified than men for the same jobs.<sup>151</sup> As a result, not only are post-land acquisition employment opportunities for women likely to be less adequate and inferior when compared to those for men, it is also likely that there will be generally fewer employment opportunities for them.<sup>152</sup>

It is important to note that the UNGPs do not state that business enterprises have a “duty to protect human rights,” like states do;<sup>153</sup> instead, the UNGPs establish that they have a responsibility to “respect human rights.”<sup>154</sup> This does not mean that business enterprises are responsible for *providing* anything to communities to enhance their human rights. With that said, this does mean that business enterprises “should *avoid* infringing on the human rights of others.”<sup>155</sup> For example, the UNGPs state that business enterprises should “*avoid* causing or contributing to adverse human rights impacts through their own activities”<sup>156</sup> and “[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations.”<sup>157</sup>

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<sup>148</sup> Behrman et al., *supra* note 10, at 51–52.

<sup>149</sup> *Id.* at 4.

<sup>150</sup> ICESCR, *supra* note 142, art. 7(a)(i).

<sup>151</sup> Behrman et al., *supra* note 10, at 53.

<sup>152</sup> *Id.*

<sup>153</sup> UNGPs, *supra* note 54, at 1.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 13 (UNGP § 11) (emphasis added).

<sup>156</sup> *Id.* at 14–15 (UNGP § 13(a)) (emphasis added).

<sup>157</sup> *Id.* at (UNGP § 13(b)) (emphasis added).



If food and beverage companies fail to explicitly require the inclusion of women in FPIC processes, however, they could be actively contributing to the violation of fundamental human rights enshrined in the ICESCR (e.g., protection of the family unit, equitable work).

## VI. CONCLUSION

Food and beverage companies must apply a gender lens when eliminating land grabs throughout their supply chains in order to comply with FPIC and the UNGPs. FPIC requires application of a gender lens because, absent this commitment, companies will be unlikely to receive the consent of all “indigenous peoples concerned” by land acquisitions. Companies will also be less likely to accurately determine “just and fair” compensation as they will be less likely to take women’s unique relationship to and valuation of land into consideration. The UNGPs also require the application of a gender lens when eliminating land grabs because it encompasses the ICESCR’s definition of human rights, which requires the protection of the family unit and that women be provided with equitable work conditions and opportunities relative to men.