

SOUTHERN AFRICAN CAMPAIGN TO DISMANTLE CORPORATE POWER¹

Recent developments of the Southern African Campaign to Dismantle Corporate Power and a summary of the provisional discussion document to the global campaign and the treaty alliance on the important developments pertaining to the right to free prior informed consent (“FPIC”).

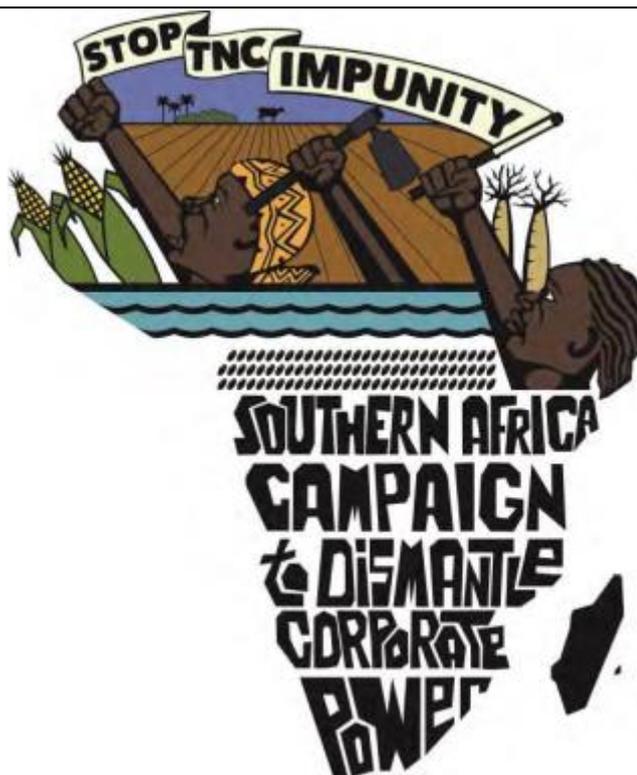
**“LAW FROM BELOW AND THE RIGHT TO
SAY NO !” - 26 OCT 2017**

RECENT DEVELOPMENTS:

The Permanent Peoples’ Tribunal (“PPT”) held its second Peoples’ Permanent Tribunal on 17 – 18 August 2017 in Johannesburg, South Africa. It was a continuation of the work of the previous PPT session on Transnational Corporations in Southern Africa, held in August 2016 in Manzini, Swaziland. Seven new cases were presented at the second session PPT and a poignant Juror’s Report came out of the process.

The campaign has a delegation in attendance at the United Nations Human Rights Commission third session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights whose mandate is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of

¹ please note that the report has not as yet been launched by the Southern Africa Campaign to Dismantle Corporate Power - 25 October 2017



transnational corporations and other business enterprises (“UNHRC 3rd Session”). Various oral and written submissions were made; which can be accessed at the following website <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Session3/Pages/Session3.aspx> .

DEFINING FPIC AND THE IMPORTANCE TO DISMANTELING CORPORATE POWER:

One of the main issues that came out of the second session of the PPT, that is also reflected in the Juror report and the UNHRC 3rd session is the issue of FPIC and its inter linked implication of corporate activities and human rights violations. It is thus important to look at FPIC from this content when defining it. FPIC refers both to a substantive right under international, statute and customary law as well as a process designed to ensure satisfactory development outcomes. The right to FPIC

places the development decision in the hands of the community. To realise this right, the community's decision should be made free from any obligation, duty, force or coercion and which includes the access to information which is understandable to such community. Ideally various development options should be presented to the affected community to ensure that the decision is based on a real choice.

Critical to the above, an affected community should make development choices without being influenced by similar decisions made by government, finance institutions or investors. In other words, the community's right to FPIC is not realised if they are presented with a project as a *fait accompli*. Again, access to sufficient information to understand the nature and scope of the project, including its projected environmental, social, cultural and economic impacts is critical. Such information should be objective and based on a principle of full disclosure.

Lastly, consent is not a mere consultation, consent means that a community has the **right to say NO** to a development, which is the quintessential point of FPIC and the communities right to development.

What the law says internationally and regionally and where FPIC should be incorporated:

Internationally, the United Nations Human Rights Council under the special rapporteur dealing with the question of a legally binding treaty that deals with the impacts of transnational corporations and other business enterprises have on human rights. The United Nations Human Rights Commission issued a draft elements document before the UNHRC 3rd session.

This document failed to incorporate the principle of FPIC, at best it wants to have adequate consultation. It is therefore assumed that at the international level FPIC still remains a concept and not a right.

However, members of the *Southern African Campaign to Dismantle Corporate Power* attending the UNHRC 3rd session advocated that the treaty must require the right of FPIC to all communities. It is also advocated that the Treaty should expressly recognise the customary rights to land and natural resources of the affected communities as property rights,, whether documented or not, and provide for appropriate compensation and reparation where applicable.

Lastly it is supported that communities at the African regional level, the peoples' right to development as recognised in the African Charter on Human and Peoples' Rights should be a core principle of the binding instrument on transnational corporations and other business enterprises with respect to human rights ("Treaty"). The peoples' right to development, as contained in the African Charter on Human and Peoples' Rights ("African Charter") and as given content by the African Commission on Human and Peoples' Rights ("African Commission"), must be included as a founding principle and enforceable right in the Treaty. This will ensure that the high water mark of the Treaty is **not to mitigate and compensate for adverse human rights impacts, but to prevent these**. In so doing so the inclusion of FPIC will be included and implemented as the community will be able to make its informed decision.

“LAW FROM BELOW AND THE RIGHT TO SAY NO”

Summary

Free, Prior, Informed Consent refers both to a substantive right under international-, regional - and indigenous customary law as well as a process designed to ensure satisfactory development outcomes. To realise this right, the affected community’s decision whether to allow development that will affect their rights, should be made free from any obligation, duty, force or coercion.

Secondly, the community has the right to make the development choice prior to any similar decisions made by government, finance institutions or investors. In the words of the African Commission on Human and Peoples’ Rights, the community’s right to FPIC is not realised if they are presented with a project as a fait accompli.

Thirdly, the community must be able to make an informed decision. That means that they should be provided sufficient information to understand the nature and scope of the project, including its projected environmental, social, cultural and economic impacts. Such information should be objective and based on a principle of full disclosure. The community should be afforded enough time to digest and debate the information.

Finally, consent means that the community’s decision may be to reject the proposed development. Consent is not mere consultation. The community can say no.

This is why FPIC is also a process, because the right to say no places the community in a position to negotiate. In other words, FPIC is not designed only to stop undesirable projects, but also to provide communities with better bargaining positions when they do consider allowing proposed developments on their land or resources.

FPIC should not be relegated to a risk-management exercise. Rather, FPIC, should be the basis upon which the relationship between the affected community and the company is built. The role of the State in enforcing this right is crucial, but not a prerequisite for building more equitable negotiating and bargaining positions between the affected communities and the developers.

Organizations of the Southern African Campaign to Dismantle Corporate Power

- AIDC (Alternative Information Development Centre) South Africa
- CNGR (Centre for Natural Resources Governance) Zimbabwe
- CTPD (Centre for Trade Policy and Development) Zambia
- JA! (Justica Ambiental) Mozambique
- LRC (Legal Resources Centre) South Africa
- LVC SEA (La Via Campesina) Southern and Eastern Africa
- RWA (Rural Women’s Assembly) Southern Africa
- WoMin (WoMin Trust Alliance) Southern Africa
- Global Campaign to Dismantle Corporate Power

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