

DEALING WITH DISCLOSURE:

IMPROVING TRANSPARENCY IN DECISION-MAKING OVER LARGE-SCALE LAND ACQUISITIONS, ALLOCATIONS AND INVESTMENTS



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LIST OF ACRONYMS

AfDB	African Development Bank
AUC	African Union Commission
BC	British Columbia, Canada
CBD	UN Convention on Biological Diversity
CCD	UN Convention to Combat Desertification
CIRAD	Centre de coopération internationale en recherche agronomique pour le développement
CFS	UN Committee on World Food Security
CSO	Civil Society Organisation
CSR	Corporate Social Responsibility
DRC	Democratic Republic of Congo
ECA	UN Economic Commission for Africa
EIF	Entry into force (for international instruments)
EIA	Environmental Impact Assessment
EITI	Extractive Industry Transparency Initiative
EPFI	Equator Principles Financial Institutions
EU	European Union
FAO	UN Food and Agriculture Organisation
FATF	Financial Action Task Force on Money Laundering
FPIC	Free, prior and informed consent
FSC	Forest Stewardship Council
GRI	Global Reporting Initiative
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
HLPE	High Level Panel of Experts on Food Security and Nutrition
IBHR	International Bill of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFC	International Finance Corporation
IFI	International Financial Institute
IIED	International Institute for Environment and Development
ILC	International Land Coalition
IMF	International Monetary Fund
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
OP	Optional Protocol (for international instruments)
PS	Performance Standard (of the IFC)
REDD	Reducing Emissions from Deforestation and Forest Degradation
RSB	Roundtable for Sustainable Biofuels
RSPO	Roundtable on Sustainable Palm Oil
RTRS	Roundtable on Responsible Soy
SLUP	Strategic Land Use Planning (of the Canadian Government)
UDHR	Universal Declaration of Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
USAID	United States Agency for International Development
VG	Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WB	World Bank

EXECUTIVE SUMMARY

The surge in large-scale commercial interest in land by domestic, international, private, and public actors has prompted a wide variety of stakeholders to consider how such investments may contribute to, rather than erode, local development priorities. The emerging body of evidence points to the significant risks of negative impacts on: access to and control over natural resources, household economies, food security, human rights, and the environment. Decision-making around such allocations and investments is frequently done in secret and without the knowledge or consent of communities affected, who are consequently unable to hold governments or commercial investors to account. Such a lack of mechanisms or political will to ensure transparent, accountable, and equitable decision-making in the acquisition and allocation of land concessions undermines governance and the democratic process. It fosters an environment where high-level corruption between political and business leaders prevails, where elite capture of natural assets becomes the norm, where human rights are routinely abused with impunity, and where investment incentives are stacked against companies willing to adhere to ethical and legal principles.

Global demand for land is predicted to remain high—especially in frontier markets struggling with inadequate governance frameworks, tenure rights, or rule of law—where the majority of the population are rural and dependent on land for their livelihoods. Policy makers are looking to transparency as a means of leveraging improved State and corporate behaviour, and empowering affected communities to hold them to account. However, in-depth understanding of the opportunities such leverage provides is yet to emerge; a gap this report aims to fill.

Transparency is defined as the relationship between three rights: the right to access information, the right to participate in decision-making, and the right to challenge such decisions. Improving transparency enables people likely to be affected by a decision to understand the potential impacts it will have on their lives. It helps empower them to gain better respect

for and protection of their rights. It enables citizens to know what a resource is worth and how much of it they are entitled to, so they can provide input into decision-making about how it should be managed. Transparency enables governments to better understand the trade-offs of land and natural resource use options available to them, to make the best choice in terms of policy and allocation of resources, and to negotiate better deals on behalf of their people and natural wealth. Meanwhile, there are considerable dividends for private sector parties from improving transparency, disclosing information, and applying free, prior, and informed consent during all stages of land allocation and commercial investment.

Despite recognition in principle of the importance of transparency and disclosure within international instruments, the majority remain discretionary and those that are binding lack the detail to be effectively enforced. Nevertheless, the momentum within debates around contract transparency and commercial confidentiality in the extractive industries and forest sectors can inform dialogue about large-scale commercial agri business. Experience from other natural resource sectors demonstrates the importance of identifying very specific entry points at which specific information disclosure will have a wider impact on transparency and subsequent accountability. Developing transparency initiatives before such targeted entry points have been identified risks creating a mechanism which is not fit for purpose.

In response, this report consolidates existing knowledge and policy recommendations relating to the type of information which needs to be made available, when, and by whom, in order to strengthen protection of local rights during all stages of decision-making around land and natural resources, including commercial investor interest. The report is based on a desk review of more than a hundred documents and interviews held with civil society experts. It compiles examples of best practice, as well as field-level experiences, which can help further understanding of the opportunities and challenges for improving transparency.

Given the continued importance of secure land tenure for the world's most vulnerable communities and the role secrecy plays in driving bad land management, this report calls for the adoption across all land and natural resource decision-making of a precautionary principle of "if in doubt, disclose." Namely, moving from an international norm in which States and business enterprises operate opaquely, to one in which they automatically disclose all information, unless it can be proven beyond doubt why such disclosure would harm commercial competitiveness or not be in the public interest.

More specifically, this research identifies the following four entry points within decision-making around land and natural resource use allocation, where greater access to information and transparency would improve people's ability to defend their rights and to hold governments and business enterprises to account:

1. Transparent land and natural resource planning—ensuring recognition of rights as a pre-requisite before land and resources can be allocated to commercial investors
2. Free, prior, and "informed" consent – ensuring people have influence over decision-making around land and natural resources which will affect them
3. Public disclosure of all contractual documentation – ensuring people have access to fully disclosed information on the investment deal, including risks and impacts
4. Multi-stakeholder initiatives, independent oversight, and grievance mechanisms – ensuring people have access to reliable and independent mechanisms for oversight and grievances

These entry points are embedded within higher-level human rights safeguards and principles, and therefore should be viewed as a step towards enjoyment of such rights and in no way replace their significance. Each of these is a response to a specific governance challenge

relating to secrecy and opacity in the way land deals are currently done. Beyond these four, a range of additional options for future policy work and campaigning were compiled, including: impact assessments, public disclosure on current land holdings, the role of transparency and disclosure in the post-project period, and extra-territorial obligations of States over overseas business enterprises.

A civil society workshop at which this initial research was presented identified a gap between the rapid developments being made within the "transparency and accountability" agenda at an international and conceptual level and the experiences of communities whose livelihoods are being devastated by bad land and natural resource decisions on the ground. For example, the above entry points for transparency will not effect change if they are simply viewed as technical solutions. Affected communities need support to be able to know what information they are entitled to, to be able to access such information, and to understand and use it to their benefit. Accountability mechanisms need to ensure that communities can operate without fear of reprisal, and that governments respond to demands for improved governance.

The extent to which State and business enterprises improve their transparency and information disclosure, and the extent to which this enables affected communities to better protect their rights and hold decision-makers to account, also depends on leveraging political will. In order to improve transparency and information disclosure in commercial land allocations and investments, it is critical to balance technical solutions (such as contract transparency) with efforts to tackle lack of political will. This needs to include creating space for civil society to engage in dialogue. Likewise, efforts to strengthen international normative frameworks need to be balanced with improvements to regulatory frameworks and the rule of law. Finally, support and capacity building must be prioritised toward ensuring local communities can take full advantage of opportunities provided for improving transparency and information disclosure.

1. INTRODUCTION

1.1 Background and rationale for the study

The surge in large-scale commercial interests in land by domestic, international, private, and public actors has prompted a wide variety of stakeholders to consider how such investments could contribute to, rather than erode, local development priorities. The emerging body of evidence points to the current significant risks of negative impacts on access to and control over natural resources, household economies, and food security. This has precipitated a rise in human rights violations and environmental degradation.

Decision-making around land-related allocations and investments is frequently done in secrecy without the knowledge or consent of communities affected. They are consequently unable to hold governments or business enterprises to account for the negative impacts they suffer. Such a lack of mechanisms or political will to ensure transparent, accountable, and equitable decision-making and allocation of concessions undermines governance and the democratic process. In addition, it fosters an environment where high-level corruption between political and business elites prevails, where capture of natural assets becomes the norm, and where investment incentives are stacked against companies willing to push for better standards of ethical or legal behaviour. As the High Level Panel of Experts on Food Security and Nutrition (HLPE) July 2011 report concluded:

“different actors – investors, government, local people – enter the negotiations with highly asymmetric information and power. Consequently, local people usually lose out, and governments lose both revenues and opportunities to achieve long-term benefits for their populations.”³

The past ten years has seen increased international recognition of the importance of transparency and accountability in natural resource governance, especially in resource-rich developing countries with high-level corruption and considered to be at risk of the “resource curse.”⁴ A proliferation of principles, initiatives and mechanisms has been developed from the local to the global levels, which aim to improve transparency as a means to hold decision-makers to account.

Global demand for land is likely to increase, especially in the frontier markets of Asia and Africa. Many countries in these regions suffer from inadequate laws and governance frameworks. Some policy makers are seeking transparency and accountability policy tools to leverage improved State and corporate behaviour.

The extractives sector provides a good example of how this can work. The Extractive Industries Transparency Initiative (EITI) requires public reporting of revenue payments to governments and offers influential instruments for holding to account operators in the sector. The question some stakeholders are asking is, could a “land transparency initiative” (an “EITI-for-land”⁵) have as powerful an impact on accountability in large-scale land investments?

This research project was borne out of a meeting hosted by the Centre for Development and Environment at the University of Bern in April 2011, which was organised by a range of civil society, think tanks, and private sector stakeholders brought together under the Land Matrix Initiative.⁶ The meeting aimed to discuss options for improving transparency in large-scale land acquisitions. Participants at the 2011 Berne meeting acknowledged that improving transparency in land and natural resource decision-making had the potential

to strengthen accountability and empower affected communities to challenge illegal, inappropriate, or badly implemented investment practices.

Until now, agreement on concrete steps for how to achieve this have been limited due to the lack of understanding about what “transparency” actually means in different circumstances. Important questions have yet to be answered:

1. What specific types of information disclosure and transparency are required?
2. What are the critical stages where improved transparency and disclosure would be most relevant in the following processes:
 - a. land and natural resource use planning
 - b. investment contract negotiation
 - c. allocation of rights and project management
3. Who is responsible for making disclosures?
4. Should disclosure be required by law, and, if so, under which jurisdiction?
5. What support do affected communities need to utilise disclosure as a means of holding decision-makers to account?

This report scopes the actual and potential interventions relating to transparency which may improve recognition and protection of existing local rights (whether formal or informal, documented or not), and the environment of decision-making in large-scale land investments. It aims to consolidate existing knowledge and policy recommendations relating to what kind of information needs to be made available, when, by whom, and how, in order for communities to be able to better protect their rights in the face of investor interest in their land. It aspires thereby to provide a foundation for all stakeholders involved in large-scale land investments to be able to prioritise targeted interventions to improve transparency.

This report builds upon the extensive policy, advocacy, and academic literature on drivers and impacts of “land grabbing.” For example, the “Commercial Pressures

on Land” research project of the International Land Coalition (ILC) and partners, their December 2011 “Land Rights and the Rush for Land” report,⁷ the Oakland Institute’s comprehensive research on land investments in seven African countries,⁸ and the July 2011 HLPE report “Land tenure and international investments in agriculture.”⁹ Despite claims of hypothetically positive macro and micro economic benefits resulting from such large-scale land investments, the reality is very different. Large-scale land investment currently taking place in Africa, South Asia, and Southeast Asia frequently targets “state” or “public” land where there is only limited recognition of existing local rights to land and natural resources. Multiple claims on such land can facilitate opaque and potentially corrupt deals with political and business elites and enable disregard for local land rights through, for example, the (re-)classification of land as “public” as a means to evict local people and transfer the land to investors. Without adequate safeguards or rule of law, the increasing demand for such investments can have devastating socio-economic, environmental, and governance impacts. Given the breadth of additional rights to water, soil nutrients, and wood frequently allocated in addition to the actual land, such investment agreements should be considered a form of “extractive industry” rather the simple transfer of land use rights.

The research undertaken for this report included a review of more than a hundred documents in the public domain (case studies, reports, policy papers and media reports) and interviews with 17 experts from northern and southern civil society; a full list of sources and interviewees is provided in Annex 3. The research did not review country based legislation relating to land unless included in specific case studies.

This report is intended for civil society groups and policy makers working on land governance issues in developing countries. It is divided into two sections. The first (section two) summarises the results of the desk review of references made to transparency and information disclosure in international legal, policy, and normative frameworks. The second (section three) analyses these references and recommends specific entry points in decision-making processes relating to land and natural resource use allocation, where greater access to information and transparency could be improved.

1.2 A word on terminology

This report uses the term “large-scale land investments” to mean the acquisition, lease, or transfer of large areas of land for commercial investment purposes. It does not determine a specific threshold as being “large-scale” due to project significance being relative to availability of land. This definition includes the agribusiness sector, but recognizes that other types of large-scale development projects have equivalent impacts in terms of forced evictions, rights violations, and environmental damage—for example, mining and forest concessions, hydropower dams, and special economic zones. The definition also recognises that in some cases investors gain rights for speculative purposes, or to extract an existing natural resource base, rather than putting the land to productive use. Therefore, unless specified, when the phrase “large-scale land investments” is used throughout this report, it is applicable to all of these modalities.

The report is primarily tailored toward the challenges for such investments made on “state” or “public” land on which customary or traditional rights of non-state actors (individuals and communities) may not be formally documented or recognised by the government. Nevertheless, many of the entry points identified for improving transparency are also applicable to other land classification types, such as transfers, leases, and acquisitions. The report uses the term “contract” to describe the package of documents involved in a land deal, including *inter alia*: memorandums of understanding, investment agreements, conventions of establishment, land lease contracts, and impact assessments.

The report uses the term “business enterprises” following the definition given in the guiding principles for business and human rights to include all types of investors involved in projects: domestic and foreign, public and private.¹⁰ Finally, the term “civil society organisation” (CSO) is intended to include all non-governmental groupings, associations, and relationships, excluding commercial institutions but including affected communities.

1.3 Limitations of the study

This research had intended to analyse specific recommendations from land dispute case studies about the types of information that were unavailable to affected communities, what they wanted access to and what their experiences had been in trying to do so. Unfortunately, the case studies reviewed lack specific details on this, despite recognising the considerable barriers to justice created by such secrecy and lack of transparency. The detail given in this report regarding specific types of disclosure and modes of transparency are therefore primarily taken from the policy level documentation.

1.4 Why information disclosure and transparency improve accountability

Client Earth defines “transparency” as the relationship between three rights: the right to access information (both that which is received/generated and details of processes); the right to participate in decision-making; and the right to an opportunity to challenge such decisions.¹¹

Improving transparency by publicly disclosing information relating to a proposed project can help people likely to be affected to better understand the potential impacts it could have on their lives. It can inform citizens about:

- the monetary value of a public resource
- what entitlements they might be due
- how to participate in decision-making processes
- what grievance procedures and avenues of recourse are available and how to engage in them
- what provisions for public disclosure they may exercise and how to pursue these options (such as freedom of information legislation)
- understanding misinformation campaigns by vested interests (such as by media groups controlled by political and business elites)

Frequently, it is assumed that current business models incentivise governments and business enterprises to make decisions behind closed doors, without consulting those who will be affected and keeping the terms and conditions secret. However, this fails to acknowledge the heterogeneity of views and perspectives of staff within government and business enterprise, some of whom respond proactively to incentives, whereas others require regulatory guidance. Growing evidence suggests that these actors could benefit from improved transparency and public consultation during all stages of investment activity.¹² Potential benefits:

1. Access to information helps government departments and different levels of authority to better understand the trade-offs and potential costs and benefits of the land and natural resource use options available to them. It enables governments to make the best decision in terms of policy and resource allocation priorities and negotiate better deals on behalf of their citizens.
2. Operating transparently and undertaking early consultation enables comprehensive evaluation

of the project benefits and costs, which can identify potential risks and local concerns. Gaining project consent from potentially affected communities reduces the risk of future expensive and less effective grievance and mitigation. It also increases the legitimacy of deals, fosters project continuity during changes of governing regime, and mitigates against local opposition (with its associated risks to local staff, supply chain, and reputation).

3. Adverse publicity for investors can result from any conflicts that arise, affecting brand image and reputation, making negotiating for future investments and attracting project finance more difficult and potentially triggering consumer boycotts.

4. From an economic perspective, improving transparency of extraction rights helps ensure that the distribution of financial benefits from a natural resource deal are in accordance with law. Such transparency subsequently makes it harder for decisions to be driven by vested interests instead of the public interest. Where assets have been allocated opaquely it can distort the market, which typically results in sub-optimal use of resources and poor development outcomes.

5. Access to information increases security of contracts and improves commodity supply chain security for businesses operating in high risk environments. Additionally, eliminating opportunities for opaque deals to be brokered through vested interests by requiring transparency fosters competition and levels the playing field for all.

6. Corrupt allocation of resources in many resource-rich developing countries can reinforce the position and impunity of elites, further strengthening their hold on the levers of power: the government, the law, the judiciary, the armed forces, and the bureaucracy.

Two recent examples in Box 1 from Sudan and Lao PDR are evidence of how important access to information can be for empowering local communities faced with their land being grabbed by investors.



Agence pour la Promotion des Investissements au Mali
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BOX 1: THE POWER OF THE RIGHT INFORMATION AT THE RIGHT TIME

In June 2011 the Oakland Institute publicly released the contract for the largest land deal in South Sudan, brokered in 2008 between the government and the American company Nile Trading and Development, Inc. The contract detailed the terms of the 49 year lease for 600,000 ha, with a possibility of the company expanding this by a further 400,000 ha for US\$25,000 (US\$16 per ha), including unencumbered rights to exploit all natural resources in the leased land.

Following release of the contract and the resulting media coverage, the community of Mukaya Payam in Lainya County, Central Equatoria State, was made aware of the terms of the deal, strengthening their mobilization against it. The traditional and senior government leaders, including county authorities, launched a joint protest in July 2011 rejecting the lease to American investors. Their message to the Government of South Sudan was “*We the chiefs, elders, religious leaders, and the youth of Mukaya Payam unanimously with strong terms condemn, disavow, or deny the land lease agreement reached on 11 March 2008 between the two parties.*” In response, President Kiir publicly announced that no investment would proceed in Mukaya without the community’s consent.¹³

A case from Lao PDR meanwhile indicates how legal rights training about procedures, rights, and responsibilities informs people about the right to participate in decision-making. Concessions for large-scale plantations are being allocated to public and private investors across the country. Bachieng District in the south is primarily affected by Vietnamese investors, where deals are done in secret, with disregard for local rights, and are having a devastating effect on livelihoods, rights, and the environment. Local communities are given no information in advance of company bulldozers arriving to clear their fields, and have very limited understanding of the law and their legal rights. They find themselves powerless to complain, or get legal redress or compensation.

Since 2006, a non-governmental organisation (NGO) has been working with officials from the Ministry of Justice to provide legal training to communities in Bachieng.¹⁴ It was commonly believed that if a central or provincial authority had approved such a land concession, then local authorities had no choice but to implement it without question or attempt to negotiate the terms, regardless of the negative impact.¹⁵ Critically, community members learned through this project that village authorities are not obliged to sign away land for concessions if they do not agree with proposed projects. Such information has increased their legal understanding and confidence to take stronger negotiating positions with investors and the government. It has empowered them to refuse to give their land away, to demand that local authorities reject proposed concessions, or at least negotiate better terms.

Transparency alone will not automatically lead to improved recognition of local land or resource rights, or enable affected communities to hold decision makers to account. Viewing transparency as a technical solution fails to recognise underlying barriers relating to power imbalances and injustice. An illegal land deal is still illegal, even if it is done transparently.

Transparency, as used by this report, includes not only the rights of communities to access this information, but their ability to understand and use it to demand better governance. For example, the complexity of information relevant to multi-million dollar foreign agri business investments can be overwhelming, and communities sometimes need support accessing, understanding and using it. These challenges are exacerbated for communities in remote areas, with low literacy or different mother tongue languages that sometimes do not have written forms.

The national database of the Cambodian government for land concessions, for example, is only available online and in English, thereby being inaccessible to communities without electricity (let alone internet access), who have never used a computer and do not speak English. Complex technical or legal information

may also require further “translation” across cultural and normative barriers before it can be understood and used meaningfully.

The improvements to transparency which this report calls for inherently include broader governance reform efforts. Activities have to be complemented by capacity building and campaigning to ensure that local communities are able to use such disclosure to their advantage:

- understand what they are entitled to
- are able to understand and use available information
- have access to mechanisms for accountability
- do not have fear of reprisal by powerful interests
- can expect their government to respond to demands for improved governance.

Broader land and natural resource governance reforms are themselves dependent on the need for greater transparency. The EITI is considered to be the best

practice example of how disclosure at one point of the secretive oil, gas, and mining operations (resource revenue flows) can improve overall transparency within the sector. Box 2 summarises the success of the EITI, its limitations, and where it needs to go next.¹⁶

BOX 2: THE EITI – A SUCCESSFUL START, BUT WHERE NEXT?

The EITI is an international multi-stakeholder voluntary mechanism, consisting of governments, CSOs, and the private sector. It concerns the reporting and monitoring of payments made by companies to governments from oil, gas, and mineral concessions. It has four basic elements:

- disclosure and verification of company payments and government receipts allows citizens to monitor flow of revenues to the state;
- a structured process of reporting, overseen by a multi-stakeholder group;
- international oversight and quality control by the EITI Board;
- independent validation checks that countries meet the rules.

The EITI was announced by the UK government in 2002 and launched at its first international conference in June 2003, which adopted the EITI Principles. In 2006, the EITI set up a board consisting of representatives from governments, the private sector, and civil society groups. Currently eleven countries are EITI compliant (Azerbaijan, Liberia, Timor-Leste, Mongolia, Ghana, Niger, Nigeria, the Kyrgyz Republic, Norway, Mali and the Central African Republic) and 22 countries are working towards this status, to be joined in the near future by the United States.

The current structure involves:

- the board: develops rules, provides oversight and quality control
- the EITI secretariat: day-to-day running of the EITI and liaison with countries
- multi-stakeholder groups: run EITI operations in each country involved
- validators: check countries' progress against the rules and report to the board

EITI's multi-stakeholder character, and its rules that require countries to meet a measurable standard of compliance, are considered positive features of the initiative. As a result, it has broad support from the international community as a benchmark for assessing the commitment of states to natural resource governance reforms. The EITI has helped to create momentum for national regulations that govern the international operations of some member countries. For example, in 2010 the US government adopted legislation requiring all oil, gas and mineral companies listed on the US Securities and Exchange Commission to publicly disclose their payments to governments around the world. The European Union is considering similar legislation and similar rules exist in Hong Kong.

However, the EITI remains contentious, and three issues are of key concern for this report:

1. Critics have claimed EITI's impact on the ground has been limited because it focuses too much on information disclosure, and not enough on building the capacity of CSOs to use information about revenue flows to hold governments and companies to account.
2. The EITI rules focus on disclosure of revenues that are paid and do not address the question of whether companies are paying their fair share of taxes, or whether the concession which generates the revenues had been allocated in a fair and transparent way.
3. The mechanism remains voluntary for countries to join and depends on continued support and political engagement from the government of the country concerned. Although a number of EITI-implementing countries are adopting revenue transparency laws, the absence of laws in many other countries means there is fragmented coverage globally.

Considerable work is now being done by CSOs to expand the scope of the EITI into areas which can be highly problematic for natural resource governance, such as the allocation of licenses and beneficial ownership of extractive companies.

2. ANALYSIS OF TRANSPARENCY AND DISCLOSURE OPTIONS FROM THE LITERATURE

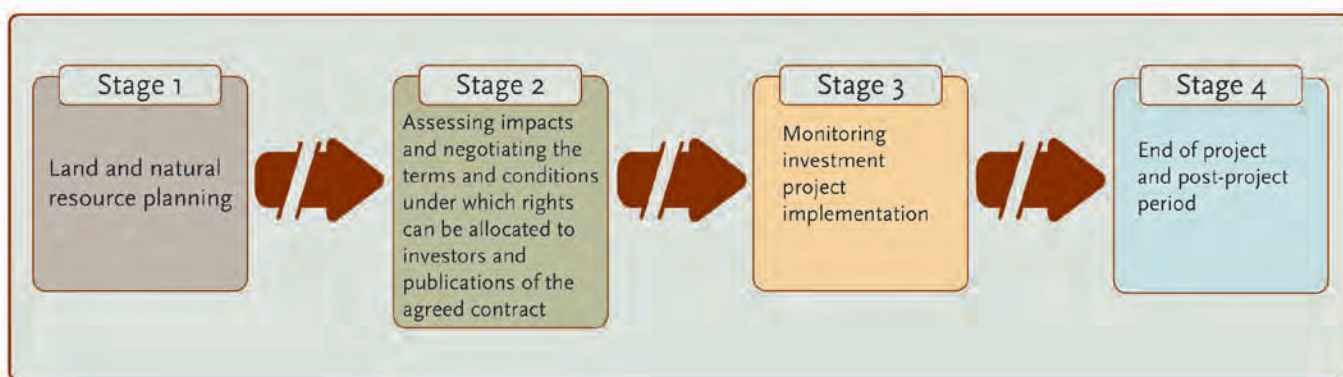
From the literature reviewed there emerged a consensus that secrecy is a driver of bad decision-making around large-scale land investments and consequent disregard for local rights. However, little consultative practice of sufficient quality to draw upon was found, and detail was lacking about what type of information should be disclosed, how and when. This study therefore incorporates, higher level principles in which transparency is an implicit requirement (including the international instruments which explicitly refer to it). It also incorporates specific case studies and examples of best practice drawn from across the world.

Decisions made during the acquisition and allocation of land for commercial investments were identified in the literature and disaggregated into four stages. Framing the decision-making process into distinct

stages helped to then identify key entry points for improving transparency and information disclosure. These were then evaluated in relation to their value to local communities for better protecting their rights. These four stages and the sources of information analysed are outlined in Diagram 1.

This diagram should in no way imply an automatic progression of decision-making which always leads to large-scale land investment projects going ahead. It simply presents a hypothetical sequence of events. Transparency and information disclosure have a specific and time-bound potential for empowerment in different ways throughout each stage. Actors involved at each stage play specific roles in terms of facilitating or hindering transparency and disclosure.

DIAGRAM 1: STAGES OF DECISION-MAKING IN ACQUISITION AND ALLOCATION OF LAND FOR COMMERCIAL INVESTMENT PURPOSES



A number of international and/or regional rights, principles, and safeguards create obligations and responsibilities throughout all stages of decision-making around large-scale land investments. These are covered first in section 2.1, and then deeper analysis of each of the four stages follows. National commitments through laws and contracts also create rights and obligations, but review of specific country frameworks was beyond the scope of this report.

2.1 Safeguards for transparency and information disclosure relevant to all decision-making stages

2.1.1 OVERVIEW OF THE INTERNATIONAL INSTRUMENTS REVIEWED

Of the 53 instruments reviewed, only four could be considered binding at the international level. The remainders are voluntary to varying degrees. Some could be described as “voluntary with strings attached,” in that compliance may be required in order to obtain a loan, or market access for a product. In practice however, the difference between binding and voluntary instruments is not black-and-white. Others, both binding and voluntary, are region-specific. Below is a brief description of some of the most relevant and significant instruments and their relevance for promoting transparency in land deals.

2.1.2 INTERNATIONAL BINDING INSTRUMENTS

The International Bill of Human Rights (IBHR) is composed of three high-level international agreements, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Universal Declaration of Human Rights (UDHR). While the first two are legally binding to the Parties, the UDHR is not. Together they establish basic human rights and provide the basis for why people should be consulted and have access to information. Several thematic binding agreements were examined: the 1992 Convention on Biological Diversity (CBD) and the 1994 Convention to Combat Desertification (CCD). Also regionally-specific agreements: the 1991 Convention on Environmental Impact Assessment in a Trans-boundary Context (Espoo Convention), and the 1998 Convention on Access to Information, Public Participation in Decision-

making and Access to Justice in Environmental Matters (Aarhus Convention). The details of these and sources for lists of signatories and participants are given in Annex 1.

2.1.3 INTERNATIONAL VOLUNTARY AGREEMENTS OR DECLARATIONS

Other voluntary instruments are purely declarative or aspirational in nature, such as the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the Guiding Principles for Business and Human Rights, Declaration on the Right to Development, Agenda 21, the Voluntary Guidelines for Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, and the Rio Declaration. These do not have signatories or Parties, but can be adopted by other more “hard” agreements, or even be incorporated into a countries constitution and laws, and in doing so can “harden” these “soft laws.”

2.1.4 PROJECT-LEVEL POLICIES

Some voluntary instruments, although non-binding in the strict sense, can be made binding in a *de facto* sense if they are stipulated as a condition of a loan. The World Bank (WB) requires projects implemented through its funding to apply a number of safeguards. As recently happened in Cambodia, disregard or incorrect application of these safeguards can lead to the suspension or termination of projects or funding.¹⁷ Within the WB Group, the International Finance Corporation (IFC) has a number of different policies relevant to investment in land that are mandatory for projects receiving its financial support.

2.1.5 VOLUNTARY CORPORATE SOCIAL RESPONSIBILITY COMMITMENTS

A number of instruments offer companies the opportunity to associate themselves with a set of principles or goals that demonstrate corporate social responsibility (CSR). Many of these are largely “declarative,” in that they do not involve specific claims that are then verified in any manner, and are not linked to a labeling system. Most are aspirational in nature, in that they set out desirable goals to strive for, but do not seek to verify the attainment of any particular standard. For example, the Organisation for Economic Cooperation and Development (OECD) guidelines

for multinational enterprises provide voluntary principles and standards for responsible business conduct for multinational corporations operating in or from countries adhering to the OECD Declaration on International Investment and Multinational Enterprises, including detailed guidance concerning information disclosure.

2.1.6 VOLUNTARY MARKET-BASED INITIATIVES AND COMMODITY AGREEMENTS

Some voluntary initiatives are associated with a labeling system, or are otherwise connected to marketed goods, and require verification; for example, The

Forest Stewardship Council (FSC) for forest products and UTZ Certified¹⁸ for coffee, tea, and cocoa. Various sector-specific roundtable agreements offer optional third party labeling as well. Compared to the CSR commitments, market-based standards are generally more prescriptive or require the attainment of specific verifiable thresholds.

An overview of the most relevant specific instruments mentioned in this report is given in Table 1, further details are provided in Annex 2.



Sierra Leone Agriculture (SLA) palm nursery © Joan Baxter / Oakland Institute

TABLE 1: SUMMARY OF INTERNATIONAL INSTRUMENTS REVIEWED

INSTRUMENT	DATE AND ENTRY INTO FORCE (EIF)	SCALE	SCOPE/RELEVANCE
International legally binding instruments			
ICCPR	1966 (EIF 1976)	167 Parties	Part of IBHR. Parties commit to respecting the civil and political rights of individuals.
ICESCR and Optional Protocol (OP)	1966 (EIF 1976); OP 2008	ICESCR 160 Parties OP 8 Parties	Part of IBHR. Parties commit to work toward granting economic, social, and cultural rights to individuals. Contains important provisions re: right to adequate housing and equitable distribution of world food supplies in relation to need. The Optional Protocol, yet to enter into force, allows Parties to recognise the competence of the ICESCR to consider complaints from individuals. General ICESCR Comments 4 and 7 address adequate housing and forced evictions, respectively.
Regional legally binding instruments			
Aarhus Convention	1998 (EIF 2001)	45 Parties	Applies primarily to European and Central Asian countries. Grants the public rights regarding access to information, public participation, and access to justice in governmental decision-making processes on matters concerning the local, national and trans-boundary environment. Originally/primarily geared towards pollution prevention, but broadly applicable to environmental issues.
African Convention on Natural Resources	1968 (EIF 1969), rev. 2003	30 Parties, 8 Parties (EIF requires 15)	Legally binding, but weak: <i>“The Contracting States undertake to adopt the measures necessary to...”</i> It seeks <i>“to encourage conservation, utilization and development of soil, water, flora and fauna for the present and future welfare of mankind, from an economic, nutritional, scientific, educational, cultural and aesthetic point of view.”</i>
International voluntary and/or declarative frameworks			
Universal Declaration of Human Rights	1948	Originally ratified by proclamation by UN General Assembly (48 to 0 with 8 abstentions)	Part of IBHR. The first global expression of rights to which all human beings are inherently entitled. Not legally binding (there are thus no signatories) but forms the basis for many subsequent treaties, regional instruments, and national constitutions.
UNDRIP	2007	150	Sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, and other issues. Embodies concept of “free, prior, and informed consent.”
Rio Declaration/ Agenda 21	1992	N/A	Principles intended to guide future sustainable development, and related UN plan of action.
Regional voluntary and/or declarative frameworks			
Framework and Guidelines on Land Policy in Africa	2006	AU	A joint product of the African Union Commission (AUC), the UN Economic Commission for Africa (ECA), and the African Development Bank (AfDB) to promote Africa’s socioeconomic development, through <i>inter alia</i> , agricultural transformation and modernisation.
Voluntary corporate social responsibility guidelines			
OECD guidelines for multi-national enterprises	1976, revised 2011	42 adhering governments (representing 85% of foreign direct investment)	Annex to the OECD Declaration on International Investment and Multinational Enterprises. Recommendations providing voluntary principles and standards for responsible business conduct for multinational corporations operating in or from countries adhering to the Declaration.

INSTRUMENT	DATE AND ENTRY INTO FORCE (EIF)	SCALE	SCOPE/RELEVANCE
Market based/labeling frameworks			
Forest Stewardship Council	1993	> 1,000 certificates in 80 countries	Claims to “promote environmentally appropriate, socially beneficial, and economically viable management of the world’s forests through certification and labeling.” Targeted at companies/private sector. Certification is carried out by accredited third party certification bodies.
UTZ	2002		Certification programme for coffee, tea, and cocoa. Traceability services for palm oil and cotton. Targeted at companies.
Roundtable on Responsible Soy Association (RTRS)	2006	150 Members	Claims to encourage responsible soybean production and reduced social and environmental impacts, while maintaining or improving the economic status for the producer.
Roundtable on Sustainable Biofuels (RSB)	2006	No certifications yet	Provides guidelines on best practice in the production and processing of biofuel feedstock and raw material, and for the production, use, and transport of liquid biofuels.
Roundtable on Sustainable Palm Oil (RSPO)	2004	549 Members	Aims to transform markets to make sustainable palm oil the norm. Targeted at companies in the supply chain: growers, traders, processors, consumer goods manufacturers, retailers, financial institution, and civil society. Mostly producers in the South and retailers and organisations in the North.
Project-based initiatives			
IFC (multiple interrelated policies)	1998-2011, rev. 2012	IFC has 182 member countries. Authorized capital: US\$2.45 billion	The level of scrutiny and detail of standards applied depends on the scale and scope of the project, as determined by the Project Classification process. The Exclusion List sets out activities not to be invested in. IFC Performance Standards on Social & Environmental Sustainability defines client roles and responsibilities for managing projects and requirements for IFC support and includes disclosure requirements. The IFC Environmental and Social Review Procedures Manual and Guidance Notes define management-approved tasks to achieve client compliance with the Policy and Performance Standards.
Equator Principles	2003, revised 2006 & 2012	73 financial institutions in 27 countries > (70% of international project finance debt in emerging markets)	Applies to project finance transactions >US\$10 million. A voluntary set of standards for determining, assessing, and managing social and environmental risk in project financing. Establishes a credit risk management framework for determining, assessing, and managing environmental and social risk. Equator Principles Financial Institutions (EPFIs) commit not to provide loans to projects where the borrower will not, or is unable to comply, with their respective social and environmental policies and procedures that implement the Equator Principles.
IMF (Code of Good Practices on Fiscal Transparency and related guidance docs)	1998	N/A	The IMF Code of Good Practices on Fiscal Transparency identifies a set of principles and practices to help ensure that governments are providing a clear picture of the structure and finances of government. While all countries are “encouraged” to adopt these practices, implementation is voluntary. Requires disclosure regarding the value of natural assets (i.e. independent of any particular project proposal), and external auditing of fiscal information. The IMF Manual on Fiscal Transparency further elaborates the Code’s principles and practices and draws on experiences in member countries to illustrate good practice. The IMF Guide to Resource Revenue Transparency applies the principles of the Code to countries that derive a significant share of revenues from oil and mineral resources.

2.1.7 HIGH LEVEL PRINCIPLES RELATING TO HUMAN RIGHTS

Within the literature reviewed, the human rights instruments provide the overarching principles that justify provisions for transparency and have the greatest weight. These instrument's provisions for disclosure are embedded within broader obligations for consultation and the enjoyment of the rights of people to land and resources.

Both the ICPPR and ICESCR stipulate that “In no case may a people be deprived of its own means of subsistence,”¹⁹ and the ICESCR requests Parties to ensure “an equitable distribution of world food supplies” in relation to need. The ICESCR's provision on the right to adequate housing²⁰ has since been given interpretive guidance through the General Comments (especially numbers 4 and 7), which extend this to “the right to live somewhere in security, peace and dignity.”²¹ General Comment 7 recognizes that forced evictions occur “in the name of development” and for “the clearing of land for agricultural purposes.” It states that legislation should include measures which provide the greatest possible security of tenure to occupiers of houses and land.²²

Ensuring fulfilment of rights is recognised as primarily the responsibility of the State. Professor John Ruggie (the United Nations Special Representative to the Secretary General for Business and Human Rights until 2011) developed “The Guiding Principles for Business and Human Rights” (hereinafter called the Guiding Principle). These have attracted widespread respect for defining business responsibility for fulfilling these rights when operating domestically and overseas, and the responsibility of home States to ensure that they meet these obligations.²³ These guiding principles provide details for how business enterprises need to undertake human rights due diligence. They report on efforts to meet these obligations and publicly communicate these efforts. They guide States and business enterprises in high risk human rights situations, and recommend independent verification of the results.

Meanwhile, the UN Special Rapporteur for the Right to Food, Olivier de Schutter, has developed a separate set of principles for how large-scale investments need

to ensure respect for the right to food.²⁴ A number of non-binding international or regional frameworks refer to high level principles relating to human rights and land rights. Agenda 21 aims to ensure land is allocated according to sustainable development principles, with respect for local rights, and that communities are protected from socially, culturally, or environmentally unsound activities.²⁵

The African Convention on Conservation of Nature and Natural Resources contains strong provisions supporting traditional rights and requires Parties to:

“Take the measures necessary to enable active participation by the local communities in the process of planning and management of natural resources upon which such communities depend with a view to creating local incentives for the conservation and sustainable use of such resources.”²⁶

The African Union's Framework and Guidelines on Land Policy in Africa are considered one of the best regional positions with respect to supporting small scale food producers.²⁷ They call for “deep engagement” with civil society during consultation processes and highlight the role of CSOs to provide “checks and balances on government decision-making” during the development and implementation of land policies. The Land Policy views such processes as being in the State's self interest and notes the importance of policy developments being followed by genuine changes in political will within governments.

2.1.8 HIGH LEVEL PRINCIPLES RELATING TO PUBLIC PARTICIPATION, CONSULTATION, AND CONSENT

Several important provisions within the international instruments pertain to public participation, consultation, and consent, and are directed at the State. They contain varying levels of specificity around when participation is to take place, who is responsible, and the degree to which this input must be taken into consideration in decision-making (ranging from informing people, to gaining their consent).

In broad terms, the right to participation, consultation, and consent is enshrined in the UDHR, the ICCPR, and



A community forestry site in Cambodia, now located inside a rubber plantation concession site © Global Witness

the ICESCR.²⁸ The CBD calls for public participation in Environmental Impact Assessment (EIA) procedures where appropriate, and CCD includes provisions supporting the participation of local communities in decision-making and implementation.²⁹ Regional conventions such as the Espoo Convention and Aarhus Convention also contain provisions guaranteeing public participation.³⁰

ICESCR General Comment 4 (on the right to adequate housing) requires State Parties to undertake “genuine consultation” with affected peoples when taking measures to confer legal security of tenure upon those persons and households currently lacking secure land tenure.³¹ Stronger provisions are found in the second principle of the UN Special Rapporteur for the Right to Food’s guidelines: “any shifts in land use can only take place with the free, prior, and informed consent of the local communities concerned.”³²

The right of indigenous peoples to give or withhold their “free, prior, and informed consent” (FPIC) in relation to actions that affect their lands, territories, and natural resources is a recognized component of international conventions and standards,³³ and has been included in some country’s national laws.³⁴

Though the principle was first established via the International Labor Organization’s Convention 169 in 1989, it gained greater legitimacy in the adoption of the UNDRIP. There remains contention over the definition of the term “consent” due to its implicit veto-right, which UNDRIP left undefined. The WB and USAID use the term “free, prior, and informed **consultation**.”³⁵ In 2012 the IFC upgraded performance standard 7 for indigenous peoples from “consultation” to “consent,” as part of broader improvements to its Sustainability Policy,³⁶ but it does not require agreement of the entire community.³⁷ FPIC was included within the FSC’s standards in 1996 and has since been adopted by several non-governmental standards (e.g. the Roundtables on Palm Oil, Soy and Biofuels).³⁸ There is increasing pressure for the right of “consent” for indigenous peoples to be extended as an equivalent principle for consultation with all communities who will be potentially affected by decision-making on land and natural resource use (as also recommended by de Schutter’s Principle 2 and as recommended by the HLPE).³⁹

The current draft Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries

and Forests in the Context of National Food Security (VGs)⁴⁰ to be adopted by the UN Committee on World Food Security in May 2012, includes FPIC for indigenous peoples before initiating the project, or adopting and implementing legislative or administrative measures affecting the resources for which the communities hold rights.⁴¹ Despite strong civil society campaigning during consultation on the VGs, the principle of FPIC was not extended to other affected communities. However, a strong definition of “consultation and participation” was agreed upon.⁴²

The definitions of “free”, “prior”, and “informed” are also evolving in international norms, with implications for decision-making and how authority is exercised or legitimized during consultation processes.⁴³ To be “free”, consent must be obtained without threats, manipulation, and in recognition of unequal bargaining power. In terms of “prior”, UNDRIP states that consultation is to occur before the initiation of a given activity or project, and that unless this leads to consent being granted, the activity or project should not proceed. The Aarhus Convention meanwhile defines “early” public participation as “when all options are open” and which enables effective public preparation and participation.⁴⁴ The IMF Code of Good Practices on Fiscal Transparency requires that “sufficient time” be allowed for “consultation about proposed laws and regulatory changes and, where feasible, broader policy changes.”⁴⁵ In addition, the Aarhus Convention has a ground-breaking provision for whistleblower protection: “Each Party shall ensure that persons exercising their rights in conformity with the provisions of this Convention shall not be penalized, persecuted or harassed in any way for their involvement.”⁴⁶ What constitutes “informed” consent is discussed in the next section.

The Espoo Convention (1991 Convention on Environmental Impact Assessment in a Trans-boundary Context) has strong requirements for disclosure (articles 2.6, 3.8 and 4.2) while the CBD and the CCD also include provisions supporting improved transparency and participation.⁴⁷

There are also consultation provisions that are context-contingent. For example, the Roundtable on Sustainable Biofuels stipulates that if operations

take place in food insecure regions, and will involve a change in land ownership, a food security risk assessment must be applied.⁴⁸ Others, such as the African Convention on Natural Resources, allow for provisions of the Convention, including consultation, to be suspended in certain circumstances (e.g. “in time of declared emergencies arising from disasters” or “for the protection of public health”).⁴⁹

2.1.9 HIGH LEVEL PROVISIONS RELATING TO TRANSPARENCY AND INFORMATION DISCLOSURE

Several of the instruments reviewed contained overarching provisions intended to ensure that general “rules of the game” are fair and establish a level playing field when it comes to transparency. In broad terms, the right to information and transparency is guaranteed under the UDHR and the ICCPR.⁵⁰ The CCD establishes that local populations should have access to appropriate information to combat desertification and mitigate the effects of drought.⁵¹ Regional conventions such as the Espoo Convention and the Aarhus Convention in particular require relevant documents, such as the EIA, and other information related to the activity, such as the public authority responsible for making the decision, to be disclosed to the public early in the decision-making process.⁵² Agenda 21 recommends transparency in administration and decision-making as a tool to improve overall efficiency and accountability in the allocation of resources.⁵³

The IMF’s Code of Good Practices on Fiscal Transparency and Manual on Fiscal Transparency recommend that all governments establish “a set of principles and practices to help ensure that governments are providing a clear picture of the structure and finances of government” and that fiscal transparency be given highest priority.⁵⁴ IMF rules require:

- public disclosure of purchases and sales of public assets
- public disclosure of internal auditing of government activities and finances
- the national revenue administration is legally protected from political interference and reports to the public regularly

They also recommend that governments' relationships with the private sector are open and follow the rule of law.⁵⁵ The IMF Guide on Resource Revenue Transparency applies the principles of this Code to oil and mineral-rich countries that derive a significant share of revenues from oil and mineral resources.⁵⁶

The current draft of the VGs recognizes transparency, accountability, and rule of law as fundamental principles for implementation, and furthermore states:

“All forms of transactions in tenure rights as a result of investments in land, fisheries and forests should be done transparently in line with relevant national sectoral policies and be consistent with the objectives of social and economic growth and sustainable human development focusing on smallholders.”⁵⁷

Meanwhile, the African Convention on Conservation of Nature and Natural Resources requires Parties to:

“Adopt legislative and regulatory measures necessary to ensure timely and appropriate
a) dissemination of environmental information;
b) access of the public to environmental information; c) participation of the public in decision-making with a potentially significant environmental impact.”⁵⁸

International financial institutions also recognize the importance of transparency and information disclosure. General disclosure policies for WB projects are contained in its Access to Information Policy, which

is based on the “presumption of disclosure” and allows access to any information in its possession that is not on a list of exemptions. A number of the WB safeguards contain specific disclosure requirements; for example, Operation Policy 4.01 requires the public release of draft environmental assessments prior to project appraisal. The IFC states information disclosure should involve full and accurate release of the proposed project’s details, including anticipated risks and potential benefits, in a form that is accessible and understandable to the affected population.⁵⁹ In both cases, the level of disclosure depends on the classification of negative impacts. However, both institutions have recently taken steps to reduce project-level transparency. Policies for disclosure do not apply to IFC investments through intermediaries (for example, private banks and private equity), even if they are for sub-projects classified as risky. Meanwhile, the WB is proposing a new lending instrument named “Program for Results” under a model which does not require disclosure of any information to affected communities about sub-projects.

2.1.10 SUMMARY

These high-level, rights-orientated instruments lay the groundwork for why people are entitled to participation in relation to projects of public interest, or decisions directly affecting them, and the information required to do this. Although these instruments recognize secrecy and lack of access to information to be a problem, they give almost no detail as to how it should be tackled in practice, nor do any mandatory provisions yet exist to ensure such an implicit aspiration is met.

2.2 Stage 1: Recognising existing land and resource rights through spatial planning and policy frameworks

2.2.1 INTERNATIONAL GUIDANCE ON LAND AND NATURAL RESOURCE USE PLANNING AND POLICY FRAMEWORKS

It is essential that existing land and natural resource rights are formally recognised and protected as a pre-requisite to the consideration of any large-scale transfers of land for commercial purposes. As recognised in “Land Rush and the Rights to Land,”

no land is “unused”; all is used under collective or individual ownership, including areas classified as “state” or “public” land.⁶⁰ In addition to respecting and protecting local rights, clearly identifying and making public land and natural resource use rights, responsibilities and procedures also enable future decision making to be transparent, accountable, and equitable.

“Land use planning” is defined as:

“Systematic and iterative procedures carried out in order to create an enabling environment for sustainable development of land and resources

BOX 3: STRATEGIC LAND USE PLANNING AND INDEPENDENT MONITORING OF FORESTRY IN BRITISH COLUMBIA, CANADA AND CAMEROON

In the early 1990s, both the province of British Columbia (BC) in Canada and Cameroon initiated major land use planning processes and revisions of their forest policies. While BC’s approach has largely been heralded as a success, Cameroon’s has been perceived to have failed due to its lack of inclusiveness and poor transparency.

Around 95% of forest land in BC is managed by the provincial government on behalf of the public.⁶⁴ Following a decade of intense conflict over logging, which culminated in the arrest of over 850 protesters in 1993, the government initiated a Strategic Land Use Planning (SLUP) process with the hopes of ending what had come to be known as the “War in the Woods.” SLUP is based on several key principles, including public participation, consensus-based decision making, consideration of all resource values and resource sustainability, and the involvement of indigenous peoples⁶⁵. A total of 17 plans were developed in the end, covering 85% of BC’s land base (over three times the size of the UK).

While conflict over land use in BC is far from over, SLUP participants, by and large, perceived the process as having been successful.⁶⁶ Lessons learned from this process include that:

- multi-stakeholder, consensus-based decision-making is a lengthy process (each plan took on average 4 years), but allows for information sharing and trust building
- establishing a moratorium on extractive activities during negotiations is necessary to avoid the phenomenon of “talk and log”⁶⁷
- enshrining plans within legislation and establishing “plan implementation monitoring committees” helps ensure that plans are adhered to

Cameroon’s National Zonation Plan (“*Plan de Zonage*”) was undertaken following sweeping reforms to the forest sector introduced by the WB and other donors in the early 1990s. In contrast to the BC process, the development of the Plan included very little consultation of forest-dependent communities and was perceived as being biased towards timber production, with a token element of conservation. The Plan was supposed to be preliminary but ended up being definitive,⁶⁸ and designated about 30% of the country (about 14 million ha) as “permanent” or “non-permanent” forest estate.

Although a small amount of forest was assigned to communities, it was mostly of poor value compared to that granted to industrial logging interests. The Plan failed to take into consideration where people lived, resulting in villages being located in the middle of production forest. Although the Cameroon government is currently attempting to support community based forest management, all efforts occur within (and are therefore tainted by) this larger context of State bias towards industrial logging interests.

In addition to the different processes undertaken by both BC and Cameroon for land use planning, it is also important to highlight the different contexts in terms of resources available, capacity, and education, as well as civil society organization. This underpins the need for land and natural resource planning processes to be supported by broader capacity building for all stakeholders and appropriate transparency and information sharing mechanisms.

which meets people's needs and demands. It assesses the physical, socio-economic, institutional and legal potentials and constraints with respect to an optimal and sustainable use of land resources, and empowers people to make decisions about how to allocate those resources."⁶¹

If "participatory", then land and natural resource use planning and policy development emphasise social processes of decision-making and consensus,⁶² and can:

- empower citizens
- reduce the risks of human rights and environmental violations
- enable fair allocation of land and natural resource rights now and in the future
- aid better decision-making and hold decision-makers to account
- improve cost-benefit analysis of land and natural resource use options.

In addition to being a means of improving transparency of land and natural resource use planning, the process itself is dependent on being transparent. If there is no transparency during the planning and decision-making about future land uses, risks are high that some people will be deprived of their rights or that future land use will not be sustainable, equitable, or representative of actual practice.⁶³ Two very different experiences of attempting to undertake such participatory planning are provided in Box 3.

Very little specific reference was made in the literature reviewed to transparency and information disclosure during land and natural resource use planning development, but it did emphasise the importance of citizen engagement in land and natural resource use planning, in which transparency is considered to be implicit.

According to the Declaration on the Right to Development (and reiterated by de Schutter), States should:

"Formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting there from."⁶⁹

The IMF Guide to Resource Revenue Transparency recommends States disclose estimates of how much their resources are worth, information which is critical for understanding the stakes involved in economically-significant investment deals.⁷⁰ The Natural Resource Charter's first precept states:

"The development of a country's natural resources should be designed to secure the *greatest social and economic benefit* for its people. This requires a *comprehensive approach* in which every stage of the decision chain is understood and addressed."⁷¹

Frameworks recommended for broad land policy reforms are complex and site-specific, so this report has only focused on those which relate specifically to transparency.⁷² The EU recommends integration of land use planning with pro-poor rural and urban development policies.

According to the WB, a good policy, legal and institutional framework is essential, and must:

- facilitate recognition of rights
- ensure transfers are voluntary
- promote openness and broad access to relevant information
- be technically and economically viable and in line with national development strategies
- comply with minimum standards of environmental and social sustainability⁷³

Such processes and policy reforms can be given greater legitimacy if they are included as benchmarks for monitoring donor development assistance programmes.⁷⁴ The VGs emphasise the importance

of public participation, information disclosure, and reflecting local priorities within regulated spatial planning, as well as the importance of implementing agencies monitoring and reporting on compliance.⁷⁵

In terms of the development of such policies, the IMF requires “sufficient time” to be allowed for “consultation about proposed laws and regulatory changes and, where feasible, broader policy changes.”⁷⁶ The WB and EU noted that processes must be transparent, impartial, and communities must be given the opportunity to do their own land-use planning.⁷⁷ The Yaounde statement by African farmers highlights the

importance of public involvement in the development of sector specific policies.⁷⁸ The WB echoed this position and recommended such consultation requirements be written into legislation.⁷⁹ The African Union emphasizes public consultation as the basis for developing land policies, and advises this be done through publication and circulation of discussion papers, inclusion of representatives of all land users on dialogues, and consultation meetings and civil society during Parliamentary review of the final policy drafts; but warns States to neutralise dominant institutions during such processes.⁸⁰

BOX 4: EXPERIENCES OF FARMERS’ ASSOCIATIONS ENGAGING WITH DEVELOPMENT OF AGRICULTURAL POLICIES

Senegal and Mali have both recently reformed their legislative and regulatory policies for the agriculture sector. Both relied heavily on the participation of farmers’ associations and therefore provide useful comparisons in terms of how to facilitate public engagement in policy development. This resulted with the 2004 Agro-Silvo-Pastoral Policy Act in Senegal, and the 2006 Agricultural Policy Act in Mali. Both constitute instruments for citizens and farmer organizations to lobby and influence government decisions. Development of the legislation involved participatory and consultative processes, and these approaches are now enshrined in the new laws.

In Mali, the government gave the National Coordination of Farmer Organizations the responsibility and budget to hold consultations to canvass farmers’ and other stakeholders’ viewpoints. These suggestions were then used by government technical departments to develop the first draft policies and legislation. But discussions on land issues were so numerous that they obscured other issues, so that the treatment of the land issue has been postponed.

In Senegal, the government sent a draft of the Agricultural Policy Act to all civil society organizations for comment in 2003. However, it simultaneously amended the first draft of the law prior to even receiving public comments in order to remove a controversial chapter on land issues, which provided that the allocation of land would be entrusted to the president of the Republic. After six months of intense consultation⁸⁵ with its members, the national farmers’ platform formulated a counter proposal to the initial government draft. A bi-partisan committee of experts was set up to reconcile the two projects. The final policies adopted in both countries successfully managed to incorporate concerns raised by farmers’ organizations, such as public participation in the monitoring of access to water and grievance mechanisms.⁸⁶

Both cases from Senegal and Mali include provisions to develop a land policy and a land law. Farmers in Mali were able to ensure their policy favoured family farming and explicitly recognized the right to food enshrined in the concept of food sovereignty.⁸⁷ They also learnt lessons from the Senegalese process and managed to avoid its drawbacks.

The difference in final content between the two Acts has been attributed to the greater degree of control farmers in Mali had in setting the terms of the debate around the content and scope of the policy and regulatory frameworks being drafted (essentially relating to increased government safeguards to protect small holder food producing systems). The government in Mali was supportive of its farmers’ agenda, in contrast to the Senegalese consultations that were more contentious, with a government setting the stage with a pre-prepared text and farmers struggling to impose their views.

Effective implementation of these policies still depends on political will to enforce them and formal government recognition of rights in practice. Capacity building of civil society will also be required, along with provision to farmers’ organizations and communities with accessible legal advice, assistance, and representation.⁸⁸ In Senegal, political will does not yet appear to be present, whereas in 2008 the Malian government adopted a roadmap⁸⁹ to implement a participatory process to develop a new agricultural land policy. A steering committee for this process, which includes farmers’ organizations and civil society, was established in 2009 and the process is underway.⁹⁰

A number of policies recommend decentralization as a means to improve local proximity to processes and decision-making, improve accessibility and accuracy of land administration, and tackle corruption and inefficiency. Although it was noted that national and local policy outcomes need to be harmonized and still require national monitoring and oversight.⁸¹

Multi-stakeholder platforms for dialogue between State, business enterprises, and civil society were generally recommended for monitoring implementation of policies and processes.⁸² However, the literature mainly considered that it is critical that such mechanisms take account of different power balances that may influence their interactions. Local levels were considered to be the best for appeal mechanisms.⁸³ Box 11, in section 2.4 below, gives further details from the African Union (AU) on how implementation of land policies can be tracked. The experiences of farmers' associations engaging with the development of national agricultural policies in Mali and Senegal are summarised in Box 4.⁸⁴

Public disclosure of information on current land holdings and use (through, for example, cadastres or land registries) was identified by the literature reviewed as an essential step toward improving overall transparency. Such mechanisms facilitate mapping of existing, traditional, and customary land use rights, including land types, productivity options, and land use plans, and must be kept complete, up-to-date, accurate, and easily accessible.⁹¹ They should make publicly available all existing land transfers, as well as provide information about opportunities and proposed title claims and transfers.⁹² Within the broader enabling environment, government roles and responsibilities must be clearly assigned and public,⁹³ information relating to land disputes in judicial and non-judicial processes must be disclosed,⁹⁴ as should information about land-related tax collection.⁹⁵ Lack of government capacity was recognised as a major limitation to achieving the above. Governments need to be able to prepare for public consultations, respond to their results, and conduct vertical and horizontal information sharing and coordination.⁹⁶

It is essential that existing land and natural resource rights are formally recognised and protected as a pre-requisite to the consideration of any large-scale transfers of land for commercial purposes. As recognised in "Land Rush and the Rights to Land," no land is "unused"; all is used under collective or individual ownership, including areas classified as "state" or "public" land.⁹⁷

2.2.2 INTERMEDIARY PLANNING TO ADDRESS EXISTING DISPUTES

While setting high principles for future planning and policy development is a preventative tool, current disputes and bad practice also need to be addressed. Fundamental policy recommendations for the forest, oil, gas, and mining sectors are well established⁹⁴ and include:

- the suspension of current allocation procedures
- revision of legislative framework
- reviews of existing concession rights to ensure they are in line with new provisions
- the cancellation of concession awards that do not comply with the new standards

on large scale commercial land investments until agricultural policies are in place, including Tanzania, Indonesia and Ukraine.⁹⁹ In 2011 the Committee on Rural Economy, Agriculture, Natural Resources and Environment of the Pan-African Parliament called for a moratorium on all new large-scale land acquisitions, pending implementation of land policies and guidelines on good land governance.¹⁰⁰

In recognition of the length that comprehensive systematic land-titling takes versus the increasing commercial pressures felt on land now, the HLPE and a recent ILC report suggest intermediary securing of rights through registration of claims first, and at "community scales."¹⁰¹ The WB suggests that land use mapping prioritise "hot spots."¹⁰²

BOX 5: COMMUNITY PROTOCOLS

“Community protocol” is a term that covers a wide variety of documents produced by communities to set out how they expect other stakeholders to engage with them.¹⁰⁵ A typical community protocol includes, *inter alia*:

- a description of the community, its leadership, and decision-making processes, including how they have defined “free, prior and informed consent”
- an assertion of their customary laws and linkages with their bio-cultural ways of life
- a map of their traditional territories and a description of their bio-cultural heritage
- an inventory of their rights, according to national and international law

The protocol serves as a two-way vehicle of communication. In the process of the protocol’s development, the community becomes informed of what it is entitled to, and then secondly through its dissemination these expectations are communicated externally. While not all communities are homogenous and power imbalances can exist, the process of developing a protocol provides an opportunity for information sharing and participation in decision-making. The protocol concept is pro-active, in that it is independent of any one initiative (whether it be a company that wishes to negotiate terms for using their knowledge of a medicinal plant, or a government establishing a new land use plan). The protocol resides with the community, ready to be used when needed.

A number of indigenous peoples, local communities, and organizations are working to further develop the theory and practice of community protocols. For example, Natural Justice (Lawyers for Communities and the Environment) are currently coordinating two regional initiatives on bio-cultural community protocols in Africa and Asia. Communities are currently using them to, among other things, object to a deep sea port (Kenya); protect their livestock keepers’ rights and indigenous breeds (Africa and Asia); ensure benefit sharing relating to plant genetic resources for food and agriculture (Peru); protect indigenous territory (Panama); and protect sacred natural sites (Africa).¹⁰⁶

Natural Justice has successfully lobbied for the inclusion of the community protocol concept within the Nagoya Protocol on Access and Benefit Sharing,¹⁰⁷ and seeks to expand the application of the concept to other policy regimes that could benefit from robust social safeguards, such as Reducing Emissions from Deforestation and Forest Degradation (REDD) and payment for ecosystem services.¹⁰⁸

One current example is the moratorium and review of industrial logging concessions in the Democratic Republic of Congo (DRC). It began in 2009 as a means of combating illegal logging under the country’s new Forest Code. This code includes provisions for local level land-use planning and consultation (“micro-zoning”) during the legal review of old logging leases. Unfortunately, implementation so far indicates the government is ignoring such safeguards and failing to consult with local communities in its rush to re-allocate logging leases.¹⁰³

2.2.3 PROACTIVE COMMUNITY-BASED PROTOCOLS

An alternative approach with potential for participatory land and natural resource use planning is that of “community protocols.”¹⁰⁴ These empower communities to proactively express their expectations regarding consultation, based on the documentation of their traditional knowledge and customary land rights. Further details are given in Box 5.

2.3 Stage 2. Assessing impacts and negotiating the terms and conditions under which rights could be allocated to large-scale land investors

The fairness of contract terms and conditions is dependent on their broader context and the overall legitimacy of the deal.¹⁰⁹ This is why this report began with Stage 1 and emphasises the importance of formally recognising and protecting local rights as a pre-requisite to the consideration of any large-scale transfers of land for commercial purposes.

Stage 2 is a critical entry point for influencing the outcome of the large-scale land investment, or considering if it should go ahead at all. It involves assessment of the costs, benefits, risks, and resulting terms and conditions of any investment deal resulting from negotiations. Transparency at this stage helps public understanding of who is ultimately behind the project and what positive outcomes it is supposed to deliver at the local level. It also ensures that genuine land-holders can be identified and their rights recognised.

According to De Schutter, the negotiations leading to investment agreements should use FPIC and “should be conducted in a fully transparent manner and with the participation of the local communities whose access to land and other productive resources may be affected as a result.”¹¹⁰ The Declaration on the Right to Development meanwhile obliges the State to “ensure the adequate public participation of local communities concerned by land leases or purchases, and that the decision-making process is fully transparent.”¹¹¹

International instruments and institutions have provisions for transparency during investment project negotiations. The IFC contains specific requirements pertaining to project level transparency, determined according to scale and intensity of the project. For example, since the IFC Access to Information Policy was revised, extractive industry financed projects now require contract disclosure.¹¹² The IMF Revenue Transparency Initiative requires that “contractual arrangements between the government and public or private entities, including resource companies and operators of government concessions, should be clear and publicly accessible.”¹¹³ The OECD Guidelines

for Multi-national Enterprises requires that “timely and accurate information is disclosed on all material matters regarding their activities, structure, financial situation, performance, ownership and governance. This information should be disclosed for the enterprise as a whole, and, where appropriate, along business lines or geographic areas.”¹¹⁴ These guidelines provide further detail regarding what type of information should be disclosed: financial and operating results; share ownership and voting rights; remuneration policy for members of the board and key executives; foreseeable risk factors; and governance structures and policies.

However, international instruments reviewed lacked specificity regarding when information disclosure must take place, with the majority simply stating that it should be provided in a “timely” fashion.¹¹⁵ The 2004 EU Transparency Directive refers to “interim management statements” being published twice in each financial year.¹¹⁶ IFC Category A (large, high-impact) projects meanwhile require a minimum 60-day disclosure period, while all other projects require at least 30 days (prior to the IFC’s Board of Directors/ Management consideration of the investment).¹¹⁷



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BOX 6: PRINCIPLES OF EIA BEST PRACTICE

Basic principles of EIAs:

- **Purposive** – the process should inform decision-making and result in appropriate levels of environmental protection and community well-being.
- **Rigorous** – the process should apply “best practicable” science, employing methodologies and techniques appropriate to address the problems being investigated.
- **Practical** – the process should result in information and outputs which assist with problem solving and are acceptable to and able to be implemented by proponents.
- **Relevant** – the process should provide sufficient, reliable and usable information for development planning and decision-making.
- **Cost-effective** – the process should achieve the objectives of EIA within the limits of available information, time, resources and methodology.
- **Efficient** – the process should impose the minimum cost burdens in terms of time and finance on proponents and participants consistent with meeting accepted requirements and objectives of EIA.
- **Focused** – the process should concentrate on significant environmental effects and key issues; i.e., the matters that need to be taken into account in making decisions.
- **Adaptive** – the process should be adjusted to the realities, issues and circumstances of the proposals under review without compromising the integrity of the process, and be iterative, incorporating lessons learned throughout the proposal's life cycle.
- **Participative** – the process should provide appropriate opportunities to inform and involve the interested and affected publics, and their inputs and concerns should be addressed explicitly in the documentation and decision-making.
- **Interdisciplinary** – the process should ensure that the appropriate techniques and experts in the relevant bio-physical and socio-economic disciplines are employed, including use of traditional knowledge as relevant.
- **Credible** – the process should be carried out with professionalism, rigor, fairness, objectivity, impartiality and balance, and be subject to independent checks and verification.
- **Integrated** – the process should address the interrelationships of social, economic and biophysical aspects.
- **Transparent** – the process should have clear, easily understood requirements for EIA content; ensure public access to information; identify the factors that are to be taken into account in decision-making; and acknowledge limitations and difficulties.
- **Systematic** – the process should result in full consideration of all relevant information on the affected environment, of proposed alternatives and their impacts, and of the measures necessary to monitor and investigate residual effects.

The EIA process should be applied:

- As early as possible in decision-making and throughout the life cycle of the proposed activity;
- To all development proposals that may cause potentially significant effects;

- To biophysical impacts and relevant socio-economic factors, including health, culture, gender, lifestyle, age, and cumulative effects consistent with the concept and principles of sustainable development;
- To provide for the involvement and input of communities and industries affected by a proposal, as well as the interested public;
- In accordance with internationally agreed measures and activities.

Specifically, the EIA process should provide for:

- **Screening** – to determine whether or not a proposal should be subject to EIA and, if so, at what level of detail.
- **Scoping** – to identify the issues and impacts that are likely to be important and to establish terms of reference for EIA.
- **Examination of alternatives** – to establish the preferred or most environmentally sound and benign option for achieving proposal objectives.
- **Impact analysis** – to identify and predict the likely environmental, social and other related effects of the proposal.
- **Mitigation and impact management** – to establish the measures that are necessary to avoid, minimize or offset predicted adverse impacts and, where appropriate, to incorporate these into an environmental management plan or system.
- **Evaluation of significance** – to determine the relative importance and acceptability of residual impacts (i.e., impacts that cannot be mitigated).
- **Preparation of environmental impact statement or report** – to document clearly and impartially impacts of the proposal, the proposed measures for mitigation, the significance of effects, and the concerns of the interested public and the communities affected by the proposal.
- **Review of the environmental impact statement** – to determine whether the report meets its terms of reference, provides a satisfactory assessment of the proposal(s) and contains the information required for decision-making.
- **Decision-making** – to approve or reject the proposal and to establish the terms and conditions for its implementation.

Follow up is essential to ensure that the terms and conditions of approval are met; to monitor the impacts of development and the effectiveness of mitigation measures; to strengthen future EIA applications and mitigation measures; and, where required, to undertake environmental audit and process evaluation to optimize environmental management. It is desirable, whenever possible, if monitoring, evaluation and management plan indicators are designed so they also contribute to local, national and global monitoring of the state of the environment and sustainable development.

2.3.1 ASSESSING THE IMPACT OF PROPOSED PROJECTS

EIAs are the most commonly used methodology to assess and address potential negative impacts resulting from proposed large-scale land investments. The UN Food and Agriculture Organization (FAO) defines EIAs as:

“A tool for decision-makers to identify potential environmental impacts of proposed projects, to evaluate alternative approaches, and to design and incorporate appropriate prevention, mitigation, management and monitoring measures. Environmental impact assessment cannot be divorced from social impact of the project, hence the latter is considered as a key dimension of the EIA process.”¹¹⁸

EIAs include variants ranging from trans-boundary to health and trade impacts, including human rights and due diligence. For the purposes of this report these are defined in the broadest terms. Their application starts at the very beginning of project planning and continues until the project is complete (see Box 16 for further details on how to incorporate end of project and post-project provisions within EIA frameworks). They are applied at the international, regional, and national level and governed by conventional and customary international law. They are requirements for many International Financial Institutions (IFIs) and OECD donor development assistance, and are being adopted into domestic legislation in over a hundred countries.¹¹⁹ The Convention on the Law of the Seas (1982), Espoo Convention (1991), CBD (1992), the CCD (1992), and the Aarhus Convention all include specific EIA requirements.

The International Association for Impact Assessment and the Institute of Environmental Assessment, UK, published principles of EIA best practice in 1999, as outlined in Box 6.¹²⁰

As documented by the Oakland Institute in their investigation into a number of land investment deals in Africa, the absence of EIAs and their lack of disclosure are considered to be a major gap in the investment process.¹²¹ On the other hand, case studies from Tanzania and Sierra Leone document how EIAs can be used as a means to adapt or cancel projects.

2.3.2 SAFEGUARDING MEANINGFUL CONSULTATION DURING NEGOTIATION PROCESSES

As described in section 2.1.8 above, FPIC is increasingly recognised internationally as the fundamental basis for any consultation or negotiations around large-scale investments in land and natural resources. De Schutter and other international human rights instruments identify the State as having the responsibility to ensure FPIC is applied, enforced, and the results recorded and made public.¹²²

The key provision for ensuring accountability and equity should be the right for communities affected to refuse to accept the proposed investment project; however,

some international instruments have weakened this provision. According to the HLPE, FPIC during this stage must be done in accordance with traditional customs and decision-making processes, recognise and address all rights of affected communities (formal and non-formal, documented and not), build trust, ensure productive dialogue, and involve independent oversight.¹²³ At the same time, methodologies for FPIC must take account of heterogeneity within communities, containing within them inequalities and households who have been marginalised historically. Gaining consent in consideration of who is eligible to speak and make decisions on behalf of the community must therefore be carefully mediated and those most vulnerable protected.

It was noted that in some cases business enterprises undertake consultation and negotiation directly with affected communities. This can have benefits in terms of increasing community ownership, building greater trust and accountability directly between parties, and reducing reliance on States with low capacity or resources.¹²⁴ However, considerable risks exist relating to imbalances of power, representation, asymmetry of information, and issues around how such information is disclosed and by whom, which leave communities vulnerable. Additionally, exclusion of government authorities may reduce their ability or interest to engage in consequent dispute resolution. Finally, the case studies reviewed indicated frequent confusion between processes for consultation versus processes for negotiation, which was further disempowering communities from meaningful engagement in decision-making. Strong safeguards must therefore be in place before and during negotiations to ensure downward accountability, full transparency, and technical and legal assistance to communities if needed from the State, CSOs, and farmers' associations.¹²⁵

Communities with limited experience negotiating with business enterprises may need support to understand the implications of private sector parties being primarily driven by profit-making, as opposed to the poverty reduction or aid disbursement objectives of development agencies, with which communities tend to be more familiar.¹²⁶ The promises of local benefits resulting from such investments must be therefore

carefully weighed against both the potential financial returns the company will gain, as well as the long-term local consequences (such as changing small-holder farming systems to large-scale monocrop systems).

2.3.3 WHO SHOULD BE REQUIRED TO DISCLOSE INFORMATION DURING THE NEGOTIATION PHASE?

In terms of responsibilities for disclosure, the international instruments are directed at the government, private sector enterprises, and/or lenders, although many do not make this explicit. The IMF's Code of Good Practice on Fiscal Transparency is directed at governments but may require the cooperation of private sector enterprises, for example in revenue payments.¹²⁷ The Aarhus Convention requires "the competent public authorities to give

the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making."¹²⁸ This is to include a description of the site and the physical and technical characteristics of the proposed activity, expected environmental impacts, mitigation measures, alternatives considered, and a non-technical summary. Conversely, voluntary commodity standards target the private sector but may ultimately require government involvement. The Global Reporting Initiative's Sustainability Reporting Guidelines contain high-resolution criteria for company-based reporting of economic, environmental, and social performance, which were expanded to consider human rights, local community impacts, and gender in March 2011.¹²⁹

BOX 7: PRINCIPLES FOR RESPONSIBLE CONTRACTS: PROCESS AND CONTENT

Principles intend to help integrate the management of human rights risks into investment project contract negotiations between host State entities and foreign business investors:

1. **Project negotiations preparation and planning:** The Parties should be adequately prepared and have the capacity to address the human rights implications of projects during negotiations.
2. **Management of potential adverse human rights impacts:** Responsibilities for the prevention and mitigation of human rights risks associated with the project and its activities.
3. **Project operating standards:** The laws, regulations and standards governing the execution of the project should facilitate the prevention, mitigation and remediation of any negative human rights impacts throughout the life cycle of the project.
4. **Stabilization clauses:** Contractual stabilization clauses, if used, should be carefully drafted so that any protections for investors against future changes in law do not interfere with the State's bona fide efforts to implement laws, regulations or policies in a non-discriminatory manner in order to meet its human rights obligations.
5. **"Additional goods or service provision":** Where the contract envisages that investors will provide additional services beyond the scope of the project, this should be carried out in a manner compatible with the State's human rights obligations and the investor's human rights responsibilities.
6. **Physical security for the project:** Physical security for the project's facilities, installations or personnel should be provided in a manner consistent with human rights principles and standards.
7. **Community engagement:** The project should have an effective community engagement plan through its life-cycle, starting at the earliest stages.
8. **Project monitoring and compliance:** The State should be able to monitor the project's compliance with relevant standards to protect human rights while providing necessary assurances for business investors against arbitrary interference in the project.
9. **Grievance mechanisms for non-contractual harms to Third Parties:** Individuals and communities that are impacted by project activities, but not party to the contract, should have access to an effective non-judicial grievance mechanism.
10. **Transparency/Disclosure of contract terms:** The contract's terms should be disclosed, and the scope and duration of exceptions to such disclosure should be based on compelling justifications.

Although not directly related to who is responsible for the release of information, several instruments require that an independent body be provided access to relevant information. The Equator Principles require that an independent expert review of the impact assessment be conducted,¹³⁰ along with independent monitoring and reporting for the duration of the loan for specific classifications.¹³¹ Similarly, the EU's eco-management and audit scheme requires that the initial environmental review, the environment management system, the audit procedure, and its implementation shall be verified by an accredited or licensed environmental verifier and the environmental statement shall be validated by that verifier.¹³² The IMF Code of Good Practice on Fiscal Transparency also includes several important provisions allowing for external scrutiny of fiscal information, noting that this should be "independent of the executive."¹³³

2.3.4 WHAT KIND OF INFORMATION SHOULD BE DISCLOSED IN THE CONTRACTS?

In terms of the type of information which should be made public during these negotiations, each "deal" involves multiple documents, including memorandums of understanding, investment agreements, conventions of establishment, land lease contracts and impact assessments.¹³⁴ For ease of use, unless specified this report will use the term "contract" to mean all of these documents considered together as a package.

Professor John Ruggie states that contracts should always be publicly disclosed when the public interest is impacted; namely cases where the project presents either large-scale or significant social, economic, or environmental risks or opportunities, or involves the depletion of renewable or non-renewable natural resources. He has defined ten principles for developing "responsible contracts," outlined in Box 7.¹³⁵

Examples of "compelling justifications" given by Professor Ruggie were business proprietary information or information that could directly impact the position of one of the Parties in a concurrent or imminent negotiation.¹³⁶ Disclosure of the contract terms allows both Parties to communicate transparently with those who will be impacted by the project and to ensure that expectations correspond to what has been agreed, and should be integrated as part of the community

engagement plan for the project. Further, Professor Ruggie states it is the State's responsibility to facilitate the disclosure of contract terms while delineating responsibility for making the contract terms accessible, which may require translating them into local languages and making them available free of charge. Responsibility is also placed on all Parties to agree on disclosure and terms to mitigate costs or risks the contract poses before the agreement is finalized.

Given the lack of adequacy and enforcement of legislation and the rule of law in many of the countries where large-scale land investment deals are being brokered, the literature reviewed and experts interviewed noted that contracts frequently carry more detail and legal weight than national legislation.¹³⁷ This supports the argument for ensuring their comprehensiveness and public disclosure.¹³⁸ State enforcement of these contracts and standards by which they are drafted is therefore critical, including sanctions for non-compliance.¹³⁹ The International Institute for Environment and Development (IIED) has comprehensively reviewed the state of land-deal contracts against what they should contain according to best practice standards.¹⁴⁰ This report builds on IIED's work and highlights three areas of information essential to contracts which therefore must be included when they are disclosed:¹⁴¹

1. Who are the Parties to the contract, and how are they involved in the investment?
 - a. Names of the business enterprise, sub-contractors, affiliates, and beneficial owners;
 - b. Financial intermediaries and backers, capital investments and deposits, and involvement of international financial institutions;
 - c. Fiscal and economic components;
 - d. Name of the State and Third Parties to the contract, such as affected communities.
2. What rights, responsibilities and obligations does the company have?
 - a. Concession area and nature of rights (e.g. provisions for water use rights), business plans and development intentions (including

social contracts), terms for local employment, procurement, and how the “economic equilibrium” (costs, risks and benefits) was weighed; value of land, rents, and fees, projected profits and revenues, taxation regimes, and closure plans (see Box 16 for further details);

b. Inter-relationship of national (and if applicable, international) legal jurisdictions and how they apply in the event of dispute;

c. Obligations of the business enterprise, including how they will liaise with employees, local communities (respecting and protecting the rights of local communities and landholders), and maintain the environment;

d. Obligations of the State to monitor the implementation of the contract’s terms and conditions, including grievance mechanisms, sanctions, and penalties in the case of non-compliance.

3. What have they done to assess and mitigate potentially negative impacts?

a. Publicly agreed and documented evidence of human rights, socio-economic, environmental, due diligence, food security, value and supply chain, and other impact assessments;

b. Publicly agreed and disclosed mitigation and management plans;

c. Resettlement and compensation plans.

Two questions around contract transparency merit further discussion: timeliness, and how to deal with commercial confidentiality clauses. International standards and best practice require contract disclosure immediately after the agreements have been signed, regardless of the anticipated project lead-time.¹⁴² However, in complex deals, many different contractual documents are signed in which disclosure must be ongoing and sequential. In some countries, such as Liberia, contracts are ratified by Parliament after signing and then should be publicly disclosed.¹⁴³ In reality, the Liberian ratification process can be just administrative and often only a summary of the contract is sent to the legislature and the full details are rarely publicly disclosed.¹⁴⁴ However, contract disclosure during the

negotiations is also important, as how can people potentially affected by the proposed project be able to give their consent for the investment to go ahead unless they are informed of the terms of the contract? In the case that investors are working directly through contracts with small-scale producers, the terms and conditions of these agreements must be disclosed during the negotiations.

The most common argument given by governments and business enterprises against contract disclosure is that confidentiality protects commercially sensitive information contained in investment contracts. Box 8 explores this and presents the arguments against keeping contracts secret. A review of confidentiality clauses in 15 large-scale land investment agreements is summarised in Annex 2.

The majority of international instruments reviewed did not contain specific provisions relating to commercial confidentiality. Within those that do, there exists a large degree of variation in the level of discretion granted to an organization in determining what is disclosed, what is considered ‘commercially sensitive,’ and the application of criteria to determine what should be exempt from disclosure.

Commodity roundtables are relatively conservative regarding disclosure: only “non-commercially sensitive” information must be made available, as determined by the company.¹⁵⁰ Additionally, the Roundtable on Palm Oil (RSPO) provides for exceptions for data that affects personal privacy, and “where disclosure of information would result in negative environmental or social outcomes.”¹⁵¹

The OECD Guidelines for Multi-national Enterprises do not require disclosure of information if doing so may “endanger their competitive position,” unless it is necessary “to fully inform the investment decision and to avoid misleading the investor.” Determination of these minimum disclosure requirements is based on the concept of “materiality”; defined as “information whose omission or mis-statement could influence the economic decisions taken by users of information,”¹⁵² but does not provide any further guidance regarding the scope. Disclosure policies of enterprises are to be “tailored to the nature, size and location of the enterprise, with due regard taken of costs, business confidentiality and other competitive concerns.”¹⁵³

BOX 8: ARGUMENTS FOR CONTRACT TRANSPARENCY AND AGAINST COMMERCIAL CONFIDENTIALITY

Investors often state concern that access to sensitive information gives competitors a commercial advantage. Host governments state that disclosing favourable conditions granted may create a demand for similar terms from future investors.¹⁴⁵ However, under scrutiny, such arguments are weak compared with the substantial arguments in favour of contract disclosure:¹⁴⁶

- Openness will provide incentives for both governments and companies to negotiate better terms, resulting in more stable and durable contracts for both Parties.
- “Commercially sensitive information” is any information that has economic value (such as proprietary information) or which could cause economic harm if known. However, neither of these terms is defined, resulting in potentially limitless boundaries for exploitation. In fact, the basic financial terms of many deals are known in the industry (and therefore considered “in the public domain”) even if they are not publicly available to affected communities.
- Contracts between a government and a business enterprise are not simply commercial transactions (e.g. between two private entities); they are the tools for public policy and of “public interest.” Contracts signed by government agencies therefore become the “law” governing a public resource project and thus must be publicly available.
- Demands from business enterprises for repeat of investment terms can be countered on the basis of Parties negotiating under different economic conditions.
- Contract transparency helps promote better contractual terms, increasing pressure for accountability and thus more balanced contracts. It strengthens the negotiating capacity of host governments as well as coordination between government agencies. Contract transparency is an important factor in creating a level playing field between companies and governments.
- Contract transparency is a step towards tackling corruption and promotes deals that maximise the public interest. It is crucial for the effective enforcement of contracts, where citizens are often best placed to monitor compliance.
- Citizens have a right to know how their government is managing the nation’s publicly owned land and natural resources on their behalf.

“Best Practice” Confidentiality Clauses

Revenue Watch International suggests the following clause as a “best practice” example for confidentiality. This adopts a precautionary principle in which disclosure is required unless either Party can prove that confidentiality is necessary to protect genuinely proprietary information. It also recognises that contract confidentiality is subject to relevant national and international laws and regulations.

“This Agreement will be published in (government gazette/federal register) or publicly available at (ministry website/ministry library/parliamentary records). Information in relation to activities under these agreements shall be kept confidential if requested by a Party, to the extent that such Party establishes that confidentiality is necessary to protect business secrets or proprietary information. Such confidentiality is subject to (relevant disclosure laws), as well as to applicable laws and regulations, including stock exchange and securities rules, and requirements for the implementation of the Extractive Industries Transparency Initiative.”¹⁴⁷

This study analysed 15 large-scale land investment contracts from a diverse range of countries, none of which stated that they were subject to disclosure and eight of which contained a confidentiality clause (see full details in Annex 2). None of the contracts provided justification for confidentiality, with only one contract from Madagascar providing a vague rationale that disclosure “may directly or indirectly affect the working of (the company).” Confidentiality clauses typically defined all information relating to the investment as confidential unless it is already in the public domain, under jurisdiction not subject to appeal or unless it has prior consent from both Parties.

Example A, between a Saudi Arabian company and the Philippine Government¹⁴

“The Parties hereby agree that any valuable information disclosed and/or received by either Party relative to this MOA shall be kept confidential from Third Parties except with prior consent of both Parties.”

Example B, between a Hong Kong company and the Liberian Government¹⁴⁹

“All data, information, documents, reports and statistics including interpretation and analysis supplied by the Contractor pursuant to this Contract shall be treated as confidential and shall not be disclosed by any Party to any other Person without the express written consent of the other Parties within the life of the Exploration, Appraisal or Exploration authorisation period.”

The Global Reporting Initiative (GRI) builds upon this definition of “materiality” as “a threshold at which topics or indicators become sufficiently important that they should be reported.”¹⁵⁴ This is accompanied by a series of “tests” to be taken into account in defining materiality (e.g. “reasonably estimable” sustainability impacts; risks or opportunities identified by expert review; significance to stakeholders; relevant laws, regulations, international agreements, or voluntary agreements).

The Aarhus Convention contains the most promising provisions against confidentiality, although it does include exceptions “where such confidentiality is protected by law to protect a legitimate economic

interest.”¹⁵⁵ It also states that grounds for refusal shall be interpreted “in a restrictive way, taking into account the public interest served by disclosure.”¹⁵⁶ In contrast, the Environmental and Social Review Procedures Manual of the IFC states that project appraisals can be deemed “confidential” by the agency, and therefore not released, if they contain “sensitive client information,” a term left undefined.¹⁵⁷

2.3.5 ADDITIONAL INFORMATION RELEVANT TO NEGOTIATIONS

Additional information on the investors and individuals behind projects can enable communities

BOX 9: BENEFICIAL OWNERSHIP

No discussion of transparency is complete without tackling the question of company ownership. This is not about listed companies whose shareholders are publicly available. It is about smaller companies, often registered in secrecy jurisdictions, whose real owners remain invisible, and which too often are used as vehicles to gain access to land and natural resources, hiding the real beneficiaries.

Limited liability is a privilege granted by the State to promote free enterprise. It means that if a company goes bust, its owners and investors lose only what they put into it in the first place. The mechanism enabling this is that a company is a separate legal entity from the people behind it – a “legal person” in the jargon, rather than a “natural” (i.e. real, breathing) person.

But a legal person can also be used as a shield, hiding the real people behind it. When companies are set up for this purpose, they are often called front companies, or shell companies. They do not conduct any real business, in the sense of selling products or services, or employing staff who attend a place of work. They exist as a piece of paper in the filing cabinet of a lawyer or company service provider, who may act as a “nominee” shareholder or director or company secretary. In this way, the privilege of limited liability is misused on an industrial scale for tax evasion, money laundering, corruption, and secretly purchasing land or natural resource concessions.

A company that is set up to hide its real (or “beneficial”) owner will use one of two mechanisms – or a combination of them:

- If it is set up in a jurisdiction that lists company shareholdings – such as the UK, with its Companies House registry – then it will make sure that the shareholder, or legal owner, is itself another company, in a further jurisdiction that does not list shareholders. This way, it gets to look like a company from a reputable onshore jurisdiction, when in fact its beneficial, real owners are unknown,
- If it is set up in a secrecy jurisdiction that does not list the owners of companies – such as the British Virgin Islands, then nobody can see who’s behind it. The only exception is law enforcement seeking information on an existing case under a mutual legal assistance treaty, or tax authorities seeking particular information on a named person under a tax information exchange agreement.

Global Witness believes that each jurisdiction should collect, verify, and make publicly available the beneficial ownership information (as opposed to just the legal owner who is the next step up in the chain) on all companies incorporated there. In September 2011 the US Administration threw its weight behind proposed legislation requiring US companies to disclose their ultimate owners, which would move the US into the lead on this issue.

Inevitably, given that anyone can set up a company anywhere else, this needs to be a global standard. The best mechanism for doing so is the Financial Action Task Force (FATF), which sets the global anti-money laundering standard. One of FATF’s standards covers the information on beneficial ownership that must be available and to whom, since front companies are so often used to open bank accounts for money laundering. But the current level of the standard does not require jurisdictions to collect any information if they don’t want to, and leaves it up to law enforcement. This needs to change. FATF is currently renegotiating this standard and the final results were made public in February 2012, but they stopped well short of the necessary changes. The EU is also interested in improving its standard before 2013, prompted by fears of organized crime.

to be better informed when entering negotiations on the terms and conditions of potential operations. Recent investigations by The Oakland Institute helped broaden understanding of the role private investors and investment funds play in supporting such projects and identifying opportunities for leveraging influence on project outcomes.¹⁵⁸ Also of importance during the negotiation stage is disclosure of the individuals and companies who are ultimately behind the investment deals, the “beneficial owners.” Communities fighting against land grabs are plagued by mysterious companies who evidently have influential connections, but are previously unknown, often have no employees, and are sometimes registered at dubious addresses. Revealing the names of the people who ultimately control such companies, but who hide behind other

people and secrecy jurisdictions, can explain their impunity and provide affected communities with a name and address to submit grievance complaints to. More details are given in Box 9.¹⁵⁹

2.3.6 ALLOCATING LAND THROUGH COMPETITIVE BIDDING

Finally, an alternative way of allocating land to investors which has the potential for improving transparency and overall public scrutiny follows the model most commonly used in the extractive industries: competitive bidding. Box 10 summarises Peru’s experiences of allocating rights to public land for large-scale commercial land investments through this mechanism.

BOX 10: LAND AUCTIONS IN PERU

Land auctioning is a process for divesting public land through competitive public auctions. Auctioning is commonly used in areas without established markets for land to be made available to investors. Competitive bidding for land is said to ensure that the host government achieves better terms and is able to extract some of the surplus created by the project, while eliminating direct negotiations between private buyers and public officials.¹⁶⁰

The land auctioning process has been used in the Peruvian agricultural sector since the 1990s and since then 235,500 ha of public land has been auctioned for nearly US\$50 million.¹⁶¹ The case is used by the WB to highlight where large-scale investment in land can be successful in yielding sustainable and equitable benefits.¹⁶² From 1997-2008, over 120 companies invested in agricultural export, completing 31 auctions with more than 350 bidders.¹⁶³ Almost 20 of the country’s 50 main agro-export companies received land in these auctions, and as a result agricultural exports more than doubled their value in less than four years.¹⁶⁴ The auction process is as follows:¹⁶⁵

1. Rights and claims to the land in question are reviewed by the government, including determination of what types of rights are eligible for transfer;
2. Auction announcements are published in the official government gazette, the government’s website, and the media for at least 90 days, including the bidding terms;
3. Bidders must prequalify for the auction by posting a bond of at least 60% of the minimum bid price, plus the intended amount of investment. The successful bidder must deposit the land payment and a letter of credit covering the proposed investment amount with the government;
4. Bids are ranked by price offered and the amount of projected investment.

Each auction takes 4-5 months and data on the minimum bid value of the land, the investment commitment, and data on land size are publically available. Redress can be remedied if the property was expropriated. If within one year of the conclusion of the court process the expropriated property is not used for its planned purpose, it automatically reverts to the original owner. So far more than 70% of the land used by the agricultural sector has been acquired through auction rather than expropriation.¹⁶⁶

Peru’s success is credited to oversight from “a high-powered and independent technical committee” representing private and the public sectors. The significant down payment eliminates speculation, ensuring only serious investors apply. Business plans are also made public.¹⁶⁷ The transparency of the process is considered significant.¹⁶⁸ However, the impact of land auctions on increasing public disclosure and scrutiny has been questioned.¹⁶⁹ The extent to which business plans incorporate community benefits, or how social and environmental concerns are considered during the awarding of investment projects, remains unclear. Also of importance is that initially the government awarded water and climate rights and risks along with the land, without assessing their value. However, since the government de-coupled allocation of water rights from awarding of land plots, the values reached during the auctions have significantly reduced.



Ethiopia, clearing the land at Karuturi's farm – Gambella © Felix Horne/Oakland Institute

2.4 Stage 3: Monitoring investment project implementation

If all the principles in this report and others are adhered to, then theoretically investment projects would only move into this third stage (implementation of investment projects) if all affected communities have given their consent. In such a case, the contract and its supporting documents (the minutes of consultation processes, social contracts, impact assessment mitigation, and management plans, etc.) provide the fundamental basis for any monitoring of the project's implementation. Hence, it is critically important that full disclosure of all these documents takes place as soon as the agreement has been signed and before operations begin.

However, the reality is very different as the HLPE report concluded: very few large-scale land investment projects begin without negatively impacting on local food security, incomes, livelihoods, and the local environment,¹⁷⁰ and limited information is available from which to start monitoring compliance.

The literature reviewed suggests a number of principles and processes which have value in terms of using transparency to strengthen recognition and protection of local communities' rights both at the conceptual level during project implementation, as well as during conflict mediation and resolution.

According to Professor Ruggie and the HLPE report, business enterprises have a legal responsibility to respect human rights and must act with due diligence to avoid infringing human rights within their sphere of influence throughout all implementation phases, and they must internally and externally report on this.¹⁷¹ Projects funded through public finance, meanwhile, need to demonstrate their commitment to, and implementation of, performance standards.¹⁷² In order to maintain contractual “economic equilibrium” (defined by IIED as the balance of the Parties' rights and obligations), such safeguards should be expected to evolve during the project life-cycle, requiring the re-negotiation of contracts, continued re-assessment of risks, and adaptation of stabilisation clauses.¹⁷³ As noted in 2.3.1 above, monitoring and reviewing the implementation of mitigation management plans and adapting these plans if impacts are different from those anticipated, are critical components of EIAs as applied throughout the project life-cycle.

Throughout these stages, CSOs have a critical role in supporting affected communities to watchdog State and business enterprise adherence to global standards, national legislation, and contractual terms and conditions.¹⁷⁴ Monitoring of the implementation of relevant sectoral frameworks (such as national agricultural policies) can ensure projects remain in line with objectives and ensure policies match government action.¹⁷⁵ See Box 11 below for further details.¹⁷⁶

BOX 11: AFRICAN UNION'S PRINCIPLES FOR TRACKING LAND POLICY DEVELOPMENT AND IMPLEMENTATION

1. Does policy development and implementation conform to initial design?
2. Does policy development and implementation match expectations of beneficiaries and requirements for sustainable development?
3. Does the implementation of the policy achieve its objectives?
4. Are resources involved in the policy development and implementation used effectively?
5. Is the land policy sustainable; are the benefits of its implementation sustained and can they support further reforms?
6. What are the direct and indirect (positive and negative) effects of policy implementation on beneficiaries and natural resources?
7. Is the land policy coherent and consistent (internally, cross-sectorally, and inter-regionally)?

Recommendations in the literature for monitoring and evaluation methodologies were based on the development of clear indicators and a reporting format (including assessing changes in risk and impacts) which are publicly disseminated and applied both at national and local levels.¹⁷⁷ Affected communities and CSOs must be consulted on the development of these indicators. The rigorous enforcement of FPIC and EIA obligations are tools through which affected communities can hold the State and business enterprises to account, but the State must ensure that strong actors are prevented from dominating such dialogue.¹⁷⁸

The current draft VGs encourage all Parties to monitor and evaluate their implementation through participatory approaches, and also recommends that international bodies regularly report on implementation and effectiveness.¹⁷⁹ Civil society recommended such monitoring be extended to all State Parties regularly reporting to the Committee on World Food Security (CFS) on implementation of the VGs. The HLPE meanwhile recommended States report to the CFS

annually on alignment of foreign investment with food security objectives and national priorities.¹⁸⁰

One example of this is a project which works with local civil society groups and forest communities in Central Africa and Latin America to monitor transparency around the implementation of forest management projects. The results are summarised in Box 12.

BOX 12: MAKING THE FOREST SECTOR TRANSPARENT

“Making the Forest Sector Transparent,” a project led by Global Witness, supports civil society organizations in select forested developing countries (Cameroon, Ghana, Liberia, and Peru), to engage with policy makers with a view to improving transparency and accountability within forest sector governance.

In order to assess progress towards transparency objectives, local partners use an **annual report card** to assess the level of public access to information in each country, identifying room for improvement and good practices that could be applied elsewhere. The standardized nature of the report cards allow for easy comparison between countries according to a number of different transparency themes and indicators, drawing attention to deficiencies and creating an incentive for governments to improve transparency. Thus far, report cards have been produced for the years 2009 and 2010.

While difficult to attribute directly to the program, there have been many improvements in transparency observed in participating countries. In 2010, Liberia enacted a Freedom of Information Act and later appointed an Information Commissioner. Both Liberia and DRC now require that forestry contracts be made public, along with those pertaining to the exploitation of other natural resources. The project has also exposed a lack of communication between ministries; for example, the issuance of large-scale mining and agricultural conversion licenses within forest reserves deemed to be of high biodiversity value. They have also raised awareness regarding forestry revenues that local populations are entitled to.

Partners have identified a number of ways in which report cards can help improve transparency, and methodologies that should be adhered to in designing a transparency report card and carrying out related research. The project is in the third year of its four-year duration, and has recently expanded to include Ecuador, Guatemala, and DRC. Partners have also called attention to a lack of transparency regarding two emerging issues requiring future scrutiny: regulatory frameworks for “carbon concessions,” and agricultural land deals.¹⁸¹

A key element of monitoring and evaluation is the presence of mechanisms for resolving disputes. Therefore, judicial and non-judicial grievance and redress mechanisms for human rights and environmental violations must be available to resolve disputes and ensure compensation is paid.¹⁸² Principle 31 of Professor Ruggie’s guiding principles outlines effectiveness criteria for non-judicial grievance mechanisms. See Box 13.¹⁸³

BOX 13: EFFECTIVENESS CRITERIA FOR NON-JUDICIAL GRIEVANCE MECHANISMS

In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

1. **Legitimate:** enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;
2. **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
3. **Predictable:** providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
4. **Equitable:** seeking to ensure that aggrieved Parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
5. **Transparent:** keeping Parties to a grievance informed about its progress, and providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake;
6. **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognized human rights;
7. **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms.

Operational-level mechanisms should also be based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

The international instruments reviewed gave considerable attention to sanctions, appeal mechanisms, and dispute resolution. The ICESCR’s Optional Protocol enables the Human Rights Committee of the Covenant to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.¹⁸⁴ The ICESCR General Comment 7, noting that the Covenant obliges States to use “all appropriate means” to promote the right to adequate housing, interprets this to mean that:

“Parties must ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards, by private persons or bodies. States Parties should therefore review relevant legislation and policies to ensure that they are compatible with the obligations arising from the right to adequate housing and repeal or amend any legislation or policies that are inconsistent with the requirements of the Covenant.”

It states that “where possible” legal aid should be provided to persons who are in need of it to seek redress from the courts.¹⁸⁵ UNDRIP contains a similar provision: “States shall provide effective mechanisms for prevention of, and redress for... b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources.”¹⁸⁶ The 1992 Rio Declaration stipulates that “Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”¹⁸⁷ Agenda 21 meanwhile calls for the “development and strengthening of national dispute-resolution arrangements in relation to settlement of land and resource-management concerns.”¹⁸⁸

The Aarhus Convention contains a unique compliance mechanism, described as “non-confrontational, non-judicial and consultative,” for reviewing compliance that allows the public to express concerns regarding a Party’s compliance directly to a Compliance Committee.¹⁸⁹ It contains a separate article ensuring that the public has access to a “review procedure before a court of law and/or another independent and impartial body” and “shall provide adequate and effective remedies, including injunctive relief

as appropriate, and be fair, equitable, timely and not prohibitively expensive.”¹⁹⁰ Both provisions are further supported by its whistleblower protection, as described above in 2.1.8.

The Equator Principles require that a grievance mechanism be established, “scaled to the risks and adverse impacts of the project,” that affected communities be informed about the mechanism during community engagement, and that concerns are addressed “promptly and transparently.”¹⁹¹ The EU Transparency Directive requires member States to ensure that decisions taken under laws, regulations, and administrative provisions adopted in accordance with the Directive are subject to the right of appeal to the courts.¹⁹²

The UN Principles for Responsible Investments is decidedly weaker, only requesting that the investor “revisit relationships” with service providers that fail to meet environmental, social, and corporate

governance expectations.¹⁹³ The African Convention on Conservation of Nature and Natural Resources requires Parties to ensure “access to justice in matters related to protection of environment and natural resources.”¹⁹⁴ Methodologies addressing grievances and resolving disputes must work, if possible, within traditional and customary structures, whilst ensuring that internal power imbalances are addressed and that processes are accessible to the most marginalized.

An alternative and complementary approach to monitoring the implementation of specific projects is to monitor the government’s implementation of national sector policies, particularly financial support. Research done by CSOs compared Cambodia’s agricultural development priorities to national budget expenditure on the agricultural sector. Its conclusions reveal that, although this sector is prioritised on paper, expenditure, especially that directly reaching farmers, is decreasing annually and is far short of budget projections. Box 14 gives further details.¹⁹⁵

BOX 14: CAMBODIA – MONITORING NATIONAL AGRICULTURAL PRIORITIES VERSUS EXPENDITURE

As part of a larger budget monitoring project in Cambodia, in 2010 local NGOs reviewed the government and donor agricultural sector financing and services for smallholder farmers. Cambodia’s National Strategic Development Plan (2006-2010) ranks agriculture as the top priority for development, and identifies the sector as having the greatest potential to reduce poverty. Agriculture and water sector plans have consequently been developed to guide the direction and distribution of resources to the sector.

However, the importance of agriculture as a priority sector has not been reflected in the government’s annual budgets and expenditure. The proportion of the total national budget combined (both recurrent and capital) for the ministries directly supporting agriculture has averaged only 7.5 percent between 2006 and 2010, and has declined during this period. Actual expenditure by these ministries has averaged only 60% of allocations. Flow of aid follows the same pattern. Only 25% of aid to the agriculture, forestry, and fisheries sector between 2007 and 2009 was allocated to food security, productivity, and agricultural diversification, while agricultural research and extension received only 7%. In reality, much assistance is diverted to national level institutional capacity building and management, which received nearly 25% of agricultural aid between 2007-2009 (instead of the 14% allocated according to national policy). The means that disbursements of resources which directly benefit small farmers are constrained and they are consequentially left under-supported by limited public services.



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2.5 Stage 4: End and post-project transparency and information disclosure

The literature provided no guidance on the role of transparency in the fourth stage, when investment projects come to an end. Such an omission might possibly be justified if this was only a concern for long-term leases (up to 99 years), which will come to an end far beyond any policy makers' horizons. However, a far more critical omission relates to the lack of provisions for what happens to land in the case of contracts being terminated early; sometimes by the investor, but more frequently when contracts are nullified by the State due to non-compliance.

The State has a duty to sanction business enterprises for non-compliance with the terms of the contract (including for example, inadequate compensation) on behalf of affected communities, and such sanctions can range from re-structuring to liquidation.¹⁹⁶ Box 15 provides an example of land successfully being returned to local communities after a concession was re-structured.¹⁹⁷ A far more common scenario is that land from cancelled leases is retained by the government and reallocated to business enterprises rather than being returned to affected communities, even if disputes on the land pertaining to the initial transfer remain unresolved. It is common practice of States to disregard local land rights in areas they consider to be “public land,” or (re-) classify land as “public,” or evict local communities and then transfer the plot over to investors. Under such circumstances, it is critical that provisions are developed for how rights are returned and disputes resolved retrospectively. Planning for project closure, including what happens to the land and resources after the contract expires, must therefore be integrated into decision-making processes throughout the investment life-cycle. Whereas environmental examples are often reflected in a host country's statutory relinquishment considerations, social considerations are not.

The study could not find an example of best practice for post-production phases of agribusiness investments. A mining example is summarized in Box 16 as the starting point for further discussions, with a recognition of the considerable differences in context between the two sectors.

BOX 15: CASE STUDY OF LAND BEING RETURNED TO COMMUNITIES FOLLOWING CONCESSION RE-STRUCTURING, WEST KALIMANTAN, BORNEO

In March 2011, a new palm oil plantation being developed in West Kalimantan, Borneo, relinquished community lands to which it had gained a government permit. The company PT Agro Wiratama, a member of the RSPO and subsidiary of the giant Musim Mas group, agreed to relinquish more than 1,000 hectares of its 9,000 hectare concession back to the community, following interventions by community representatives and NGOs.

The company was subject to the RSPO's “New Plantings Procedure” which requires member companies to publicly announce plans to expand their operations, with the aim being to ensure that the social and environmental requirements of RSPO are taken into account before new operations get going. In this case, the local Indonesian NGO Gemawan was able to alert the local people to what was being proposed; open up discussions with the local government, the company, and the RSPO; and then assist the community in its negotiations.

Following local level mobilisation, mapping of land use and land claims, and a series of meetings with local authorities and company officials, the reduction of the concession area was made official by the local regent and the land returned to the local forest communities. However, the current legal status of this land and tenure rights of the community is not clear.

BOX 16: BEST PRACTICE FOR ENVIRONMENTAL, SOCIO-ECONOMIC, AND GOVERNANCE CLEAN-UPS IN POST-PRODUCTION PHASES FROM THE MINING SECTOR

Best practice in the mining sector suggests planning for closure from the earliest possible time to integrate environmental management, community engagement and development, health and safety, security and human rights, labor, and management and governance. As the International Council on Mining and Metals Toolkit states, all operations “*undertake some closure activities continually...Closure activity does not therefore commence only towards the end of an operation, although the intensity of such activities increases substantially at this time.*”¹⁹⁸ Transparency and full disclosure are important elements in this preparation. In one case, a community in the Philippines successfully campaigned for the operating mining company to integrate their concerns into the firm’s Decommissioning and Rehabilitation Plan. This included gaining assurance from the company that contaminants from ore processing would not reach the nearby river basins, that the mines would not threaten their watersheds, and addressing other concerns related to workers’ benefits as well as resource tenure and access issues.¹⁹⁹

According to the Model Mining Development Agreement developed by the International Bar Association,²⁰⁰ companies have an obligation, prior to construction, to submit a closure plan. This includes the anticipated environmental, social, and economic state of the project area, and is to be prepared in consultation with affected communities, guaranteeing the company provides closure expenses and as such is inherently embedded within the EIA framework. This five year plan is to be continually updated, and all post-closure activities monitored by a committee developed in consultation with local community leaders with the mandate to supervise the monitoring of geophysical stability, water quality, and rehabilitation of contaminated sites and restoration of land for post-closure use. CSR guidelines in the Philippines further suggest mine rehabilitation and decommissioning plans include land reversion rights, the enforcement of which is the responsibility of the government.²⁰¹ Ideally, closure plans are to be developed consistent with the comprehensive land use plans of the concerned city or municipality.

3. ANALYSIS OF THE FINDINGS

3.1 Prioritised entry points for improving transparency and information disclosure

The second part of this report analyses the findings outlined in Section 2 and prioritises specific entry points during decision-making around land and natural resource use allocation. Priority is given to examples of where greater access to information and transparency would improve people's ability to defend their rights and to hold governments and business enterprises to account. The following criteria were used during the analysis to identify and assess the entry points:

- Is the entry point time-bound, specific with clear identification of who is responsible for disclosing this information and how?
- Can the willingness of governments and investors to release such information be assessed based on experiences from other sectors?

- Is there a clear “theory of change” identified about how releasing such information will have a larger impact on overall transparency and consequent accountability of decision-making

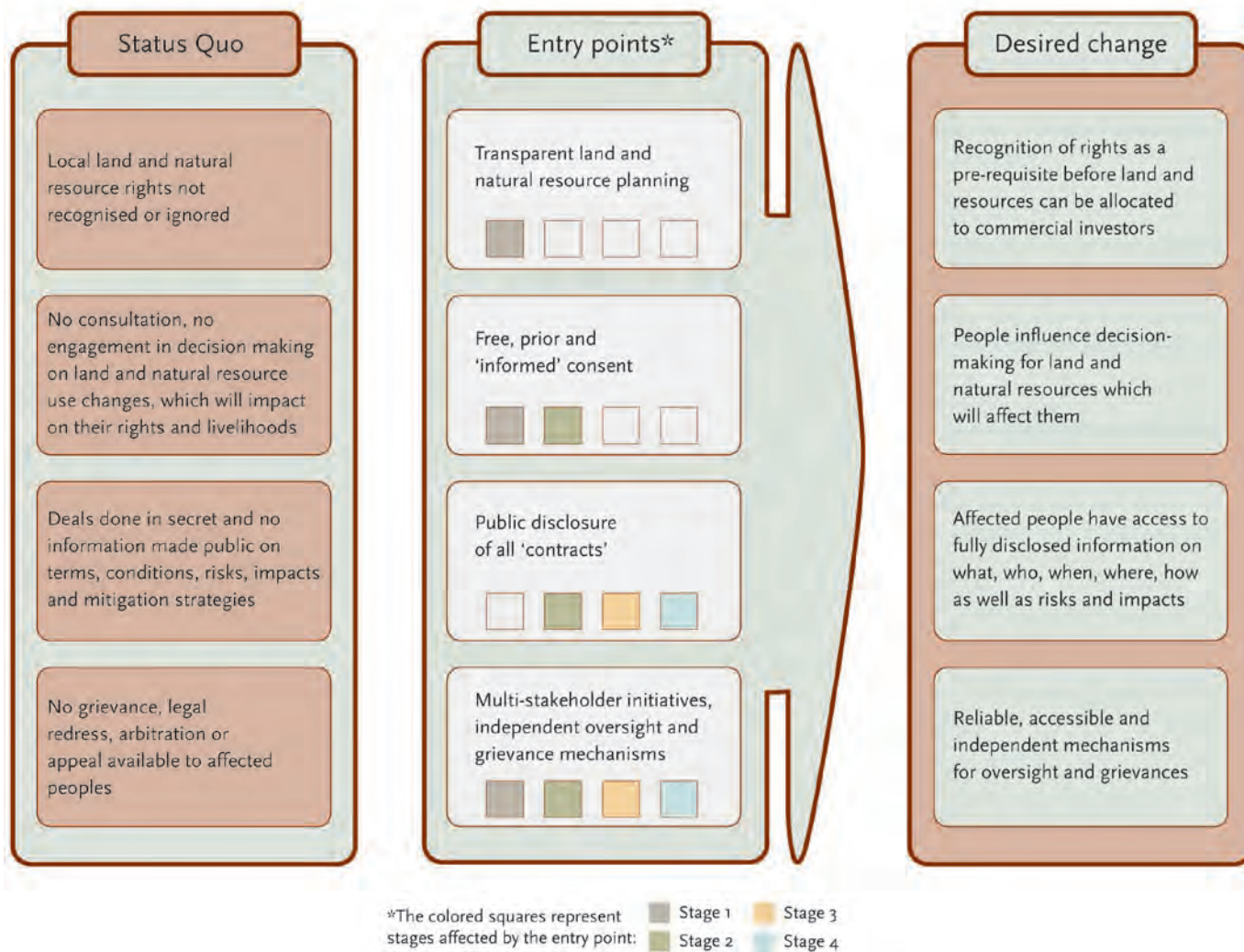
Based on these criteria, four entry points have been prioritised by Global Witness, each shining a light on a specific stage in the broader decision-making process and each being complimentary with the other three:

1. Transparent land and natural resource planning
2. Free, prior and “Informed” Consent
3. Public disclosure of all “contracts”
4. Multi-stakeholder initiatives, independent oversight, and grievance mechanisms

Ethiopia, land cleared by Saudi Star ©Felix Horne/Oakland Institute



DIAGRAM 2: HOW CAN TRANSPARENCY LEAD TO CHANGE?



Given the complex nature of land tenure governance and differing local specificities, this report does not attempt to identify a “silver bullet” to improve transparency in all situations. Rather, the four entry points identify the most promising ways forward, and they should be considered mutually reinforcing and interdependent.

Before analysing each of these in greater detail, it is important to recall that while the objective of this report is to identify specific entry points for improving transparency, it does so within recognition of higher-

level rights, safeguards, and principles which must be applied throughout all decision-making processes. In this way, each entry point for improving transparency should be viewed as a step toward enjoyment of these rights and in no way a replacement of their significance.

3.1.1 TRANSPARENT LAND AND NATURAL RESOURCE PLANNING

The first entry point aims to improve transparency in land and natural resource rights, ownership, and tenure regimes. As such, recognising these rights must

be a fundamental pre-requisite before land and natural resources can be allocated for commercial investment purposes. Transparency is not only of critical importance during the undertaking of participatory planning, but is also an anticipated outcome.

As described by the Declaration on the Right to Development, the State is as responsible for developing plans and supporting policies as it is for ensuring transparency and information disclosure.²⁰² Section 2.1 outlines existing higher-level rights obligations of States relating to human rights; public participation consultation and consent; and transparency and disclosure. It is therefore implicit in State obligations and land and natural resource use planning methodologies that this is a stage intended to safeguard the rights of local communities as a precursor to decisions being made to allocate large areas of land for commercial investment purposes.

This report details considerable incentives for governments to improve transparency during land and natural resource use planning. Lessons from Canada emphasise the benefit of ensuring meaningful participation, embedding the results in law, and placing a moratorium on extractive activities until the planning process is complete, despite the time and cost this involves. Cameroon provides an example of challenges that occur if the process is rushed, undertaken without good faith, and if the government shows a clear stakeholder bias (see Box 4 for further details).

Participatory land and natural resource use planning can also be done at more localised scales (for example, in areas where tenure disputes are many), which is particularly relevant considering that often master land use plans do not exist. Regardless of the scale of implementation, such planning processes depend on having legitimacy, at both the national and local levels, and the administrative or legal weight to last beyond government terms in office. They therefore must be done in line with the higher-level rights obligations relating to human rights, public participation, consultation, and consent outlined above. In this way, the ways in which information is made publicly available (namely, timely, accessible, and accurate) is also of importance for information disclosed about

land and natural resource planning, as well as the dissemination of the final outcome.

Due to the lack of technical and financial capacity of many recipient governments, international donors often are involved in supporting and implementing such processes. Agencies such as GIZ's Land Policy and Land Management division have, for example, published detailed manuals documenting experiences of implementing land use planning processes, including best practice concepts, tools, and applications.²⁰³ Operational donor involvement can also provide an opportunity for CSOs to get greater leverage to ensure the methodology and outcome are in line with international financial institution safeguards.

However, State and/or donor initiated planning processes can disempower local communities from determining the parameters of mapping their own assets and tenure regimes, or owning the methodology and outcome. Examples of communities taking proactive steps to document their own land and natural resource claims, such as Community Protocols, should be further considered for opportunities they might provide for strengthening transparency during land and natural resource use planning processes and outcomes.

3.1.2 FREE, PRIOR, AND "INFORMED" CONSENT

The second entry point identifies FPIC as the strongest means to ensure people potentially affected by a proposed land and/or natural resource proposal have a voice in decision-making. The current international focus on FPIC has been around strengthening of its provision from "consultation" to "consent" and the expansion of this right for indigenous peoples to a principle for all communities affected by proposed large-scale land investments. The right to be consulted in an "informed" way is one of the most important of the three pillars on which consent or veto is based.

As a high-level human rights principle, improving transparency and information disclosure as a means to ensure that consultations are "informed" is not time-bound to one specific decision; rather, it is integral to all decision-making stages and processes. Timeliness of information disclosure in terms of consultation

procedures is best described by the Aarhus Convention and the UN Declaration on the Right to Development. As with all human rights, the ultimate obligations for their fulfilment fall upon the State. But the guiding principles for business and human rights best define the responsibilities of business enterprises to respect these rights when operating domestically and overseas. It is the responsibility of home States to ensure their companies fulfill these obligations.²⁰⁴

The willingness of governments and investors to fully meet their obligations towards “informed” consultations under FPIC is closely related to willingness to operate more transparently in general. The incentives outlined in the introduction for government and investors to improve transparency should form the basis for any CSO engagement with governments to strengthen these provisions.

Another essential requirement of being “informed” is that the information disclosed is in a form which is accessible, accurate, can be understood and used. The State (possibly in collaboration with the business enterprises) is therefore responsible for ensuring that relevant information is translated into local languages accurately, available at the local level, is distributed orally in the case of low literacy, and uses appropriate terminology. Where large amounts of information require translation, communities have high levels of illiteracy, or where technical terms need special attention, it is recommended that disclosure is prioritised by the documents of most immediate and direct local relevance. Much can be learnt from the implementation of the EITI at the local level, regarding the challenges of CSOs being able to effectively use complex information disclosed on revenue transparency, and the opportunities which have developed through efforts to overcome such challenges.

Strengthening the extent to which FPIC can be better “informed” would have significant impacts on ensuring that people potentially affected by a decision understand the potential impacts it will have on their lives, and are empowered to gain better respect and protection of their rights. This is not only relevant for ensuring affected communities have enough

information to decline consent for the project to go ahead if their concerns are not addressed. It also ensures that, if consent is given for the project, the assessment of potential risks and the mitigation strategies in place to address them are based on the best available knowledge and information.

In addition to strengthening understanding of the definition and application of “informed” consent, there are a range of arguments being developed (as described in section 1.4) on the considerable dividends and incentives for governments and business enterprises from applying FPIC throughout all stages of investment activity. Such arguments are based on experiences in the extractive industries sector, and should provide the basis for future engagement with government agencies and business enterprises on improving consultation procedures for land related investments.

3.1.3 PUBLIC DISCLOSURE OF ALL “CONTRACTS”

It is clear from the literature reviewed, the interviews held, and analysis of campaigning experiences from other natural resource sectors that public disclosure of the contract (and sub-contracts) is of utmost importance. These are the documents which contain the most critical information regarding the parties, financing, terms and conditions, potential risks and impacts and agreed mitigation strategies. Their disclosure would have the greatest up- and down-stream impact on broader transparency in land governance. “Contracts”²⁰⁵ are all the relevant documents relating to the agreement, defining aspects such as the terms and conditions, and rights and responsibilities of all Parties involved.

The literature reviewed unanimously agreed with contracts needing to be disclosed as soon as they have been signed; this was recognised as the responsibility of the State, both at national and local levels. However, questions remain regarding comprehensiveness of such disclosure, and the extent to which contracts should be made public while the agreement is still being negotiated.

As Box 8 describes, governments and investors rely on the excuse of “commercial confidentiality” clauses in contracts as the rationale for non-disclosure. This

argument is poorly constructed. Not only are there legal arguments relating to public interest which should prevent the terms of contracts between private investors and public agencies being kept from public view, there are also significant incentives for all Parties to the contract in maximising disclosure. Annex 2 gives examples of the lack of detail and broad sweeping areas of information kept confidential in large-scale land investment agreements.

This report takes the precautionary approach of “if in doubt, disclose,” laying the onus on the State and the investor to prove why information should be kept confidential, instead of affected people having to make the case for disclosure. Such arguments for and against contract disclosure and commercial confidentiality are receiving significant public hearing as the guidelines for the reporting requirements of extractive industry revenues are developed for companies listed in the US Securities and Exchange Commission following the 2010 Act. These discussions in the US are evidence of a slowly growing momentum within governments and business enterprises to disclose contracts once agreements are finalised. Again, positions are most advanced in the extractive industries, and civil society groups need to learn from and build upon these arguments as the basis for campaigning for agri-business contract transparency.

Less focus is given to contract transparency while deals are being negotiated. However, if, as this report highlights, full details of the terms and conditions of the investment project must be shared with affected communities and the government during the consultation phase, then this could be understood to be equivalent to contract disclosure. Formal recognition of such requirements would help communities know what documents and information they have the right to see during consultation and negotiation phases. Nevertheless, there are significant details contained in contracts which are noted as being temporarily commercially sensitive and whose disclosure would undermine competitive advantage. CSOs could discuss with interested private sector and government stakeholders where the lines between such degrees of temporary commercial confidentiality need to be drawn, within a new precautionary normative framework of “if

in doubt, disclose.” Options such as parliamentary oversight of proposed confidentiality clauses could also be considered.

Contract disclosure would also have significant impacts on consequent decision-making by all stakeholders. First, the terms and conditions of the deal which would be made public through contract disclosure are essential for monitoring how the project is being implemented. Safeguards (such as mitigation plans for social and environmental risks) and compliance measures require contract information against which performance can be measured. The local level can be the most effective for such monitoring, and therefore contract disclosure requires ensuring that the information is locally accessible in language(s) and formats that can be understood and used effectively. Second, as Box 1 highlights in the case of Sudan, public disclosure of contracts, even long after they are signed (in this case three years), can result in the reversal of a decision, the project being cancelled, or the agreements being re-structured. Reminders of the potential reversibility of seemingly permanent land-use change and land rights transfers are of critical importance for long-term and seemingly intractable disputes between business enterprises and affected communities.²⁰⁶

3.1.4 INDEPENDENT CSO MONITORING AND OVERSIGHT OF PROJECT IMPLEMENTATION

The fourth priority entry point is transparency through the means of multi-stakeholder initiatives, independent oversight, and grievance mechanisms for large-scale land investment projects. As with land and natural resource use planning (entry point 1), transparency is both an outcome of these procedures, as well as being an essential internal function.

At a conceptual level, if all other entry point priorities are carried out, then there are less likely to be institutional barriers against independent monitoring of implementation and ensuring concerns are addressed. In this case, the contract, the agreements resulting from consultations under FPIC, impact assessments, and the “social contract,” will provide the monitoring framework. For example, the business and

human rights guiding principles require businesses to regularly report on progress towards protecting human rights and acting with due diligence.²⁰⁷

In reality, however, large-scale land and natural resource related concessions are being allocated before or during land use planning processes, or with complete disregard for their outcomes. Information if it is released at all, is incomplete and inaccurate, and local communities in many areas are increasingly facing negative impacts. In this chaotic context, civil society (both community representatives and organisations)

plays a critical role within formal multi-stakeholder oversight mechanisms, within mediation and grievance processes, and also as independent watchdogs.

In terms of formal multi-stakeholder monitoring mechanisms, the EITI is considered one of the most genuinely independent and best functioning. Other examples of natural resource focused multi-stakeholder initiatives are commodity roundtables such as the Roundtable on Sustainable Palm Oil. The review of international instruments included a number of their provisions; however, analysing their efficacy

BOX 17: WHAT CAN BE LEARNT FROM THE EITI AS A MECHANISM TO IMPROVE TRANSPARENCY IN LAND DEALS?

Although there is now a widespread view that the EITI needs to expand its scope, its initial success in building international support from a wide range of stakeholders was dependent on its targeted focus (public disclosure of revenue reporting). Developing a mechanism for land, therefore, before identifying a targeted entry point in which improved transparency will be equivalently influential, risks creating a mechanism which is not fit for purpose.

The strength of the EITI is also dependent on its multi-stakeholder groups working in coordination at the national and international levels. These enable decision-making systems which should protect the voices of the weakest stakeholders. The EITI at the international level works on the basis of consensus amongst all stakeholders, backed up by a qualified majority voting system, and is operational within a set of international rules to which implementing countries must commit themselves, and whose implementation is validated by an independent Third Party. Participation in the EITI provides reputational benefits and other incentives for those Parties who comply with the rules and allows for the prospect of eventual expulsion for those which do not.

Any replication of the EITI model to other sectors requires clear consideration of five critical design and implementation issues:

- 1. Getting the politics right from the start.** Civil society needs to have a genuinely equal role, political backing, and buy-in from the host government, with incentives provided to the private sector. The initial focus needs to be on strengthening civil society resources, monitoring and advocacy capacity at the local level, and bringing in Governments and the private sector at a later stage.
- 2. Transparency does not equal accountability or equitable benefit sharing.** “Evidence-based, multi-stakeholder platforms” are conceptually popular, but hide a myriad of inequitable power balances and conflicts of interest. Any initiative must move beyond technical and administrative solutions, and provide political and economic incentives.
- 3. Critical analysis and review.** There needs to be regular evaluation, not just of the effectiveness of the initiative in meeting its own self-set goals, but in its effectiveness in actually bringing about meaningful changes on the ground in countries where it operates.
- 4. Determining criteria through consensus.** The EITI’s strong foundation is based on minimum criteria, process standards and independent validation, but these grew out of initially vague principles, through multi-stakeholder dialogue developed in good faith and through building trust.
- 5. Gaining legitimacy.** There needs to be an initial focus which can attract the support of diverse stakeholders, and which is capable of having a significant effect on the underlying problem. At the same time, the initiative must be capable of evolving to meet the needs of stakeholders on the ground and addressing changes in the nature of the underlying problem, rather than becoming trapped within its starting assumptions. The speed of establishment of the mechanism needs to be balanced with inclusiveness and ensuring stakeholder capacity.

as multi-stakeholder mechanisms was beyond the scope of this report, but has been done by a number of other organisations.²⁰⁸ No formal international multi-stakeholder mechanisms yet exist for monitoring large-scale land investments, although a number of international groups have suggested the potential for an “EITI for land.” Box 17 outlines lessons that can be learnt from the EITI for large-scale land investments, from the perspective of one of this reports’ authors, Global Witness.

In terms of mediation and grievance processes, Professor Ruggie’s effectiveness criteria (outlined in Box 13), provides a strong foundation for how such mechanisms should be established and function, including broad stakeholder involvement, transparency and trust.

The case studies reviewed in this report are evidence of the breadth of ways in which poor implementation of large-scale land investments are being documented and monitored for local and international policy advocacy work. Continued exposure of bad practice, policies, and decisions is a critical means of campaigning for change and Annex 3 gives a number of examples.

In addition to monitoring the execution of specific projects and exposing non-compliance and disputes, there are also opportunities for evaluating the implementation of broader government policy, for example as is done in Cambodia. The country remains heavily dependent on international donors for financial assistance and, as a result, the government and donors meet every 18 months to monitor progress against development benchmarks, identify new priorities, and commit financial and technical resources. National CSO coalitions use these meetings as an opportunity for launching “shadow reports” presenting their experiences of the progress made by the government and donors towards achieving these objectives in the intervening periods. Depending on the concerns at the time, these reports on the implementation of national sectoral policies submit recommendations for legislation being drafted, as well as including specific case studies of disputes (for example, between large-scale land investment companies and forest dependent communities). These shadow reports influence government and donor interventions at the meeting and contribute to defining future benchmarks, and are a critical track record of longer-term government and donor commitments to reform versus actual achievements.

3.2 Broader opportunities for improving transparency and information disclosure for further consideration

These four entry points could form the basis of campaigning and policy advocacy for improved transparency and information disclosure in large-scale land investments. Further analysis is needed to identify the benefits and opportunities of each entry point, as well as potential limitations, challenges, and risks around future campaigns which would need to be addressed from the start.

As this report notes however, there are numerous additional ways which may have significant influence in terms of protecting local rights or providing greater traction through improving transparency and information disclosure. Additionally, many issues are identified for further research, analysis, and policy development and campaigning. These are inextricably linked and mutually reinforcing. Some possible opportunities and areas for further consideration are:

- **Impact assessments.** Impact assessments are key instruments during consultation and also provide important information on the expected outcomes of the investments beyond contractual arrangements. If conducted well, EIAs provide critical information about expected impacts on people, the forests, the water resources, the climate, etc. (See EIA best practices summarized in Box 6.) They also provide a framework for monitoring project implementation and can help ensure that mitigation strategies are responsive to unanticipated impacts.
- **Public participation.** Greater public participation in the development of policy frameworks can provide an underlying foundation of transparency which can leverage against corruption, vested interests, and abuse of political power. For example, strong public input to the development of overarching policies which have political intent (such as land policies) can guide the adoption of legislative and regulatory detail in subsequent laws and technical documents.
- **Clarifying procedures and safeguards for consultation versus negotiation.** Some case studies highlight a lack of clarity (from the perspective of affected communities) of the difference between consultation over proposed projects and actual negotiation of the terms and conditions of the investment project. Further work is needed to address the gap between international policy developments around definitions and safeguards for concepts, such as FPIC, consultation and negotiation, and how these steps are operationalised in reality.
- **Community Protocols.** The Community Protocol concept is being developed and expanded by several communities in many regions, with the support of organisations such as: Natural Justice, Cool Ground, the Centre for International Environmental Law and others. In addition to empowering communities to know their own rights, the existence of protocols have in some cases changed power dynamics in decision-making processes, which has prevented locally unwelcome developments in several circumstances.
- **Project end and post-project period.** Almost no consideration was given in any of the literature reviewed about the importance of transparency and information disclosure during the project ending or post-project period. This report considers such a gap to be a major omission given the current number of large-scale land investments which are currently involved in disputes with local communities and the need for provisions to be developed for how rights are returned and disputes addressed retrospectively if these contracts are nullified.
- **Freedom of Information Laws.** Legislation encompassing freedom of information provides an opportunity for citizens to request information from their government, although this is contingent on the adequate content and enforcement of such laws. A study could be done within a selected group of countries to review which information can be requested and/or obtained from which entity (government agencies, business enterprises, international institutions, etc.), what means there are to get such information (public display, freedom of information requests, courts, etc.), and how such experience could be relevant in the broader context.

- **State extra-territorial obligations over business enterprises.** The responsibilities of home States to regulate the overseas operations of business enterprises registered in their jurisdictions have received greater scrutiny through the work of Professor Ruggie and the Guiding Principles. These principles have been incorporated into other mechanisms, such as the current draft of the VGs.

Civil and criminal cases have been filed as an attempt to test legal responsibility in extra-territorial jurisdictions. There is a clear difference between how individual states fulfill their obligation to regulate business enterprises overseas, for example Australia, specifically, and the extent to which such regulations cover transparency and information disclosure. A UN Working Group has been created to ensure the Guiding Principles are utilised effectively. Further work needs to be done to campaign for extra-territorial regulatory protection for human rights and legitimate tenure rights by business enterprises, their financiers, and enterprises owned, controlled by, or receiving substantial support from State agencies.

- **General comments of international human rights instruments.** The General Comments (for example General Comment 7 of ICESCR), are evolving interpretive guidance for the application of human rights conventions. Therefore furthering understanding of the role of transparency as a means to protect the right to adequate housing and/or the right to food may be one possible campaign option within the human rights framework.

- **International donors and the development community.** Given the lack of technical, financial, judicial, and administrative capacity of many governments facing demand for large-scale investment in land, international donors are often deeply involved in the implementation of land reform processes referred to in this report. In terms of the stages outlined, this is most relevant for Stage 1 (land and natural resource use planning). For example, the WB and GIZ have supported a number of such initiatives in Asia and Africa. Donor involvement provides CSOs with at least two opportunities. First, safeguards, performance standards, and internal policies provide guidance on how projects they fund must be implemented, and in some cases a grievance mechanism if communities encounter problems. Second, land reform processes and policies can be given greater legitimacy and leverage if their adoption is included as a benchmark within donor-government aid effectiveness monitoring frameworks.

- **The Open Government Partnership.**²⁰⁹ This multilateral initiative was launched in the US in 2011 and aims to secure concrete commitments from governments to promote transparency, empower citizens, fight corruption, and harness new technologies to strengthen governance. In the spirit of multi-stakeholder collaboration, the partnership is overseen by a steering committee of governments and CSOs. Organisations were invited to submit sector-specific briefings to the process with policy recommendations for improving transparency in the forests, land, extractive industries, illicit financial flows, and aid sectors. The initiative is in early stages and specific commitments have not been made. However, as the partnership grows and each government member clarifies their own commitments and road-maps for implementation, it may provide civil society with ongoing opportunities for campaigning and policy advocacy.

- **Development of international normative frameworks.** The VGs are being developed under the auspices of the CFS in coordination with a number of other guidelines, such as the principles for responsible agricultural investment. These frameworks and the strong civil society role within the CFS through the Civil Society Mechanism²¹⁰ provide a number of opportunities for ensuring such guidelines have strong provisions for improving transparency and information disclosure.

In discussion around the four entry points which this report prioritised in the CSO workshop in Dakar in February 2012, a number of key themes emerged. There was overall consensus that disclosing contracts (in their fullest definition) are likely to have the greatest up- and down-stream impact overall on transparency across decision-making on land investments. However, focusing on contract transparency as a technical solution would be unlikely to succeed in influencing actual change unless governance was also addressed. On the one hand, any transparency initiatives must first and foremost be focused on the communities affected by the deals. In particular, support must be given to ensure that they have the capacity to access, understand, and use the information disclosed. Mechanisms subsequently need to be functioning in order to enable affected communities to then use this information to hold decision makers to account. On the other hand, work is needed to improve the quality of the contracts themselves to ensure that they are complete, accurate, and include all relevant information. Finally, Dakar workshop participants strongly concluded that the idea of there being “idle” land available for investors to come and develop in Africa, Asia, or Latin America

is a fallacy. All land has some form of local use and community livelihoods are dependent on it. Therefore, all business enterprises must expect to go through rigorous risk assessments and consultations (based on FPIC) when considering any investment options.

The discussions at the Dakar workshop indicated a gap between rapid developments being made within the “transparency and accountability” agenda at an international and conceptual level, and the experiences of communities whose livelihoods are being devastated by bad land and natural resource decisions on the ground. Efforts to improve transparency therefore need multiple coordinated approaches linking the local to the global levels as well as horizontal coordination and learning across sectors. From a policy campaigning perspective, efforts strengthening international normative frameworks (such as the VGs) need to be balanced with substantive improvements to regulatory frameworks and the rule of law at national, regional, and international levels. Leveraging political will toward greater openness through, for example, raising parliamentarians’ awareness of the impacts of such land deals on the ground is therefore of fundamental importance to more specific transparency objectives.

4. CONCLUSIONS

The surge in large-scale commercial investments in land by business enterprises has been identified as having significant negative risks on food security, the environment, human rights, and governance. Of particular concern is the growing demand by investors for land-based projects in developing countries. Recipient countries and local communities face challenges of tenure insecurity, weak governance, and inadequate rule of law. In such contexts, the allocation of land for such investments is frequently done in secret and without the knowledge or consent of communities affected, who are consequently not informed or consulted about potential impacts and are unable to hold governments or investors to account. Such opacity undermines governance and democratic process and fosters an environment where high-level corruption between political and business leaders prevails, where elite capture of natural assets becomes the norm, where human rights are routinely abused with impunity, and where investment incentives are stacked against companies willing to do the right thing.

Such risks in large-scale land investments are associated with the Resource Curse, a phenomenon more commonly associated with unregulated extraction of oil, gas, and mining resources in developing countries. Policy makers concerned about such risks for large-scale land investments are also looking toward the extractive industry sector for experience on how transparency and information disclosure can leverage improved State and corporate behavior.

There are clear lessons and momentum around contract transparency and tackling commercial confidentiality in the extractive sectors which are of relevance for civil society groups monitoring the agribusiness sector. Improving transparency helps affected peoples understand the impact proposed transfers in land allocation and use will have on their lives. It helps them

engage with decision-making processes and gain better respect for and protection of their rights. Transparency enables governments to better understand the trade-offs of land and natural resource use options available to them, to make the best choice in terms of policy and allocation of resources, and to negotiate better deals on behalf of their people and natural wealth. There are considerable dividends meanwhile for business enterprises from operating through improved transparency, disclosure, and consultation.

However, experiences attempting to improve transparency in the management of the extractive industries also highlights the critical importance of identifying entry points at which specific information disclosure will have a wider impact on transparency and subsequent accountability. Developing transparency initiatives before such targeted entry points have been identified risks creating a mechanism which is not fit for purpose. On the other hand, an overly technocratic response which focuses on one means of improving transparency as a silver bullet will not be adequate to leverage the broader reforms to improve accountability.

In response, this report consolidates existing knowledge and policy recommendations relating to what kind of information needs to be made available, when, and by whom, in order to strengthen community influence and protection of their rights during all stages of decision-making around land and natural resources, including investor interest in their land.

This report concludes that the underlying change needed within all decision-making is for a precautionary principle of “if in doubt, disclose.” This requires a normative and regulatory transformation from the current practice in which affected communities and civil society have to convince companies and the government to operate transparently to a practice of

the State being responsible for automatically disclosing all information, unless the business enterprise can prove beyond doubt why releasing that information would affect their commercial competitiveness, or governments can prove why disclosing information would not be in the public interest.

In moving toward this principle, the report prioritizes four entry points within decision-making around land and natural resource use allocation where greater access to information and transparency would improve people's ability to defend their rights and to hold governments and business enterprises to account. These entry points are embedded within higher-level human rights, safeguards, and principles and therefore should be viewed as a step toward enjoyment of such rights and in no way a replacement of their significance. These are:

1. Transparent and participatory land and natural resource use planning.
2. Strengthening the concept of what it means to be "informed" within the right and principle of free, prior, and informed consent.

3. Contract disclosure as the fundamental principle of transparency for large-scale land investments.

4. Independent monitoring and oversight of project implementation through strong civil society engagement.

A number of additional opportunities and options were identified which have potential to improve transparency and information disclosure and these need further research and consideration.

Of critical importance is not viewing these entry points as single remedies for improving accountability and governance in large-scale land investments. They are interdependent and mutually reinforcing; therefore any civil society policy dialogue and campaigning toward these goals needs to take a long-term and strategic approach. Starting from an uneven playing field prevents any discussion or movement toward the kind of reforms needed to address the challenges laid out in this report. Leveling this playing field through redressing inequalities in information, knowledge, and power ultimately depends on tackling issues of political will.

ANNEX 1: PARTIES TO RELEVANT INTERNATIONAL LEGALLY BINDING INSTRUMENTS

1) International Covenant on Civil and Political Rights²¹¹

New York, 16 December 1966. Entry into force: 23 March 1976.

Signatories: 74. Parties: 167.

More details on the parties are available here: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

2) International Covenant on Economic, Social and Cultural Rights²¹²

New York, 16 December 1966. Entry into force: 3 January 1976.

Signatories: 70. Parties: 160.

More details on the parties are available here: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en

3) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights²¹³

New York, 10 December 2008. Not yet in force (requires 10 Parties).

Signatories: 39. Parties: 5.

More details on the parties are available here: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en

4) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters²¹⁴ (the "Aarhus Convention")

Aarhus, Denmark, 25 June 1998. Entry into force: 30 October 2001.

Signatories: 40. Parties: 45.

More details on the parties are available here: <http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xxvii/xxvii-13.en.pdf>

5) UNECE Convention on Environmental Impact Assessment in a Trans-boundary Context (1991, Espoo Convention)²¹⁵

Signatories: 30. Parties: 45.

More details on the parties are available here: <http://treaties.un.org/doc/publication/mtdsg/volume%20ii/chapter%20xxvii/xxvii-4.en.pdf>

6) Parties to the UN Convention on Biological Diversity²¹⁶

Signatories: 168. Parties: 193.

More details on the parties are available here: <http://www.cbd.int/convention/parties/list/>

7) The UN Convention to Combat Desertification

Entry into force 26th December 1999, Signatories 115, Parties 195.

More details on the parties are available here:

<http://www.unccd.int/en/about-the-convention/the-convention/Status-of-ratification/Pages/default.aspx>

ANNEX 2: LAND CONCESSION CONTRACTS REVIEWED FOR COMMERCIAL CONFIDENTIALITY CLAUSES

Country	Date	Contract Type	Confidentiality Clause or Clause Summary
Tanzania ²¹⁷	2010	Feasibility study between AgriSol Energy and the Mpanda District Council	<p>2.8 That AgriSol shall have sole ownership and control of its Feasibility Study and all such information, projections and analyses, studies, test results and any other data comprising the Feasibility study whatsoever, gathered or produced by AgriSol or its advisors. Such documents shall be confidential and propriety information belonging solely to AgriSol, except for such information and data that is already in the public domain or owned or controlled by the Council or Third Parties.</p> <p>Notwithstanding, AgriSol shall avail the Council such information gathered after the termination of the contract by performance.</p>
Philippines ²¹⁸	2010	MoA between Far Eastern Agricultural Investment Company (FEAICO) (Saudi Arabia) for large food crop plantations and processing plants in the Philippines	<p>IV.8. The Parties hereby agree that any valuable information disclosed and/or received by either Party relative to this MOA shall be kept confidential from Third Parties except with prior consent of both Parties.</p>
Madagascar ²¹⁹	2009	Contract farming deal between Varun Agriculture (India) and 13 associations in Sofia, Madagascar	<p>The land owners, the association, members of the association and the SODHAI have agreed to keep all the information and details as strictly confidential and shall not be disclosed to any Party in between or to the Third Party in any circumstances, as it may directly or indirectly affect the working of the VARUN AGRICULTURE SARL.</p>
Senegal ²²⁰	2009	Exclusive rights contract for land use between AgroAfrica (Norway) and Kounkane, Senegal	<p>4. a) Les deux parties reconnaissent que toute information, procédé, travail expérimental, travail en cours, plan d'affaires, liste de clients et autre secret de fabrique ou tout autre secret ou information confidentiels en rapport avec les affaires de chacun, sont précieux et particuliers aux affaires de chaque partie. Aussi, les deux parties acceptent que:</p> <p>i.) Les parties garderont dans le plus strict secret et ne révéleront, ne reproduiront, ne publieront ni n'utiliseront en aucune manière, pendant ou après cet accord, sans l'autorisation expresse du Conseil d'Administration des deux parties, aucune information, procédé, travail de développement ou prospectif, travaux en cours, affaire, liste de clients, secret de fabrique ou tout autre secret ou question confidentielle lié à un aspect ou un autre des affaires de chaque partie, excepté lorsque la divulgation ou l'utilisation sont nécessaires pour le travail de chaque partie dans ce projet.</p> <p>(Unofficial translation from French into English undertaken by Global Witness)</p> <p>Both Parties acknowledge that all information, procedures, experimental work, work in progress, business plans, client lists and other trade secrets or all other secret or confidential information in relation with each of the affairs, are valuable and private to the business of each Party. Also, both Parties accept that:</p> <p>i.) The Parties will keep in strictest confidence and will not reveal, nor reproduce, publish or use in any way during or after this agreement, without the express authorisation of the Administration Council of Both Parties, any information, procedures, experimental work, work in progress, business plans, client lists and other trade secrets or all other secret or confidential information linked to one aspect or another of the business of each of the Parties, except when the disclosure or the use of is necessary for the work of each Party in the project.</p>

Liberia ²²¹	2010	Amended and restated concession agreement between the Republic of Liberia and SIME Derby Plantation	<p>23.5 Confidential information provided to one Party by the other Party under this agreement shall only be used by the receiving Party and its representatives, and only for the purpose for which it was obtained, and shall be maintained in confidence as to third Parties by the receiving Party and its representatives except as may otherwise be required by law, the terms of this agreement or a final order of any Court having jurisdiction that is not subject to appeal. Subject to the exceptions set forth in 23.5 b), all information, not available to the public, disclosed to the other Party shall be considered “Confidential Information”, including i.) all written information of the disclosing Party that conspicuously bears a “Confidential”, “Proprietary” or similar designation, and ii.) all oral information of the disclosing Party that is identified at the time of disclosure as being of a confidential or proprietary nature. Confidential Information shall also include all information which either Party has received from others and which it is obligated to treat as confidential, provided such information is disclosed in the manner set forth in the preceding sentence.</p> <p>i.) For purposes of this Agreement, information provided by one Party to the other shall not be considered Confidential information if i.) it is already in the public domain or subsequently becomes public, but in either instance not by virtue of any act in violation of an obligation any Person had to keep such information confidential, or otherwise by virtue of any wrongful or illegal act by any Person, or is required by Law to be made public; ii.) the disclosing Party or its representatives, including Affiliates, has provided the information to other Persons not entitled to any legal privilege with respect to such information; iii.) it is known by the receiving Party without any obligation to keep such information confidential at the time of receiving such information as evidenced by its contemporaneous written records; iv.) it is hereafter furnished to the receiving Party by a Third Party, as a matter of right and without restriction on disclosure; v.) it is the subject of a prior written permission to disclosure provided by the disclosing Party; vi.) it is necessary to establish rights or enforce obligations under this Agreement or vii.) it is required to be disclosed by a court order that cannot be appealed under applicable Law, or by any authorities, including any Stock Exchange, that have jurisdiction over a Party.</p>
Liberia ²²²	2010	Production sharing contract between The Republic of Liberia and HongKong Tongtai Petroleum International Corporation Ltd for Offshore Block LB6 and for Block LB7	<p>8.5. All data, information, documents, reports and statistics including interpretation and analysis supplied by the Contractor pursuant to this Contract shall be treated as confidential and shall not be disclosed by any Party to any other Person without the express written consent of the other Parties within the life of the Exploration, Appraisal or Exploration authorisation period.</p>
Bolivia ²²³	2006	Petroleum - Model	<p>During the Contract, Parties agree to treat as confidential and not communicate to Third Parties information, documents, maps, and samples obtained during the execution of the Contract. If the Contract concludes for any of the grounds foreseen in the present Agreement, the Titleholder may not communicate to Third Parties any of the above materials obtained during the execution of the Contract. The Titleholder may communicate to Third Parties the materials mentioned above when required for good performance of the Oil Operations, with prior authorisation from YPFB and through records of confidentiality.</p>
Brazil ²²⁴	2001	Petroleum - Model	<p>Concessionaire shall treat this Agreement and all data and information produced, developed or obtained by any means whatsoever as a result of the Operations as strictly confidential, and shall not disclose without prior written consent from the National Agency of Petroleum, EXCEPT: when data and information are already in the public domain; when required by law or court order; when disclosed in accordance with rules and limits of stock exchanges; or when disclosed to Affiliates, consultants or agents of the Concessionaire, possible assignees and their consultants and Affiliates, financial institutions used by Concessionaire and their consultants, and to Concessionaires of adjacent areas and their consultants and Affiliates for the execution of the agreement in paragraphs 12.1 and 12.2, subject to a confidentiality agreement with no exceptions and subject to sanctions and fines for breach. Concessionaire must notify the Agency of the disclosures within 30 days. Confidentiality obligation lasts forever. The Agency may not disclose any data or information obtained as a result of Operations and which pertains to the parts of the Concession Area retained by the Concessionaire, except when such disclosure is necessary under legal provisions or for the purposes for which the Agency was created.</p>

ANNEX 3: SOURCES FOR THE LITERATURE REVIEW

A) POLICY DOCUMENTS

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D) EXPERT INTERVIEWS INCLUDED THE FOLLOWING INDIVIDUALS:

- Anuradha Mittal, Executive Director, The Oakland Institute.
- Frederic Mousseau, Policy Director, The Oakland Institute.
- Dr Lorenzo Cotula, Senior Researcher, International Institute for Environment and Development.
- Emily Polack, Researcher, International Institute for Environment and Development.
- David K. Deng, Research Director, South Sudan Law Society.
- Shepard Daniel, Fellow, The Oakland Institute.
- Dr Robin Palmer, Land Rights Adviser, Mokoro Ltd.
- Vidya Bhushan Rawat, Writer, Activist and Film-maker, also director Social Development Foundation, New Delhi.
- Professor Praveen Kumar Jha, Jawaharlal Nehru University, New Delhi.
- Lalanath de Silva, Director, The Access Initiative, World Resources Institute.
- Matthew Steil, Associate, The Access Initiative, World Resources Institute.
- Shalmali Guttal, Senior Associate and Coordinator, Reclaiming the Commons Programme, Focus on the Global South.
- Rebecca Leonard, Researcher, Focus on the Global South.
- Joan Baxter, Senior Fellow, The Oakland Institute.
- Dr Reinier de Man, Sustainable Business Development.
- Felix Horne, Consultant to Oakland Institute.
- Carin Smaller, Advisor on Agriculture and Investment, International Institute for Sustainable Development.

ENDNOTES

- 1 Unlike the other organizing partners and participants of the workshop, International Land Coalition is not a civil organization, but a partnership that brings together civil society with intergovernmental organizations.
- 2 The draft title of this document as at the date of publication.
- 3 HLPE (2011) *Land tenure and international investments in agriculture*. A report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security: Rome – principle observation 13, page 10.
- 4 The “Resource Curse” or the “Paradox of Plenty” is the phenomenon by which natural resource wealth often results in poor standards of human development, bad governance, increased corruption and sometimes conflict.
- 5 The Extractive Industry Transparency Initiative is an international multi-stakeholder voluntary mechanism, consisting of governments, CSOs and the private sector for the reporting and monitoring of payments made by companies to governments from oil, gas, and mineral concessions, more details are given in Box 3 below. The question about the viability of a “Land Transparency Initiative” was proposed by media coverage of a leaked draft version of the World Bank 2010 global report on large-scale land investments, according to Blas J. (2010) *World Bank warns on ‘farmland grab’* The Financial Times, 27 July 2010.
- 6 The Land Matrix is a partnership of ILC, CIRAD, Centre for Development and Environment of the University of Bern, GIGA and GIZ, with the support of Oxfam, SDC and EC. It is an inventory of land-related acquisitions and investments, presently including over 2,000 entries.
- 7 Anseuw, W., L., Alden Wily, L. Cotula, and M. Taylor. 2012. *Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project*. ILC, Rome.
- 8 The Oakland Institute (December 2011) *Understanding Land Investment Deals in Africa; Country Reports: Ethiopia, Mali, Mozambique, Sierra Leone, South Sudan, Tanzania, Zambia* Available at: <http://www.oaklandinstitute.org/special-investigation-two-land-deals-africa>
- 9 HLPE (2011) *Land tenure and international investments in agriculture*. A report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security: Rome.
- 10 Following the work of the United Nations Special Representative to the Secretary General for Business and Human Rights Professor John Ruggie, further information available at: <http://www.business-humanrights.org/SpecialRepPortal/Home>
- 11 Client Earth (2011) *Legal Briefing: The Impact of Transparency Requirements on the Timber Regulation*. Page 3.
- 12 For a more detailed consideration see: Global Witness (2011) “*Lessons Learnt - the need for resource transparency beyond the extractive industries*,” Global Witness Discussion Paper, revised 25 May 2011; and Sohn J, Herz S & La Vina A, “*The Business Case for Community Consent*,” World Resource Institute.
- 13 For further information, see Oakland Institute (December 2011). *Understanding land Investment in Africa, Country Report Sudan*, page 27. Available at: http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_country_report_south_sudan_2.pdf
- 14 The Global Association for People and the Environment, a small Canadian registered international NGO, began working in Bachieng District in October 2006 with the Rural Research and Development Training Centre, a private Lao non profit association, to disseminate legal information to five villages affected by rubber developments.
- 15 Baird, I.G. (2010) *Land, Rubber and People: Rapid Agrarian Changes and Responses in Southern Laos*. The Journal of Lao Studies, Volume 1, Issue 1, pp 1-47. The Center for Lao Studies, pages 26-28.
- 16 Global Witness campaigned for the establishment of the EITI, helped to design it, and currently holds an NGO nominee seat on its international board; Box 2 summarises Global Witness’ perspective on the EITI.
- 17 See the following for further details: <http://www.guardian.co.uk/global-development/2011/aug/10/world-bank-suspends-cambodia-lending>
- 18 For further information see the UTZ Certified website: <http://www.utzcertified.org/index.php>
- 19 International Covenant on Civil and Political Rights, Art. 1.2 and International Covenant on Economic, Social and Cultural Rights Art. 1.2.
- 20 International Covenant on Economic, Social and Cultural Rights Art. 11.1.
- 21 ICESCR General Comment 4 (1991) and 7 (1997). The General Comments take stock of a number of statements made at the international level that denounce forced evictions, and discusses the types of protection required to ensure respect for provisions of the Covenant.
- 22 ICESCR General Comment 7 (para 9a).
- 23 Prof. Ruggie, J. (2011) *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Guiding principles on Business and Human Rights, implementing the United Nations “Protect, Respect and Remedy” framework*. Human Rights Council, 17th Session, Geneva.
- 24 De Schutter, O. (2009) *Report of the Special Rapporteur on the right to food, Addendum: Large-scale land acquisitions and leases, a set of minimum principles and measures to address the human rights challenge*. Human Rights Council, 13th Session, Geneva.
- 25 Agenda 21, Chapter 10: integrated approach to the planning and management of land resources, para 10.5; Chapter 26, para 3(ii); UNCED, 1992. Agenda 21, Chapter 27, Promoting Sustainable Human Settlement Development, A/CONF.151/26 (Vol. I), page 58.
- 26 African Convention on Conservation of Nature and Natural Resources, 2003. Article XVII. Traditional rights of local communities and indigenous knowledge.
- 27 Framework and Guidelines on Land Policy in Africa, 2010. Section 4.5: Appropriate Strategies for Land Policy Development.
- 28 UDHR, Art. 21 (right to take part in the government of one’s country, directly or through freely chosen representatives); ICCPR, Art. 1 (right to self-determination); Art. 25 (right to take part in the conduct of public affairs); and ICESCR, Art. 1 (right to self-determination).
- 29 1992 Convention on Biological Diversity, Art. 14.1(a); 1994 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Art. 3(a) and Art. 5(d).
- 30 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, Art. 2(6); 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Art. 6.
- 31 ICESCR General Comment 4: The right to adequate housing (Art. 11 (1)):12/13/1991, 8(a).

- 32 De Schutter, O. (2009) *Report of the Special Rapporteur on the right to food, Addendum: Large-scale land acquisitions and leases, a set of minimum principles and measures to address the human rights challenge*. Human Rights Council, 13th Session, Geneva.
- 33 Free Prior and Informed Consent is recognized in the following (non-exhaustive) conventions: United Nations Declaration on the Rights of Indigenous Peoples, Convention on the Elimination of Racial Discrimination, International Covenant on Civil and Political Rights, Convention on Biological Diversity, UN Sub-Commission on the Promotion and Protection of Human Rights' Norms on Transnational Corporations, The Inter-American Commission on Human Rights, Forest Stewardship Council, World Bank's Extractive Industries Review.
- 34 For example, the following countries are examples in which national legislation incorporates community consent provisions Philippines, Malaysia, Australia, Venezuela, and Peru. UN (2005) "An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices," Presented at Workshop on Free, Prior and Informed Consent and Indigenous Peoples, organized by the Secretariat of UNPFII, 17-19 January 2005, UN Headquarters, New York, USA. Page 8.
- 35 The U.S. Government recognizes the right of IP to "free, prior, and informed consultation," maintaining that the use of the term "consent" privileges IP over other groups and is undemocratic in its effect on process. See: USAID Issue Brief: *Tenure and Indigenous Peoples*. Property Rights and Resource Governance Briefing Paper #13. US Agency for International Development, 2011. Page 2.
- 36 More details on how the IFC recommends implementing FPIC can be found in its new Guidance Notes available at: http://www1.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/ifc+sustainability+framework/2012+edition/2012-edition#GuidanceNotes. (See Guidance Note 7 on Indigenous Peoples.)
- 37 IFC (2012) *Performance Standard 7 Indigenous People*, January 2012, page 1.
- 38 FSC (1996) *FSC Standards for Forest Stewardship*. Criterion 3.1: "Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies". Roundtable on Palm Oil Crit. 7.5; Roundtable on Soy Criterion 3.2.2; Roundtable on Biofuels Criterion 12b.
- 39 De Schutter, O. (2009) *Report of the Special Rapporteur on the right to food, Addendum: Large-scale land acquisitions and leases, a set of minimum principles and measures to address the human rights challenge*. Human Rights Council, 13th Session, Geneva, Principle 2, page 16. Herz, Steven, Antonia Vina, and Jonathan Sohn, Development Without Conflict, The Business Case for Community Consent. Ed. Jonathan Sohn. World Resources Institute, page 10. HLPE (2011) *Land tenure and international investments in agriculture*. A report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security: Rome.
- 40 The draft version of the VGs as per the date of publication of this report.
- 41 CFS (2011) *Consolidated Changes to the First Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, (12-15 July and 10-15 October 2011)*. Committee on World Food Security, UN-FAO, Rome.
- 42 Ibid, Article.3B6.
- 43 Forest Peoples Programme also considers the definition of each of these terms in a memo on the IFC ESRP manual, and states that "To be meaningful, informed consent must be sought sufficiently in advance of any authorization by the State or third parties or commencement of activities by a company that affect indigenous peoples and their lands, territories and resources." Forest Peoples Programme (2011) *Memo on the International Finance Corporation, Review of the Sustainability Policy, Performance Standards and the Access to Information Policy*. Forest Peoples Programme, March 2011, page 22.
- 44 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Arts. 6.3, 6.4 and 6.8.
- 45 IMF (2007) *Code of Good Practices on Fiscal Transparency*. International Monetary Fund, section 1.1.5.
- 46 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Art. 3.8.
- 47 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context, the 1992 Convention on Biological Diversity, and the 1992 UN Convention to Combat Desertification.
- 48 Roundtable on Sustainable Biofuels (2011) *RSB Screening Tool*. Principle 6b, page 14.
- 49 African Convention for Natural Resources, 1968 rev 2003. Article XXV: Exceptions, 2a.
- 50 UDHR, Art. 19 (right to freedom of opinion and expression; which includes right to seek, receive and impart information and ideas through any media and regardless of frontiers); ICCPR, Art. 19 (right to receive information).
- 51 1994 UN Convention to Combat Desertification, Arts. 10(c), 16(f).
- 52 Espoo Convention, Arts. 3.8, 4.2; Aarhus Convention, Arts. 6.2.2, 6.3, 6.6.
- 53 UNCED (1993) *Agenda 21: The United Nations Programme of Action for Sustainable Development*. United Nations Conference on Environment and Development, Arts. 2.37(b) and 8.4(e).
- 54 IMF (2007a) *Code of Good Practices on Fiscal Transparency*, Art. 4.2.4.; IMF (2007b) *Manual on Fiscal Transparency*.
- 55 IMF (2007a) *Code of Good Practices on Fiscal Transparency*, Art. 1.1.5.
- 56 IMF (2005) *Guide on Resource Revenue Transparency*, International Monetary Fund, June 2005.
- 57 CFS (2011) *Consolidated Changes to the First Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, (12-15 July and 10-15 October 2011)*. Committee on World Food Security, UN-FAO, Rome, Arts. 3b and 12.3.
- 58 The African Convention on Conservation of Nature and Natural Resources, 2003. Article XVI. Procedural Rights.
- 59 IFC (2007a) *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets, International Finance Corporation*, page 27 "...stakeholders, including affected communities, have accurate and timely information about the project, its impacts, and any other aspects that may have an effect on them."
- 60 Anseeuw, W., L., Alden Wily, L. Cotula, and M. Taylor. 2012. Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project. ILC, Rome, page 7.
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- 62 Ibid.
- 63 Ibid, Principle 17, page 30.
- 64 A Quick Reference: British Columbia's Timber Tenure System. 2001. Cortex.
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- 69 UN (1986) *United Nations Declaration on the Right to Development*, Article 2(3). De Schutter, O. (2009) *Report of the Special Rapporteur on the right to food, Addendum: Large-scale land acquisitions and leases, a set of minimum principles and measures to address the human rights challenge*. Human Rights Council, 13th Session, Geneva.
- 70 IMF (2005) *Guide on Resource Revenue Transparency*, International Monetary Fund, June 2005, para 91.
- 71 The Natural Resource Charter, November 2010, Precept 1.
- 72 For those interested the African Union Land Policy, the EU Land Policy and the French White Paper are considered to be best practice guidance.
- 73 EU Task Force on Land Tenure (2004) *EU Land Policy Guidelines. Guidelines for support to land policy design and land policy reform processes in developing countries*, para 3.1. Deininger, K., Byerlee, D., Lindsay, J., Norton, A., Selod, H., Stickler, M. (2011) *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits*. The World Bank, page 68.
- 74 Expert Interview, August 2011.
- 75 CFS (2011) *Consolidated Changes to the First Draft of the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, (12-15 July and 10-15 October 2011). Committee on World Food Security, UN-FAO, Rome, paras 20.1 to 20.5.
- 76 IMF (2005) *Guide on Resource Revenue Transparency*, International Monetary Fund, June 2005, para 1.1.5.
- 77 EU Task Force on Land Tenure (2004) *EU Land Policy Guidelines. Guidelines for support to land policy design and land policy reform processes in developing countries*, para 3.10. Deininger, K., Byerlee, D., Lindsay, J., Norton, A., Selod, H., Stickler, M. (2011) *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits*. The World Bank, page 93.
- 78 ROPPA, PROPAC and EAFF (2011) *Agricultural investment strengthening family farming and sustainable food systems in Africa: a synthesis report*. African farmer Workshop, 4-5 May 2011, Mfou, Yaounde, Cameroon, page 9.
- 79 Deininger, K., Byerlee, D., Lindsay, J., Norton, A., Selod, H., Stickler, M. (2011) *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits*. The World Bank, pages 116 and 118.
- 80 African Union (2010) *Frameworks and guidelines on land policy in Africa. Land policy in Africa: and framework to strengthen land rights, enhance productivity and secure livelihoods*. African Union, African Development Bank, and Economic Commission for Africa, Addis Ababa, Ethiopia, para 2.6.
- 81 African Union (2010) *Frameworks and guidelines on land policy in Africa. Land policy in Africa: and framework to strengthen land rights, enhance productivity and secure livelihoods*. African Union, African Development Bank, and Economic Commission for Africa, Addis Ababa, Ethiopia, pages 13 and 35. Deininger, K., Byerlee, D., Lindsay, J., Norton, A., Selod, H., Stickler, M. (2011) *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits*. The World Bank, page 155. EU Task Force on Land Tenure (2004) *EU Land Policy Guidelines. Guidelines for support to land policy design and land policy reform processes in developing countries*, para 3.6.2. AFD (2010) *Large-scale Land Acquisition and Responsible Agricultural Investment: for an approach respecting human rights, food security and sustainable development*. Agence France Développement, GISA and the Technical Committee on Land Tenure and Development. French Ministry of Foreign Affairs, page 7.
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- 86 Ibid, pages 45 and 46.
- 87 Ibid, pages 39 and 47.
- 88 Ibid, page 62.
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- 90 RFI (2011) "Accapement des terres - Un projet de biocarburant fait deux morts dans la Vallée du Fleuve Sénégal" <http://fr.allafrica.com/stories/20110271111.html>
- 91 Deininger, K., Byerlee, D., Lindsay, J., Norton, A., Selod, H., Stickler, M. (2011) *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits*. The World Bank, pages 23, 111 and 155. EU Task Force on Land Tenure (2004) *EU Land Policy Guidelines. Guidelines for support to land policy design and land policy reform processes in developing countries*, para 6.4.
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- 97 Anseeuw, W., L. Alden Wily, L. Cotula, and M. Taylor (2012) "Land Rights and the Rush for Land: Findings of the Global Commercial, Pressures on Land Research Project". ILC, Rome, page 7.
- 98 For example, see Global Witness report: Cambodia's Family Trees and Country for Sale, available for download at: <http://www.globalwitness.org/campaigns/corruption/oil-gas-and-mining/cambodia>

- 99 Deininger, K., Byerlee, D., Lindsay, J., Norton, A., Selod, H., Stickler, M. (2011) *Rising Global Interest in Farmland: Can it Yield Sustainable and Equitable Benefits*. The World Bank, pages 118 and 120.
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- 101 HLPE (2011) *Land tenure and international investments in agriculture*. A report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security: Rome, page 27. Anseeuw, W., L. Alden Wily, L. Coyula and M. Taylor (2011) *Land Rights and the Land Rush: Findings of the Commercial Pressures on Land global research project*. International Land Coalition: Rome.
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- 107 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, is an international agreement which aims at sharing the benefits arising from the utilization of genetic resources in a fair and equitable way. Art.12, Traditional Knowledge Associated with Genetic Resources: para 1, states that: "In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources." For further information, please see: <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>
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- 110 De Schutter, O. (2009) Report of the Special Rapporteur on the right to food, Addendum: Large-scale land acquisitions and leases, a set of minimum principles and measures to address the human rights challenge. Human Rights Council, 13th Session, Geneva, Principles 1 and 2.
- 111 UN (1986) United Nations Declaration on the Right to Development, Arts. 6(3) and 8(2).
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- 113 IMF (2007a) *Code of Good Practices on Fiscal Transparency* Art. 1.2.4.
- 114 OECD (2011b) *OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a global Context*. OECD Ministerial Meeting 2011: Organisation for Economic Co-operation and Development, Section III.
- 115 The UNEP (2010) Guidance Notes on land and conflict; Agenda 21, Chapter 27. 9 (g); ISO 2600, 286-287, p. 4; The Equator Principles, Ceres Principles, and Roundtable on Biofuels all contain similar provisions.
- 116 EC (2004) *Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC*. Strasbourg: European Parliament, Council. Official Journal of the European Union, para 16.
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- 118 UNFAO (2011) *Environmental Impact Assessment: Guidelines for FAO Field Projects*. Food and Agricultural Organisation of the United Nations, Rome, September 2011, page 7.
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- 125 HLPE (2011) *Land tenure and international investments in agriculture*. A report by the High Level Panel of Experts on Food Security and Nutrition of the Committee on World Food Security: Rome. Expert Interview, September 2011.
- 126 Expert Interview, September 2011.
- 127 IMF (2007a) *Code of Good Practices on Fiscal Transparency*. International Monetary Fund, Section 3.1.
- 128 UNECE (1998) *Aarhus Convention: Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters*. Aarhus, Denmark: United Nations Economic Commission for Europe, Art. 6(6).
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- 130 Equator Principles (2006) *Equator Principles*, Principle 7 (categories are defined as per IFC criteria).
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 - 133 IMF (2007a) *Code of Good Practices on Fiscal Transparency*. International Monetary Fund, Section 4.3.
 - 134 Cotula, L (2011) *Land Deals in Africa: What's in the contracts?* International Institute for Environment and Development, page 7.
 - 135 Prof. Ruggie, J (2011) *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: Principles for responsible contracts, integrating the management of human rights risks into State-investor contract negotiations, guidelines for negotiators*. Human Rights Council, 17th Session, 25 May 2011.
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