

TAINTED LANDS

CORRUPTION IN LARGE-SCALE LAND DEALS



Professor Olivier De Schutter

ABOUT THIS REPORT

This report details the findings of the *Tainted Lands* project, which was jointly launched in 2015 by the International Corporate Accountability Roundtable (ICAR) and Global Witness. At the outset of the project, ICAR and Global Witness commissioned Professor Olivier De Schutter to author this report, which is the result of a series of stakeholder consultations and extensive desk-based research. The intention of this report is twofold. First, the report aims to raise awareness of large-scale land deals, corruption, and the combined effects of these two issue areas on human rights around the world. Second, the report intends to provide practical steps that investors, financial institutions, and governments must take to prevent human rights harms from occurring in the context of corruption and land.

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ACKNOWLEDGEMENTS

Sara Blackwell and Mina Manucheheri of ICAR and Josie Cohen of Global Witness coordinated the development of this report.

ICAR and Global Witness have consulted the following organizations throughout the project and would like to thank them for their valuable contributions to the report:

Action Aid, Amnesty International, Forest Peoples Programme, Friends of the Earth, Global Initiative for Economic, Social, and Cultural Rights, Inclusive Development International, International Consortium of Investigative Journalists, Landesa, Leigh Day, Munden Project, Namati, Peace Brigades International, Oakland Institute, Oxfam America, Rights and Resources Initiative, Self, Transparency International, World Resource Institute.



PREFACE

Communities around the world are being robbed of the land on which they depend. While “tainted lands” is a term newly established by this report, it defines an old phenomenon—one where investors gain control of large parcels of land through corrupt means, harming local populations in the process.

Driven by the rising demand for food, fuel, and commodities, companies are all too often striking deals with corrupt State officials without the consent of the people who live on it. The last decade has seen an upsurge in land grabs for industries like mining, logging, agribusiness, and infrastructure projects, with local communities rarely consulted or compensated. The actors colluding to grab land tend to be corporations, foreign investment funds, national and local State officials, and the governments of wealthy yet resource-poor nations looking to cheaply acquire land.

Regrettably, it’s a phenomenon that is occurring the world over at an unprecedented rate. As of 2013, in Myanmar/Burma, 5.2 million acres of land had been awarded to businesses, largely without the consent or consideration of the Burmese people. To put that number in perspective, it’s more than the land mass of Rhode Island, Delaware, and Connecticut combined. In certain instances, Burmese military personnel accompanied corporate representatives, and together they forced villagers from their homes. Left with no way to earn a living, the only option for many land grab victims is to head to already over-crowded cities, where they live largely in poverty.

The displacement of the Burmese people is devastating, but it is not unique. Throughout the world, and particularly across Africa, Asia, and Latin America, tainted land deals are depriving rural communities of the land and natural resources they and their families have relied on for generations. In both Cambodia and Laos, Vietnamese rubber companies were able to ignore national laws to acquire large swathes of land, polluting local water sources and trashing legally protected forests in the process. In Liberia, land has been taken away from communities and leased out to investors for the development of palm oil plantations which then break promises of decent salaries to local workers and damage the local environment.

Thus, tainted land deals are inflicting irreparable damage on populations around the world. Millions of people are being pushed off their land deeper into poverty and left with limited or no access to what is often the only lifeline they have—their land.

As this report will illustrate, corruption enables land grabbing in a number of ways. It can be simply transactional—when State officials accept bribes from a company to gain access to land, for example. It can also be institutionalized—when decision-making in State bodies such as the police, judiciary, or executive is skewed so that business or political elites can ignore national laws to seize land without facing the consequences.

Tainted Lands explores existing frameworks that could help protect land rights and tackle corruption, including laws such as the UK Bribery Act and the U.S. Foreign Corrupt Practices Act. The report asserts, however, that much more must be done, laying out a set of recommendations for governments, companies, and the financial sector.

What is clear is that any efforts to end land grabbing must also tackle corruption, as the two tend to co-exist and are mutually reinforcing. Private sector actors and governments need to do far more to ensure that they aren’t driving human rights harms at home or abroad. Not only is the impact on life and livelihood severe, but for companies and investors, becoming embroiled in a corrupt land deal poses major reputational, financial, and legal risks.

Cumulatively, we must demand reform from our governments, corporations, and financial institutions. We hope that this report provides several stepping stones toward a world in which land deals are not tainted by human rights harms and corruption.

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EXECUTIVE SUMMARY

In recent years, there has been an unprecedented rise in the sale and leasing of large areas of land, particularly in developing countries. The regions concerned are those where natural resources and land suitable for agriculture, extractive activities, timber concessions, or infrastructure projects is abundant; workforces are cheap; and access to global markets is relatively easy. The investors in these large-scale land leases or acquisitions—referred to as “land deals” or “land investments” throughout this report—are local government and business elites, foreign investment funds, corporations, or governments of cash-rich but resource-poor countries.

This report focuses on one major driver of the adverse human rights impacts of these increasing land investments—corruption. Corruption taints land deals in multiple ways, most notably when investors pay bribes to public officials in exchange for favorable land leases or acquisitions that violate the rights of local communities, elites capture the titling process through illegal means and at the expense of local land users, or investors rely on weak rule of law or corrupt remedial schemes to deny land users’ access to remedy.

Even in the absence of corruption, large-scale land investments may worsen rather than reduce rural poverty, encouraging forms of development that are neither environmentally nor socially sustainable. The Author and developers of this report advocate for investments in local communities and small holder farmers to be prioritized as the best means to achieve sustainable development. However, the focus of this report is to shed light on corruption, which intensifies the negative human rights and environmental impacts of the growing system of large-scale land investments and yet remains largely ignored. As such, this report aims to highlight these impacts and provide recommendations for addressing them while at the same time acknowledging the pressing need for systematic reform.

Project Background

Launched in 2015 by the International Corporate Accountability Roundtable (ICAR) and Global Witness, the “Tainted Lands” project examines the risk of both grand corruption and petty bribes in large-scale land deals and develops recommendations for what can be done to address corruption at all phases of such land leasing and acquisition. In doing so, the project commissioned Professor Olivier De Schutter, former UN Special Rapporteur on the Right to Food, to lead a series of stakeholder consultations and extensive desk-based research toward the development of concrete policy recommendations aimed at eliminating corrupt practices from large-scale land deals.

Report Roadmap

Section I of this report provides an overview of the phenomenon of large-scale land deals. It assesses the trend at a global level and examines structural obstacles faced by efforts to regulate such deals. Within this context, Section II focuses on corruption as a major obstacle to improving the protection of local communities and indigenous peoples whose livelihood, identities, and traditional ways of life depend on the use of local lands and natural resources. This phenomenon is largely understudied because corruption, by its very nature, is hidden and therefore poorly documented. Outlining the current state of play in relation to corruption and land deals, Section III explores domestic legislation, international treaties, and multi-stakeholder initiatives that have aimed to address various aspects of corruption and land rights issues. In Section IV, the report concludes by offering a set of policy recommendations targeted toward: investors, banks and other financial institutions, States where investments in land are made (host States), and States where investors are headquartered (home States).

Report Recommendations

The following is a summary of this report’s key recommendations:

Investing companies should:

- Undertake a process at all stages of operations to seek the **free, prior, and informed consent (FPIC)** of all affected communities, including indigenous peoples.
- Take **human rights due diligence** measures to ensure that their subsidiaries and business partners do not resort to corruption. Due diligence should be exercised in five key ways:
 1. A prohibition on corruption and a reference to human rights should be inserted systematically into any contract that establishes a long-term, ongoing relationship between an enterprise and a business partner.

2. Business enterprises should identify general areas where the risk of adverse human rights impacts is most salient and prioritize these areas for systematic human rights due diligence measures. If due diligence reveals that corruption in a country's land sector is unavoidable, the company should not proceed with the investment.
 3. An investing company should develop and adopt adequate internal controls, ethics and compliance programs, and measures for preventing and detecting both bribery and grand corruption, developed on the basis of a risk assessment addressing the corruption risks facing the enterprise.
 4. Corruption risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's human rights due diligence measures are adapted and continue to be effective in mitigating the risk of becoming complicit in corruption.
 5. Strongly articulated and visible support and commitment should come from senior management, with one or more senior corporate officers exercising independent oversight of the enterprise's human rights due diligence measures regarding corruption.
- **Disclose contract terms** relating to large-scale land leasing and acquisition, ensuring that, at the very minimum, basic information about the project (including contract term, size of land, purpose of investment, impact assessments, mitigation plans, and local employment and infrastructure commitments) is made available and accessible to potentially affected communities.
 - Focus the company's disclosure of contract terms and operational transparency on "**salient human rights issues**," which are measured by scale, scope, and possibility to remedy.
 - Have in place strong **whistleblower protections** to ensure that there are no reprisals against them. This will, in turn, make a company's human rights due diligence policies more effective, as individuals with relevant information may feel safer coming forward.

Banks and other financial institutions should:

- Ensure that the investors they support in projects involving land tenure risks undertake **human rights due diligence** to ensure that they or their business partners do not cause human rights violations or resort to corruption.
- Undertake "**customer due diligence**" (**CDD**) upon establishing business relationships with new clients, for occasional transactions that reach a certain level, or where there is suspicion of money laundering. CDD includes identifying both the direct client and the "beneficial owner" to see who is behind the corporate structure, as well as conducting ongoing due diligence on the business

relationship and maintaining scrutiny of transactions to ensure consistency with the institution’s knowledge of the customer and its source of funds.

- Include information on **beneficial ownership** in publicly available land registries.

Host States should:

- **Fully protect and secure** the land and natural resource rights of local communities who depend on the land concerned. These forms of protection should include both the specific protection granted to the lands and territories of indigenous peoples as well as the right of all peoples to freely make use of their natural wealth and resources.
- Adopt legislative reforms that reduce opportunities for corruption in land deals by implementing **principles of transparency and accountability**. This should include requiring the public disclosure of income and assets for all elected and senior public officials and their family members. This includes implementing, as a matter of priority:
 - 1 The “publish what you pay, publish what you receive” principle;
 - 2 Access to information acts that allow civil society and the media to effectively perform their monitoring roles; and
 - 3 Legislation ensuring that public servants divulge the assets they and their family members own at the start and end of their tenure in office and regularly throughout. Such reforms would be particularly effective if combined with a prohibition for public sector employees to hold bank accounts outside the jurisdiction concerned, in order to avoid any expatriation of illicit funds—a rule which, in order to be effectively enforced, requires the collaboration of the financial sector.
- Ensure that **negotiations** with prospective investors are fully transparent, key contract terms and conditions are disclosed in their entirety before the contract is signed, and that the agreement reached is in the best interests of the local population, as required under human rights law, particularly in relation to the right to self-determination.
- Ensure that **local communities** who depend on the land concerned are fully involved in the negotiations, an FPIC process is undertaken with potentially impacted communities, and measures are taken to guard against the bribery of community representatives.
- Ensure that **judicial and non-judicial grievance mechanisms** are independent and free from pressure from political or business elites involved in the land

sector. In particular, courts should have the capacity and legal authority to review any decision to allocate land, both on procedural and substantive grounds. In particular, courts should be in a position to control the invocation of “public purpose,” “public interest,” or other formulations of the “eminent domain” requirement. Reliance on such provisions should refer not to some abstract or general notion that investment shall contribute to economic growth and therefore to economic progress, but to the specific purposes of the investment concerned, as well as to whether or not it shall improve the situation of the local communities concerned.

Home States should:

- **Prevent human rights violations abroad** by business enterprises that are incorporated under the State’s laws or that have a main seat or a main place of business under its jurisdiction. This requires a combination of policy measures (including economic incentives) and regulatory reform.
- Make corruption in both the public and private sectors a **criminal offence** and ensure that entities within the State responsible for investigating and enforcing such laws have **adequate resources and training** to do so effectively.
- Require that companies domiciled under the State’s jurisdiction take **human rights due diligence** measures to ensure that their subsidiaries and business partners neither resort to nor benefit from corruption.
- Require **disclosure** of details about companies’ land acquisitions in other countries. This requirement should include a description of the negotiation process, information on the seeking of FPIC in the process, and key contract terms such as the size of the land leased or bought, the exact location of the land, the final sale or leasing price, and commitments made to affected communities such as the building of roads, schools, or other infrastructures.
- Provide victims of human rights abuses with **access to the State’s courts** to address harms caused by, contributed to by, or linked to companies and/or their subsidiaries incorporated under the State’s laws or that have a main seat or a main place of business under its jurisdiction.

INTRODUCTION

The world over, robbing communities from the land on which they depend has become an instrument of mass marginalization. Land grabs increase poverty in rural areas and force the destitute to move to already over-crowded cities. Although this phenomenon is by now well documented, little is changing on the ground, and crucial contributors remain systematically unaddressed. This report aims to tackle one of the key parts of the problem—widespread corruption in the development, conclusion, and monitoring of large-scale land deals.

What is corruption?

While corruption takes many forms, it can generally be separated into two categories—petty corruption and grand corruption.¹ Petty corruption includes exchanges of small amounts of money or favors (i.e. bribes) and most often involves local government authorities or community leaders, such as village chiefs.² Grand corruption takes place on a large-scale, systematic basis and pervades all levels of government, including the highest levels. Because of the sums involved, grand corruption is often linked to money laundering schemes and in many cases has international ramifications.³ In both forms, corruption “always involves the acquisition of money, assets, or power in a way which escapes the public view; is usually illegal; and is at the expense of society as a whole either at a ‘grand’ or everyday level.”⁴ When referring to corruption, this report includes both grand and petty corruption in its use of the term, unless otherwise noted.

What is the connection between corruption and human rights?

Corruption is increasingly tainting all phases of land deals, resulting in a wide range of adverse human rights impacts. Examples of such harms range from forced displacement of communities without adequate compensation, to limiting access to basic necessities such as food and water, to the targeting and killing of land defenders. Corruption facilitates such violations by allowing actors involved to bypass existing legal safeguards that were designed to protect against such abuses.

What are “tainted lands”?

This report establishes and defines the term “tainted lands” as lands that have been obtained by an investor through corrupt means. The investor may have bribed public officials or community leaders in charge of allocating land on behalf of communities. Alternatively, the investor may have failed to ensure that the land was acquired by the seller through legal and transparent means (i.e. untainted by corruption). As will be highlighted throughout this report, studies show a significant statistical correlation

between levels of perceived corruption and the likelihood of large-scale land deals affecting the rights and interests of land users.

What are “land grabs”?

An important distinction to be made in discussing the issue of large-scale land deals is the relationship between such deals and what civil society groups denounce as “land grabs.” In a 2011 Declaration, the International Land Coalition (ILC)—a global alliance of civil society and intergovernmental organizations with 152 institutional members representing 54 countries—defined “large-scale land grabs” as land acquisitions or concessions that are one or more of the following:

- (i) In violation of human rights, particularly the equal rights of women;
- (ii) Not based on the free, prior, and informed consent (FPIC)⁵ of the affected land-users;
- (iii) Not based on a thorough assessment or in disregard of social, economic, and environmental impacts, including the way these impacts are gendered;
- (iv) Not based on transparent contracts that specify clear and binding commitments about activities, employment, and benefits-sharing; and/or
- (v) Not based on effective democratic planning, independent oversight, and meaningful participation.⁶

Any large-scale land deal that is tainted by corruption would fall under this definition, at the very least because it would not meet the requirements of FPIC; transparency; and democratic planning, oversight, and participation. As such, large-scale land deals that qualify as “tainted lands” also qualify as land grabs.

In which ways does corruption play a role in land deals?

Corruption is often difficult to identify and reliably measure. Surveys show, however, that corruption is widespread in land administration in many countries and a major obstacle to protecting local communities from the negative human rights impacts of large-scale land deals.⁷ As will be discussed in detail in this report, corruption may play a role at six interconnected phases of land leasing and acquisition:

1. The demarcation of land and the rolling out of titling schemes;
2. The design of land use schemes and the identification of land as “underutilized” or “vacant”;
3. The use of “public purpose” or “eminent domain” provisions to justify the expropriation of land;

4. The selling or leasing out of land to investors by the government or by community leaders;
5. The exercise of remedies in land-related complaints; and
6. The monitoring of investor obligations during the post-project period.

What are some common pre-conditions of “tainted lands”?

The regions primarily impacted by the recent wave of large-scale investments in land are those where natural resources and/or land suitable for cultivation, extractive activities, timber concessions, and/or infrastructure projects is abundant; workforces are cheap; and access to global markets is relatively easy. But weak governance also facilitates such deals. As a 2011 Oxfam report notes, “[l]and investors appear to be targeting countries with poor governance in order to maximise profit and minimise red tape . . . [O]ver three quarters of the 56 countries where land deals were agreed between 2000 and 2011 scored below average on four key governance indicators.”⁸

To some, this may come as a surprise. In many sectors, home governments of major foreign direct investors, and socially responsible investors themselves, tend to prefer to invest in countries where the host government respects human rights in order to avoid risks associated with social and political instability.⁹ Land, however, is a resource that is typically poorly governed, with decision-making concentrated in very few hands. Lack of transparency, rather than democratic accountability, is the norm. Host government officials at all levels may see the interest of investors in land as an opportunity to enrich themselves, and recent studies show a significant statistical correlation between levels of perceived corruption and the likelihood of land deals.¹⁰ This suggests that local officials in charge of land administration, or higher-level public officials involved in delivering the requested authorizations for land deals, may actively encourage large-scale leases or acquisitions of land as a means to attract personal profit.

Moreover, some companies may intentionally target countries where the rule of law is weak and, correspondingly, corruption is rampant.¹¹ Specifically, a company may see advantages to paying bribes and establishing a presence in countries where corrupt practices pervade the governmental and judicial systems. The widespread tolerance of such practices may enable the company to bypass certain regulations and “fast track” investments through administrative procedures that the company might otherwise be required to follow.

The perpetration of corrupt land deals is also being incentivized by wider macro-economic factors. The tendency for economic development programs to focus on large-scale projects, especially in the agricultural, mining, and infrastructure sectors,

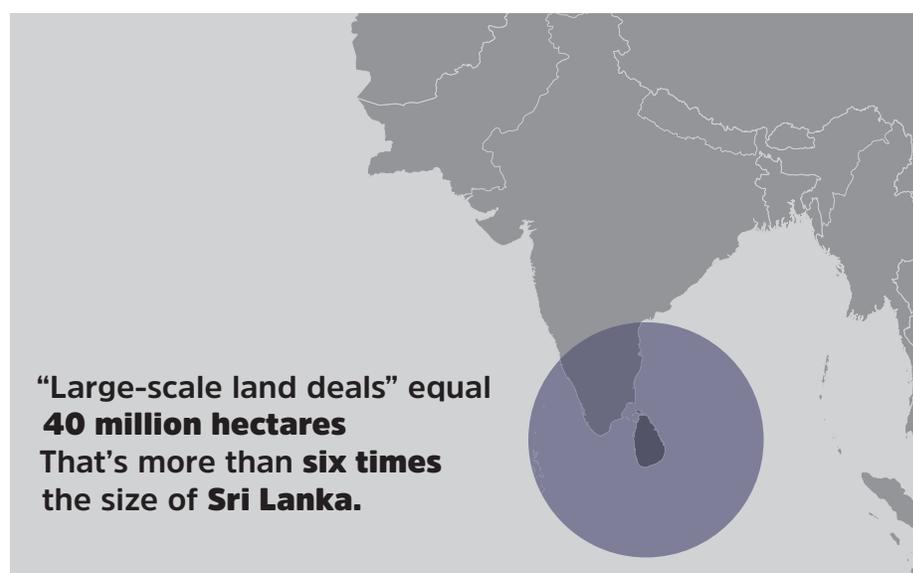
massively increases the pressure on land resources. Such programs are often promoted by governments across the Global South and supported by bilateral and multilateral donors, as well as through trade and investment deals. Furthermore, as discussed in Section II of this report, some multilateral and donor-funded initiatives, such as the New Alliance for Food Security and Nutrition, are actively seeking to change domestic land policies and laws in order to facilitate large-scale land investments by multinational companies. In light of this, the issues raised in this report reflect as much upon the dominant economic development paradigm, and those who promote it, as they do upon the countries where such corrupt land deals are rife.

I. THE CURRENT WAVE OF INVESTMENTS IN LAND

Recent years have witnessed a significant increase in large-scale acquisitions or leases of land, and countries with weak governance and poor government accountability are being particularly targeted.

1. The Extent of Large-Scale Land Deals

Since 2000, over 1073 “large-scale land deals”—defined as an area of at least 200 hectares—have been concluded, covering an estimated total of almost 40 million hectares.¹² As a matter of scale, this figure represents more than six times the size of Sri Lanka (6.5 million hectares), significantly more than the total landmass of the United Kingdom (28 million hectares), and more than twice the total arable land of France (18 million hectares).

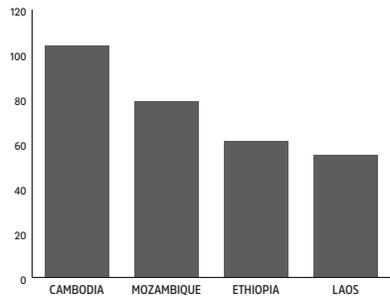


Regionally, the largest share of these deals has concerned Africa, where 457 deals have been documented. Within Africa, Eastern and Western Africa have been most significantly targeted, with 229 and 137 deals documented, respectively.¹³ The regions of Southeast Asia, with 316 deals documented, and, to some extent, Latin America, with 167 deals, are also significantly affected by this wave of large-scale land investment.¹⁴

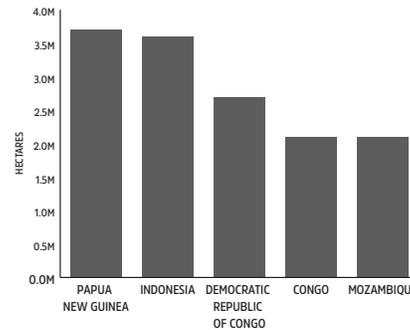
At the country level, Indonesia tops the list, with 125 deals documented, followed by Cambodia (104 deals), Mozambique (79 deals), Ethiopia (61 deals), and Laos (55 deals).¹⁵

Focusing on the amount of land involved, rather than on the number of deals in target countries, six countries top the list—more than 4 million hectares of deals have

been concluded in South Sudan, followed closely by Papua New Guinea (3.7 million hectares), Indonesia (3.6 million hectares), the Democratic Republic of Congo (2.7 million hectares), the Congo (approximately 2.1 million), and Mozambique (also approximately 2.1 million).¹⁶



LARGE SCALE LAND DEALS BY COUNTRY



LARGE SCALE LAND DEALS BY LAND SIZE

However, the corruption and secrecy surrounding land acquisitions makes it difficult to determine the full extent of land acquisitions globally or even nationally in the majority of States. Moreover, the information above relies on publicly available information, meaning that countries with more open data policies tend to be overrepresented. Despite their limitations, the figures above illustrate the extent of the phenomenon.

As noted above, the regions most impacted by the recent wave of investments in land are those where natural resources and/or land suitable for cultivation, extractive activities, timber concessions, and/or infrastructure projects is abundant; workforces are cheap; and access to global markets is relatively easy. These regions are also often where financial and commodity speculation has fueled increasing commercial demand for land. The investors involved in such deals are most often local elites, foreign investment funds, foreign corporations, or the governments of cash-rich, yet resource-poor, countries seeking to outsource food production in order to ensure a stable and reliable food supply for their populations.

Of course, the recent wave of large-scale land deals is not entirely unprecedented—but the speed at which the phenomenon has been developing and the scope of the development is alarming, as the statistics above suggest. In addition, the characteristics of the current wave of land deals are different from what has been seen in the past. Rather than leaving it to local producers to supply international markets with agricultural products at the most competitive conditions, current lessees or buyers of land now seek to ensure their own direct access to land in order to supply agricultural commodities themselves. The strategy of these investors is to circumvent international markets that have become more volatile and thus increasingly unreliable.

A global market for land and resources rights is thus rapidly taking shape.

Competition for access to these resources is increasing, combined with a discourse about the scarcity of and growing demand for agricultural commodities. As a result, more and more actors vie for the land on which communities rely, and land is rapidly becoming an asset on which investors are speculating.¹⁷



CASE STUDY: MYANMAR/BURMA

The process toward civilian rule, which began in 2011, and the new National Land Use Policy approved in January 2016 are, without a doubt, encouraging developments in Myanmar/Burma. Despite this progress, however, illegal land acquisitions continue. According to a 2013 Forest Trends report, approximately 5.2 million acres—nearly thirty-five times the size of Yangon, the country's largest city—had already been awarded to business enterprises by 2013, predominantly for agriculture.¹⁸ These transfers of land have often taken place without the consent of local communities, who rely on this land for their livelihoods.

Due to the lack of transparency in Myanmar/Burma's land sector, it is usually impossible to access information on how these land seizures are happening, and few in-depth investigations have been conducted. However, a Global Witness exposé published in 2015 detailed how Myanmar/Burma's business, political, and military cronies conspired to grab farmers' land, leaving communities struggling

to survive. The investigation revealed the extent of the collusion. For example, company representatives accompanied soldiers as they confiscated land and military actors presented themselves as company representatives to local villagers. The involved companies, high-ranking military officials, and the Union Solidarity and Development Party (USDP)—the political party linked to the army—all appear to have directly benefited from these transfers of land, while affected local communities have been pushed deeper into poverty with little chance of accessing redress.¹⁹

When Global Witness wrote in 2015 to the actors involved in the case above, only one response was received. Sein Wut Hmon, a rubber company controlling almost two thousand hectares of land, denied that it had colluded with the military or grabbed local people's land and stated that it had brought jobs and development to the area.

2. Obstacles to Regulating Land Deals

Some commentators see opportunities in this renewed interest in large-scale land investment. These commentators underline that, as a sector, agriculture in particular has been neglected for many years due to falling prices of agricultural commodities and the weak ability for rural communities to be involved in defining development priorities.²⁰ Yet, these commentators tend to underestimate the risks involved in land investments and often adopt an idealized view of the framework under which such

investments are regulated. Any such framework should regulate land investments in a manner that would avoid the taint of corruption and prevent human rights violations within local communities and indigenous populations. In reality, however, establishing such a framework encounters major obstacles.

a. The “Race to the Bottom”

The first major obstacle in establishing an effective framework to address the issue of “tainted lands” takes the form of the familiar concept of “race to the bottom.” Poor, agriculture-based countries are now seeking to attract foreign capital in order to develop their economies and infrastructures. In doing so, they compete with similarly situated countries that are seeking to bring in the same types of investors. This incentivizes these governments to relax regulation and corresponding demands on investors across a broad spectrum, including in relation to wages, enforceable labor and human rights commitments, environmental protections, and appropriate levels of taxation.²¹ These countries have thus resorted to “beggar-thy-neighbor” strategies—in order to attract investors, governments are tempted to offer investors conditions more favorable than those proposed by countries similarly situated, resulting in an endless, and ultimately self-defeating, quest for capital inflows at the expense of human rights and other protections.

box 1

THE ROLE OF REGIONAL FRAMEWORKS IN THE “RACE TO THE BOTTOM”

Regional frameworks for investment may have an important role to play in avoiding a “race to the bottom.” One encouraging example of such an initiative is the Land Policy Initiative (LPI), endorsed by the African Union.²² The LPI sets forth a framework for regulating land investment that addresses problems posed by local elites, agribusiness, corruption, and the special needs of vulnerable groups.²³ This regional initiative reiterates the need to clarify property rights in agriculture²⁴ and promotes the development of land rights transfer systems and markets.²⁵ At the same time, however, the LPI acknowledges risks associated with a reliance on Western-based concepts of property rights that result in the commodification of land and the privatization of common resources on which certain groups rely. The LPI therefore illustrates the scope of the challenges faced in creating such a framework while suggesting opportunities for addressing these challenges. If countries from the same region, potentially competing to attract the same investors, join forces in order to strengthen their respective regulatory frameworks, this could reduce the risk that such frameworks would be gradually weakened for the purpose of attracting investment. Whether this particular effort will have an impact on the behavior of governments remains to be seen.

b. The Weak Capacity of Target States

A second major obstacle in establishing a strong framework to address the issue of “tainted lands” resides in the weak capacity of host States to manage and regulate the administration and wide-ranging impacts of land investments. Robust governance frameworks and a well-trained and well-resourced public administration are necessary in order to map current land use in a way that accurately identifies the specific land available for development by investors. Both are also required in order to effectively enforce legal regulations imposing investor compliance with certain social and environmental standards. Strong institutions are also needed to support appropriate processes for consultation with local communities to ensure that the principle of FPIC—which essentially provides communities with the right to veto land deals by which they are potentially affected—is complied with whenever shifts of land use are implied and to ensure that these communities benefit from investments in their area. In particular, the screening of investors and an analysis of the economic and technical viability of any investment project, as well as the negotiation of contractual agreements and the subsequent monitoring of compliance with such agreements, all require highly qualified administrations.

Moreover, legitimate and well-resourced grievance mechanisms must be established in order to resolve any disputes that arise from large-scale land deals in a fair and expeditious manner. Specifically, the judicial systems in host States must be independent, and judges must have the capacity and knowledge of relevant laws to provide adequate oversight and ensure that land rights disputes brought before the courts are fairly decided.

All of the above elements require a level of capacity that many of the States targeted by large-scale land deals may not have.

c. The “Resource Curse”

Large-scale land deals can be seen as a new version of the “resource curse.”²⁶

Citizens of resource-rich countries may suffer from weak governance and impoverishment not despite, but rather because of, their abundant and widely coveted natural wealth.²⁷

As has been well documented, the exploitation of natural resources typically takes the form of large-scale projects in which a small number of individuals control vast amounts of wealth. The capture and distribution of benefits can therefore be highly unequal unless affirmative measures are taken to ensure that benefits will be fairly allocated across all those who are affected.

The “resource curse” phenomenon has been particularly highlighted in the context of mineral resources commoditized by the extractives industry. Such resources are non-renewable—they are “assets in the ground” whose value depends on technology, market prices, and political risk.²⁸ The exploitation of mineral resources should thus be seen as the consumption of capital, rather than a stream of income.²⁹ And although agricultural products as such are “renewed” year after year, the depletion of the soils by industrial farming methods results in agriculture ultimately becoming a form of mining. The temptation is thus overwhelming for those in power at the government and corporate levels, who do not know for how long they will stay in power, to exploit these resources in order to create as much wealth as possible within the shortest possible time. These actors are also tempted to sell off the right to exploit these resources to the highest bidder in order to cash in immediately on the equivalent of all future income streams that could result from exploiting the resource.

At the same time, Members States of the Organization for Economic Cooperation and Development (OECD) frequently seek to negotiate trade and investment deals with low- and middle-income countries in order to facilitate access by their companies to these resources, despite some of these countries having notoriously high levels of corruption and/ or weak land governance systems. Together, these factors contribute to the “resource curse” and the related issue of “tainted lands.”

d. The Complex Implications of Titling

In many of the countries most severely impacted by the issue of “tainted lands,” a significant number of individuals and broader communities do not have secure tenure rights to the land on which they live and rely upon for their livelihoods. This is due in part to the fact that many of these countries are in post-conflict, State-building situations where land titling and broader administration systems have not yet reached all affected areas.³⁰ In addition, customary and traditional forms of land tenure are often not recognized by law within such countries. Even when they are recognized on paper, customary land rights may be poorly protected in practice due to a lack of on-the-ground mapping of traditional land

tenure throughout the country. Many governments fail in particular to register or recognize shifting cultivation and communal lands, thus making land grabbing easier. Moreover, many countries have national laws establishing that all land belongs to the State, and it is therefore the government's right to lease the land to whomever it chooses. Such situations result in a heightened risk of violations of communities' land and resource rights by potential investors.

Additionally, debates continue over the appropriateness of formal titling schemes as a means of addressing such situations and strengthening the security of land tenure. Recent efforts to support reinvestment in agriculture, such as the G8's New Alliance for Food Security and Nutrition (see Box 2), have encouraged and supported target countries to implement formal titling schemes. A rationale for this position is that, whereas the rolling out of titling schemes is expensive, it is certainly less costly than agrarian reform that would involve the provision of strong support to small-scale farmers to ensure that they can use their land productively.³¹ According to this perspective, titling would also encourage individual landowners to make necessary investments in their land, not only because they will be protected from the risk of losing it, but also because the titling of property allows owners to mortgage their land and thus obtain access to credit for investments.

One problematic aspect of this perspective, however, is that small-scale farmers may end up with large amounts of debt after mortgaging their land to obtain such credit. Moreover, the emergence of land markets is seen as conducive to economic growth due to the fact that lowering transaction costs is expected to result in land going to the most productive user, thus maximizing the productivity of land as an economic asset. However, the reality is often very different. Once it is treated as a commodity, land often goes to the buyers with the highest purchasing power, not to those who need it most or can use it most productively.³²

In addition, many communities, such as indigenous communities, manage their land collectively and are unfamiliar with the notion of privately held property. Land titling schemes that force members of these communities to accept individual titles often go against communal traditions and ways of life, potentially threatening these communities' ongoing cohesiveness and existence.

Governments operating titling schemes should thus recognize the rights of communities to manage their land collectively by granting them collective land titles. Business enterprises operating in such an environment must also be sure not to undermine traditional land management systems and should seek consent from the community as a collective.

THE NEW ALLIANCE FOR FOOD SECURITY AND NUTRITION IN AFRICA (NAFSN)

The New Alliance for Food Security and Nutrition in Africa (NAFSN) was announced at the G8 Summit in May 2012, which brought together the leaders of Canada, France, Germany, Italy, Japan, Russia, the United Kingdom, and the United States. According to the terms of the declaration resulting from this G8 Summit, the participants in the NAFSN pledge to:

lift 50 million people out of poverty over the next decade, and be guided by a collective commitment to invest in credible, comprehensive, and country-owned plans, develop new tools to mobilize private capital, spur and scale innovation, and manage risk; and engage and leverage the capacity of private sector partners—from women and smallholder farmers to entrepreneurs to domestic and international companies.

The NAFSN is an attempt to mobilize the private sector to invest in food security and nutrition in order to compensate for the inability of public budgets to make up for the financing gap. To this end, the participating countries in the NAFSN negotiate country cooperation frameworks (CCFs), setting out a number of commitments to facilitate private investment in the areas concerned. With regard to the governance of land tenure, the emphasis in these CCFs has been on the clarification of property rights through the implementation of titling (also referred to as “certification”) schemes. The CCFs describe the clarification of property rights over land as beneficial for both small-scale farmers and investors. Since the announcement of NAFSN, ten African countries have joined the initiative: Burkina Faso, Côte d’Ivoire, Ethiopia, Ghana, Mozambique, and Tanzania in 2012, and Benin, Malawi, Nigeria, and Senegal in 2013.

However, the outcomes of these CCFs can be highly ambiguous. The emergence of a market for land rights may facilitate the transfer of land into the hands of local elites or foreign investors, who may capture the process of titling for their own benefit at the expense of local land and resource users. In part for this reason, the approach adopted by the NAFSN has been criticized by many civil society groups as prioritizing large-scale and industrial forms of agricultural production while potentially neglecting the needs of small-scale farmers for whom low-cost solutions based on agro-ecological methods may be more suitable and affordable.³³

The current push toward the titling of property presents a number of challenges. The clarification of property rights and the development of markets for land rights attract investors, whether these are local elites or foreign investors. This is due to the fact that, as it becomes easier to register property rights, the procedures for transferring property rights become faster and cheaper. As a result, more investors become willing to acquire land. This may result in these investors building infrastructure that will increase productivity (e.g., better storage facilities, communication routes, and irrigation schemes) and in the creation of local employment.³⁴ However, this also means that these external

investors will compete against local communities for access to the land and resources on which these communities depend. Because of the considerable difference in the respective purchasing powers of the parties involved, it is likely that external investors will easily outcompete local land and resource users in the purchasing process that has resulted from the establishment of a market for land rights.

Moreover, due to corruption, titles may simply be ignored and land taken regardless of titling schemes that involve local land and resource users. Corruption may also prevent individuals and communities that lost land from obtaining justice or redress if and when they are able to challenge such practices. In particular, the process of titling may disproportionately benefit local elites due to better connections to the officers responsible for the rolling out of titling schemes. The process of obtaining title may also be too costly or complex for the poorest segments of the population to benefit.

In addition, the rural poor may be tempted to sell off land in order to overcome temporary economic hardship such as a bad harvest or a fall in the prices received for their crops—a phenomenon referred to as “distress sales.”³⁵ This may also result in the possibility of losing property where the household finds itself unable to reimburse the lender after having mortgaged the land. Moreover, titling schemes protect those who have land and would otherwise be evicted without compensation, but they also lead to inflated prices for land that exacerbates the situation of landless rural households. Such households may find it impossible to have access to land following the speculation fueled by the titling process.

Indigenous and other communities relying on collective or communal land and resource management systems face particular challenges. National laws often do not recognize such systems and the rights they protect. As a consequence, these communities may be unable to benefit from a formal land titling process when their traditionally used land has not been formally registered in their name. Of particular concern is the forcing of communities’ previously managing land under collective or communal systems into privately registering land titles, which can have a hugely negative impact in terms of overall social cohesion and cultural well-being.³⁶ This can make a community even more vulnerable to the negative impacts of land markets due to increasing incentives for individual households to sell land to which they now hold private titles, even if such land was previously considered to be collectively owned.

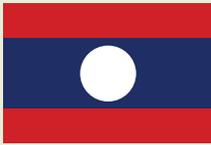
The lessons from titling schemes are therefore mixed. Such schemes are generally seen as an easy means to allow small farmers to be protected from eviction. At the same time, however, the commodification of property rights can in fact be a source of exclusion and, in practice, increase insecurity of tenure.³⁷ The competition for investment, the weak capacity of States, and the complex implications of titling and clarification of property rights are all factors that have impeded the establishment of robust regulatory frameworks to protect local communities from land grabs. As mentioned above, corruption is a distinct but interrelated factor that has played an important yet largely understudied role in obstructing the development of such frameworks in a way that addresses human rights harms. The following Section will aim to fill this gap by specifically examining the role of corruption at various phases of large-scale land deals.

II. THE ROLE OF CORRUPTION IN LARGE-SCALE LAND DEALS

This report seeks to document the role of corruption in large-scale land deals and identify how to overcome the human rights challenges that corruption presents. Corruption is a part of the broader phenomenon of “land grabbing” that is both hugely significant in practice and vastly underreported in existing analysis and advocacy. As mentioned above, there exists a statistically significant correlation between levels of perceived corruption and the likelihood of large-scale land deals. However, by its nature, corruption is difficult to identify in specific instances, let alone reliably measure. Corruption continues to be a major obstacle in protecting local communities from the negative impacts of the current wave of investments in land.



CASE STUDY: CAMBODIA AND LAOS



In the past decade, both Cambodia and Laos have experienced a “land grab” crisis. In Laos, due to the lack of transparency in the land sector, estimates for the amount of land leased out to private companies vary from 1.1 million to as much as 3.5 million hectares, with 18 percent of villages in the country potentially affected.³⁸ Cambodia has seen an equally rapid sell off, with 2.1 million hectares of land leased out as land concessions and at least 830,000 people impacted.³⁹

In both countries, the land sector is dominated by secrecy and high-levels of corruption. Business and political elites are seemingly able to get away with ignoring national laws designed to safeguard the rights of communities and the environment and have been able to rely on State security forces to protect their private interests over those of ordinary citizens.

A 2013 investigation revealed how two major Vietnamese rubber companies—Hoang Anh Gia Lai (HAGL) and the Vietnam Rubber Group (VRG)—acquired vast areas of land in violation of national laws governing land concessions

in both Cambodia and Laos. In particular, the land purchases by both companies took place at the expense of local communities who were barely compensated and whose free, prior, and informed consent was not sought. Far from protecting these communities, government officials in Cambodia and Laos licensed concessions in contravention of their own national laws and failed to take action when HAGL and VRG openly ignored these same laws.⁴⁰

Additionally, HAGL's and VRG's activities had significant negative environmental impacts, including clearing of valuable and legally protected forests within their concessions and the chemical pollution of local water sources, among other impacts.⁴¹ Only after Global Witness released a report on these land grabs and international pressure, including from investors, increased, did the companies enter into a dialogue with the communities concerned.⁴² Despite this engagement, very few of the affected individuals have received redress from the companies, although HAGL has at least begun a negotiation process with fourteen communities.⁴³

In April 2013, HAGL wrote to Global Witness, denying all the allegations described above, including any involvement in illegal logging and taking land from local residents. Furthermore, the company stated that it was the responsibility of the governments of Cambodia and Laos to ensure that community land and forests were not included in concession areas. VRG declined to comment on evidence of its members and affiliates being responsible for land grabbing and illegal activities in Cambodia and Laos. Instead,

the company pointed to a set of “responsible investment principles” that it adheres to, which include observing national laws, respecting the welfare of local communities, and implementing social infrastructure projects.

In preparing this report, ICAR attempted to contact both HAGL and VRG for responses to the allegations contained herein. No response was received from either company by the time of this report’s publication.

1. The Two Modalities of Large-Scale Land Deals

In order to understand the role played by corruption in large-scale land deals, it is useful to distinguish two modalities through which such deals may occur.

A first scenario is State-led land deals. In this scenario, the host government maps an area, identifies land that it deems “underutilized” or “vacant,” and decides to sell or lease that land to an investor, whether local or foreign. Here, the rights of land users may not be recognized at all—such users may be considered to be occupants or “squatters” without title, and the government may simply treat the land as its own.

Alternatively, if such rights are in fact recognized, the government may decide to expropriate the land by relying on a version of the “public purpose” or “eminent domain” doctrine. In the latter case, whereas the rights of land and resource users may be recognized under statutory law, such users may still be evicted from land that they are using when public authorities nevertheless decide to cede the land to an investor.



CASE STUDY: LIBERIA

The question of accountability for the choices made by governments with respect to agricultural investments is raised even in the most unlikely contexts, for example, where governments have a reputation for making decisions that benefit the population. Liberia is a case in point.

The first African female head of State, President Ellen Johnson Sirleaf was awarded the Nobel Peace Prize in 2011 for her contributions to rebuilding the country after fourteen years of civil conflict. In 2011, she was re-elected for a second term as the head of the country. However, like all leaders in the region, she cannot escape the dilemmas associated with development. On 6 December 2011, she visited communities affected by the development of a large palm tree plantation in the northwestern part of the country. Her visit and that of the ministers of her government accompanying her were triggered by protests against a large concession for palm oil development that went to a Malaysian company called Sime Darby, to which the Liberian government had ceded a total of over 768,000 acres in 2009.⁴⁴

The rural communities affected by the first stages of implementation complained that salaries paid to those employed on the plantations were below the wages promised and that the planting of palm trees led to environmental degradation. The response of President Ellen Johnson Sirleaf, as reported in the Liberian press, was this: “You are trying to undermine your own government. You can’t do that. If you do so all the foreign investors coming to Liberia will close their businesses and leave, then Liberian [sic] will go back to the old days.”⁴⁵

This response and other similar government reactions suggest an incorrect and contradictory relationship between the protection of the rights of the local communities affected by an investment and the attractiveness of a particular

location for the investor. In fact, research shows that violations of civil and political rights make a country less attractive to an investor, not more.⁴⁶ This is consistent with surveys of managers of transnational corporations, which indicate the importance of political and social stability for the choice of where to invest in foreign jurisdictions.⁴⁷ Governments with strong records on human rights are rewarded by higher foreign investment flows.⁴⁸

Unfortunately, recent reports show that the rights of land and resource users are routinely ignored in Liberia, as large sections of land are allocated to investors, particularly for the development of palm oil plantations.⁴⁹ Indeed, the outbreak of Ebola in 2014 made the situation worse, providing an opportunity for palm oil companies such as Golden Veroleum (GVL) to expand their presence, as the population was staying home because of the risks of contamination.⁵⁰

In a long and detailed letter to Global Witness in June 2015, GVL stated that the company had not expanded its land holdings during the Ebola outbreak beyond its existing plans. The company also stated that it had followed procedures that respected communities’ land rights and denied any involvement in bribery.

ICAR contacted both GVL and Sime Darby in September 2016, requesting their comment on the allegations outlined above. At the time of publication, GVL had not responded. Sime Darby replied, acknowledging that the company had “not always got everything right,” but listing a wide range of actions it had taken since 2011 to ensure positive outcomes for the environment and all stakeholders, including plantation workers and local communities. The company also stated that “if community members do not provide consent, Sime Darby will not develop their land.” Further detail on the company’s response can be found at the back of this report, at endnote 44.

A second scenario is market-led land deals. Here, the investor directly approaches a public official or local representative and offers a price for the acquisition or long-term lease of the land. In some cases, this is done by negotiating with a community leader such as a village chief or local village council. The role of the government in this scenario is less visible, but is nevertheless key. In these situations, the government will usually have already clarified property rights, thus reassuring the investor that it will be allowed to use the land without disturbance or counterclaims to the land. Ideally, this would facilitate the conclusion of mutually beneficial agreements between the investor and local communities.

In practice, however, the vast disparities in bargaining power between investors and communities impede the conclusion of fair and equitable agreements.⁵¹ Moreover, community “representatives” that investors conclude deals with may not actually have the community’s consent to take on this role, particularly where the “representative” is in fact a government appointed local official. Finally, such community “representatives” may not adequately represent the perspectives of women or minority groups affected by the land deal.



CASE STUDY: TANZANIA

Some cases of large-scale land deals are a hybrid of State-led and market-led deals. One example is the development of the Southern Agricultural Growth Corridor (SAGCOT) in Tanzania. SAGCOT covers around 287,000 square kilometers of land, representing approximately one-third of mainland Tanzania in which between nine to eleven million people live.⁵² The land acquisition process for SAGCOT has been fast-tracked under the “Big Results Now” initiative, which was launched by the Tanzanian government to accelerate progress towards poverty reduction. Under this initiative, “a total of 80,000 [hectares has been] entrusted to the Tanzania Investment Centre (TIC) to date for fielding expressions of interest from investors for land grants.”⁵³ Such land would be allocated to investors at a very low price—one USD per year per hectare, according to government representatives.⁵⁴ A 2014 government report claims that this allocation of land to investors will also benefit local, surrounding smallholders as potential out-growers who “have been trained and sensitized and are ready to engage and work with investors.”⁵⁵

In addition, in the country cooperation framework (CCF) it adopted when joining the NAFSN (see Box 2), the Tanzanian government committed to “demarcating . . . all village land in [the] SAGCOT region” and completing “village land use plans.”⁵⁶ Such plans are, in principle, the result of a participatory process of identifying the different land uses in a particular location, including settlements, pastures, cultivation, forests, or wildlife. What remains is then marked as “unused” or “general” land that the Tanzanian government can lease out to an investor, minus compensation to the local community and provided that certain environmental and social safeguards are met.⁵⁷ Thus, the demarcation of land under the SAGCOT project can be considered a hybrid of the State-led and investor-led modalities of land deals as, at least in theory, the development of “village land use plans” is a formal precondition for the demarcation of land to investors, and titles are only secured once tenure rights are fully clarified.

2. Corruption at the Various Phases of Land Deals

Within the various modalities of large-scale land deals outlined above, corruption can play a major role at six phases that are often overlapping and mutually reinforcing:⁵⁸

1. The demarcation of land and the rolling out of titling schemes;
2. The design of land use schemes and the identification of land as “underutilized” or “vacant”;
3. The use of “public purpose” or “eminent domain” provisions to justify expropriation of land;
4. The selling or leasing out of land to investors by the government or by community leaders;
5. The exercise of remedies in land-related complaints; and
6. The monitoring of investor obligations during the post-project period.

While the remainder of this Section focuses on outlining the characteristics of corruption at these six phases, it is important to note that these phases are centered on *procedural mechanisms* of corruption, which involve the subversion of land governance processes at various phases for the purpose of providing gains to a particular individual or group. In addition to this focus on procedure is the question of what *type of form* the corrupt activity itself takes in order to drive these procedural subversions. For example, corrupt activities can take the form of straight bribes (either “group bribes” or the paying off of a key local leader or public official), contract fraud or embezzlement, political support for an individual or party in exchange for land, and myriad other forms.

a. Demarcation of Land and Rolling Out of Titling Schemes

The titling of property typically involves land users seeking “certification” of their land based on evidence such as testimonies from neighbors or the results of an official demarcation process. Both petty corruption and grand corruption are common at this stage, either during the process of demarcation itself or where the individual land user seeks to have his or her land registered.⁵⁹ For example, when a farmer in the Cambodian province of Koh Kong went to local authorities to have his land measured pursuant to the Cambodian titling scheme, the local authority refused because they considered him part of the political opposition and because he would not pay them a bribe.⁶⁰

Transparency International’s Global Corruption Barometer 2013 found that, on average, twenty-one percent of the people surveyed in the

ninety-five countries for which data could be collected reported having paid a bribe for land services.⁶¹ Some countries score much higher than this average: Sierra Leone and Pakistan top the list with seventy-five percent, followed by Cambodia with fifty-seven percent and Liberia with forty-two percent of people having paid a bribe for land services.⁶² Such bribes significantly increase the cost of registering or transferring land by allowing those with the deepest pockets to capture most of the benefits from titling schemes.

For the poorest households, land administration services may simply be inaccessible. It is therefore unsurprising that there is a strong correlation between levels of corruption in land administration services and levels of hunger, as reported by the International Food Policy Research Institute's Global Hunger Index.⁶³ In the developing world, extreme poverty associated with hunger remains a primarily rural phenomenon, and secure access to land is therefore a key determinant of the ability of families to feed themselves.⁶⁴

In addition to bribery, local elites—such as government ministers or senior public officials, their family members, or powerful companies— may be tempted to use their positions of power to influence land demarcation in order to get beneficial treatment and increase their own land holdings at the expense of less powerful members of society,⁶⁵ including indigenous persons or ethnic minorities.

b. Design of Land Use Schemes and Identification of Land as “Underutilized” or “Vacant”

Large-scale land deals are typically preceded by a mapping of the various land uses in a certain area, leading the government to identify certain portions of land as “unused,” “underutilized,” or “vacant.” A common concern, however, is that land used only intermittently for activities such as shifting agriculture, grazing animals, collecting firewood, hunting, or gathering is often considered “unused,” despite the fact that such activities substantially support the livelihoods of surrounding communities. At the same time, land may be used regularly by a community, yet that community's title or claim to that land may not be recognized by a government that has instead decided to classify all untitled land as “available” for investors.

Corruption may therefore explain why, in some cases, authorities treat such land as “vacant” when, in fact, the land is being used. In today's world, almost no land is actually “unused.”⁶⁶ Such labeling is instead often utilized

as a means to facilitate elite capture for personal gain despite risks to vulnerable groups such as indigenous communities and ethnic minorities that hold land communally and/or practice forms of shifting cultivation.⁶⁷ In fact, corrupt land deals have become so systematic that they have infiltrated national development and poverty alleviation strategies.⁶⁸

c. Use of “Public Interest” or “Public Purpose” Provisions

Under international human rights law, expropriation by government of privately owned land is generally possible under four conditions:⁶⁹

1. It must be regulated by law and follow authorized legal procedures;
2. There must be a “public purpose” or “public interest” in expropriating the land, such as the building of major infrastructure that serves the public welfare;
3. The eviction must be reasonable and proportionate to the public welfare objective pursued; and
4. The landowner must be granted full, fair, and equitable compensation, which generally must include that he or she should be allowed to resettle on land of at least commensurate quality, size, and value.⁷⁰

The notions of “public interest” and “public purpose” play a central role in development. However, these notions are frequently abused due to the fact that clear and uncontested definitions of these terms are lacking. According to the Basic Principles and Guidelines on Development-Based Evictions and Displacement, the notions of “public interest,” “public welfare,” or any equivalent concepts should be defined by reference to the realization of human rights.⁷¹ These guidelines explain that “the promotion of the general welfare refers to steps taken by States consistent with their international human rights obligations, in particular the need to ensure the human rights of the most vulnerable.”⁷²

In practice, however, public authorities easily manipulate these concepts. For instance, the Ethiopian Expropriations of Landholdings for Public Purposes and Payment of Compensation Proclamation No. 455/2005 defines “public purpose” as “the use of lan[d] defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan [sic] in order to ensure that the interest of the peoples to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.”⁷³ Such

a definition, due to its vagueness, gives almost complete discretion to public authorities to decide when an expropriation is justified. In particular, far from adopting a restrictive view of what is included in the notion of “public welfare,” this definition does not prohibit attributing the land, following the expropriation, to a private investor for development.⁷⁴

Despite the fact that an existing definitions are commonly contested, it should follow from the very notion of public interest that expropriation should never be used for private or commercial purposes. Moreover, the burden of proving that the expropriation satisfies the requirement of serving the public interest should fall on public authorities.

In reality, however, it is often the victims who shoulder the burden of proving that the expropriation is not in the public interest, if and when they choose to challenge the eviction before the court system. The victims may find this particularly challenging to do given that courts may also play a role in corrupt practices. Courts may lack independence vis-à-vis the executive branch in the country or may be deferential to public authorities in assessing what qualifies as being in the “public interest.” Moreover, in most cases, the scales seem almost inevitably weighted in favor of projects that aim to “commercialize” the land, even when such projects make it impossible for local communities to continue to use the land to satisfy their own basic needs.

In such cases, it is tempting for the private investor interested in acquiring land to bribe or use its influence over the public officials responsible for defining expropriation as being in the “public interest” or for “public purpose.” This is particularly true where the consent of the landowners to cede their land has been refused or, more commonly, not even been sought. As mentioned above, once the government has decided to support the investment project, it is typically very difficult to challenge that decision via legal channels.

d. Selling or Leasing of Land to Investors by the Government or by Community Leaders

The most widely discussed stage of corruption in land deals is when public officials or representatives of the community are directly bribed by the investor in order to ensure that the land is leased or sold. The risk of such forms of corruption materializes where land is State-owned or communal. In both cases, land and resource users are affected, whether these users are permanently occupying the land or they depend on the land for subsistence or other needs. While the problem of corruption at this stage is widely recognized to exist, it is difficult to document, investigate, and prosecute since corruption, by its very nature, is kept secret.

Another obstacle in identifying and addressing such instances of corruption is that legal definitions of bribery as a criminal offence are generally limited to public officials, which may leave out community chiefs or other community leaders even when these individuals, acting as “representatives” of their communities, give away communal land. Moreover, political corruption can take a rather indirect route when politicians or high-level public officials who are political appointees may be encouraged to favor certain investors who have contributed to financing their political party or campaigns. Even when land and resource users receive compensation following the expropriation process in these cases, such compensation typically will be below the market value of the land. This is due to the fact that these leases or sales often occur below the assessed market value of land, and it is particularly difficult for land and resource users to prove that these types of land deals are grossly unfair.

box 3

SEVERE RISKS TO LAND AND ENVIRONMENTAL DEFENDERS

In many cases, local indigenous, environmental, and landless peasant leadership are subject to threats and at times physically harmed, even murdered, if they object to or report instances of corruption related to large-scale land deals. Moreover, local police and judicial authorities rarely ever investigate or try the accused, and only low-level criminals are ever found guilty. At the same time, those ordering the threats and acts of violence are typically go unpunished by local authorities, often because they have political coverage at the local, state, or national level.

As available land becomes increasingly scarce, the battle to control it is intensifying. In 2015, across the globe, more than three people were killed a week defending their land, forests, and rivers against destructive industries—a fifty-nine percent increase from the previous year.⁷⁵ Severe limits on information mean the true numbers are undoubtedly higher. Brazil is by far the deadliest country for land and environmental defenders, with a total of fifty deaths in 2015 alone.⁷⁶

e. Accessing Remedy for Land-Related Complaints

At each of the four phases above, corruption disenfranchises people from their land and resource rights. Corruption may also play a subsequent role in preventing the victims of land grabs from being able to access remedy, such as getting their land returned or obtaining fair compensation for damages, through judicial and other accountability mechanisms.

In the most extreme situations, the judicial system is captured by political elites, and acts merely as an arm of the established vested interests of the ruling elites of that country. In such contexts, corrupt land deals undertaken by those ruling elites will almost never be impartially

scrutinized by the courts, nor will people affected by such deals be given a chance to obtain remedy through the judicial system. In other cases, the police and local authorities may be bribed to threaten, intimidate, or even arrest community members who are protesting or submitting complaints about the loss of land and any involvement of corruption. At the same time, judges and court officials can be bribed or otherwise influenced to make certain decisions in land grab cases, to block or refuse to accept charges brought by community members, or to expedite charges brought by those accused of land grabbing against the victims themselves. Subsequently, appeal and judicial review mechanisms for land demarcation and titling can also be corrupted to uphold unjust decisions, furthering the disenfranchisement of the victims of “tainted lands.”⁷⁷

f. Monitoring of Investor Obligations During the Post-Project Period

While a lease term on a concession might be for a period of, typically, fifty to ninety-nine years, impacts on affected communities often last forever. This is due to the fact that, even when projects end, fail, or are cancelled, corruption often prevents land from being returned to communities throughout the post-project period.

Moreover, specific concerns emerge regarding the implementation phase of the investment project. When land is ceded to an investor, it is not unusual that certain conditions are attached, such as avoiding the overuse of water, creating employment opportunities for the local population, or sourcing certain supplies from local producers by setting up out-grower schemes intended to complement production on large plantations. Such conditions are imposed as a means to ensure that the investment will benefit the local communities and, it is hoped, outweigh any negative impacts. However, corruption may impede the willingness of local authorities to monitor compliance with such conditions. Even investments that may seem balanced on paper, taking into account the commitments agreed to by the investor, will often turn out to be deeply imbalanced in practice.

III. COMBATING CORRUPTION IN LAND DEALS: THE STATE OF PLAY

Corruption and large-scale land deals are not new phenomena. A number of instruments and initiatives already exist in relation to both of these issues. This section analyzes the current state of play in addressing the specific challenges of corruption in large-scale land deals through the establishment of normative frameworks at the international, regional, and national levels. As this section will demonstrate, however, the range of existing initiatives remains inadequate given the scale of the problem.

1. Land Tenure Frameworks

Acting under the pressure of civil society, some intergovernmental entities and individual governments have established frameworks to address the risks associated with increased large-scale land deals and complex land tenure systems, particularly with regards to agricultural investments.

a. The Voluntary Guidelines on the Responsible Governance of Tenure

In May 2012, after eighteen months of discussion, the Committee on World Food Security (CFS) adopted the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries, and Forests in the Context of National Food Security (VGGT).⁷⁸

Despite their voluntary nature and current lack of implementation on the ground, the VGGT are an attempt to provide recommendations to States as to how they should protect the rights of land and natural resource users, particularly small-scale farmers and herders whose access to land is insufficiently protected.

The VGGT include a number of references to the need to address corruption in its various forms. In particular, the framework articulates the expectation that States shall “prevent tenure disputes, violent conflicts, and corruption” and “endeavour to prevent corruption in all forms, at all levels, and in all settings.”⁷⁹ The VGGT also provide that “[i]mplementing agencies and judicial authorities should . . . endeavor to prevent corruption through transparent processes and decision-making.”⁸⁰

Elaborating on the issue of corruption in the context of land tenure, the VGGT provide that:

States and non-State actors should endeavor to prevent corruption with regard to tenure rights. States should do so particularly through consultation and participation, rule of law, transparency, and accountability. States should adopt and enforce anti-corruption measures including applying checks and balances, limiting the arbitrary use of power, addressing conflicts of interest, and adopting clear rules and regulations. States should provide for the administrative and/or judicial review of decisions of implementing agencies. Staff working on the administration of tenure should be held accountable for their actions. They should be provided with the means of conducting their duties effectively. They should be protected against interference in their duties and from retaliation for reporting acts of corruption.⁸¹

Beyond these general requirements, the VGGT refer to the need to prevent and address corruption within certain specific components of land governance (see Box 4).

box 4

THE VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES, AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY (VGGT)

The Committee on World Food Security (CFS) adopted the Voluntary Guidelines on the Governance of Tenure (VGGT) in May 2012. In addition to general statements about the need to address corruption in the governance of land tenure, the VGGT include recommendations specific to certain components of such governance, such as recording of land rights, valuation of land, and adoption of land planning schemes:

(a) In the *recording of tenure rights*, “States should ensure that information on tenure rights is easily available to all, subject to privacy restrictions. Such restrictions should not unnecessarily prevent public scrutiny to identify corrupt and illegal transactions. States and non-state actors should further endeavour to prevent corruption in the recording of tenure rights by widely publicizing processes, requirements, fees and any exemptions, and deadlines for responses to service requests” (Guideline 17.5).

(b) In the *valuation of land*, for example where land is used as collateral to secure loans or for taxation purposes, “[i]mplementing agencies should make their valuation information and analyses available to the public in accordance with national standards. States should endeavour to prevent corruption in valuation through transparency of information and methodologies, in public resource administration and compensation, and in company accounts and lending” (Guideline 18.5 and Guideline 19.3).

Similarly, where evictions are inevitable for a public purpose, “[a]ll parties should endeavour to prevent corruption, particularly through use of objectively assessed values, transparent and decentralized processes and services, and a right to appeal” (Guideline 16.6).

(c) In the *design of land planning schemes*, “States should endeavour to prevent corruption by establishing safeguards against improper use of spatial planning powers, particularly regarding changes to regulated use. Implementing agencies should report on results of compliance monitoring” (Guideline 20.4).

b. The Principles for Responsible Investment in Agriculture and Food Systems

The VGGT are directed at governments, rather than at the private sector. However, when acquisitions and leases of large areas of land began to surge in 2009 through 2010, it soon appeared that the private sector would also need guidance as to how to respect the rights and livelihoods of local communities affected. This led the World Bank, together with the UN Food and Agriculture Organization (FAO), the International Fund for Agricultural Development (IFAD), and the UN Conference on Trade and Development (UNCTAD), to present a set of Principles for Responsible Agricultural Investment (PRAI) in 2010.⁸²

The PRAI were widely criticized, both in terms of content and process. Unlike the VGGT, they were developed through a top-down process involving neither the governments concerned, nor those negatively affected by land investments. As a result, at the 36th annual session of the Committee on World Food Security (CFS), held in Rome in October 2010, the CFS decided to launch, “an inclusive process of consideration of the [Principles for Responsible Agricultural Investments that Respect Rights, Livelihoods and Resources (RAI)] within the CFS.”⁸³

After three years of negotiations, in October 2014, the CFS adopted the Principles for Responsible Investment in Agriculture and Food Systems. Like the PRAI, these “RAI Principles,” also referred to as “CFS-RAI,” are voluntary in nature. They contain ten core principles related, *inter alia*, to tenure of land, and outline the various responsibilities of different stakeholders involved in agricultural investments. In particular, Principle 9 deals with issues around corruption, stating in its chapeau that “[r]esponsible investment in agriculture and food systems should abide by national legislation and public policies, and incorporate inclusive and transparent governance structures, processes, decision-making, and

grievance mechanisms.” The new principles also elaborate that all actors should respect “the rule and application of law, free of corruption.”⁸⁴ In addition, they lay out a number of transparency requirements to be followed by all stakeholders and advocate for the “sharing of information relevant to the investment, in accordance with applicable law, in an inclusive, equitable, accessible, and transparent manner at all stages of the investment cycle.”⁸⁵

The CFS-RAI Principles also mention the UN Convention Against Corruption among the instruments that are relevant to implementation,⁸⁶ and include provisions on negotiating with stakeholders and disclosure while supporting transparency within contractual relationships.⁸⁷

c. The OECD-FAO Guidance for Responsible Agricultural Supply Chains

In March 2016, the OECD and the FAO presented their joint Guidance for Responsible Agricultural Supply Chains.⁸⁸ Building on a range of consultations that took place between October 2013 and June 2015, the OECD-FAO Guidance draws on a broad set of instruments defining responsible business conduct in the agricultural sector, including the VGGT and the CFS-RAI.

The “model enterprise policy” presented in the OECD-FAO Guidance includes a reference to a pledge to transparency and information disclosure in land-based investments.⁸⁹ The document is also explicit about the risks for companies entering into land-based investments:

In many developing countries, the unclear and/or broad definition of public purpose, the lack of land use plans, high corruption levels in land management, and land speculation all lead to unlawful expropriation. Such expropriation may precipitate the loss of the livelihoods of local communities, or more limited access to land and other key natural resources, thus resulting in nutritional deprivation, social polarization, entrenched poverty, or political instability.⁹⁰

There is one particular area, however, in which the OECD-FAO Guidance is unclear. The document suggests that companies should “commit to transparency and information disclosure related to land-based investments in [their] operations and those of [their] business partners, including transparency of lease/concession contract terms, *with due regard to privacy restrictions*” (emphasis added).⁹¹ The lack of clarity as to the scope of such “privacy restrictions” is a source of concern. Unless made more concrete, it could provide an easy loophole for investors.

Global Witness and others noted that this type of broadly worded restrictions to the duty to disclose the terms of contracts, including “commercial confidentiality,” has routinely been invoked to justify a refusal to release information.⁹² Yet, full transparency would incentivize companies and governments to provide more equitable treatment to local communities, which will make contracts more “stable and durable.”⁹³ Full transparency is also justified because contracts between businesses and governments, although they take the form of commercial transactions, may also be seen as “tools for public policy and of the ‘public interest.’”⁹⁴ Transparency is necessary, moreover, in order to curb corruption, as well as to allow civil society and the media to monitor investor compliance with contract terms.⁹⁵

2. Anti-Corruption Frameworks

This section examines a number of frameworks established by individual governments and intergovernmental entities to specifically combat corruption. In presenting these initiatives, the report seeks to highlight the remaining gaps in guidance concerning the prevention of corruption in land deals specifically.

Perhaps unsurprisingly, given the lack of incentives for host States to tackle corruption, many of the following instruments or initiatives impose primary responsibility on the home States of investors to address corruption or set out expectations for the private sector.

a. The United States Foreign Corrupt Practices Act of 1977

Initial legal and policy initiatives to combat corruption date back to the 1970s. The United States took the lead in this regard, when the U.S. Congress enacted the Foreign Corrupt Practice Act (FCPA) in 1977.⁹⁶

The FCPA contains both anti-bribery and accounting provisions. The accounting provisions of the FCPA require issuers to make and keep books, records, and accounts “in reasonable detail, accurately and fairly reflecting the issuer’s transactions and dispositions of an issuer’s assets.”⁹⁷ The FCPA also requires issuers to develop and maintain an internal accounting controls system that sufficiently assures “management’s control, authority, and responsibility over the firm’s assets.”⁹⁸ These provisions are of course directly related to combating bribery, since transparent financial records are a means to identify any instance in which funds have been diverted to influence a foreign official.

The FCPA also includes requirements specifically directed at bribery. In particular, it prohibits:

offering to pay, paying, promising to pay, or authorizing the payment of money or anything of value to a foreign official in order to influence any act or decision of the foreign official in his or her official capacity or to secure any other improper advantage in order to obtain or retain business.⁹⁹

The anti-bribery provisions of the FCPA apply to U.S. persons and businesses and also to any company (whether or not incorporated in the United States) listed on U.S. stock exchanges or required to file periodic reports with the U.S. Securities and Exchange Commission (SEC). In regards to these categories, the provisions of the FCPA extend to the company's officers, directors, employees, agents, and shareholders.¹⁰⁰ The FCPA also applies to foreign persons and business entities that do not fall into these categories, but act as such while in U.S. territory.¹⁰¹ Moreover, the FCPA can also be interpreted to cover all global transactions in U.S. dollars.¹⁰²

The FCPA explicitly prohibits a company from making a corrupt payment to a foreign official through a third party or intermediary.¹⁰³ Therefore, if a company enlists the services of a local individual or company to buy or lease large-scale land, it will be liable if that third party or intermediary bribes a foreign official to facilitate a favorable deal.¹⁰⁴

The FCPA allows two affirmative defenses. The first affirmative defense is the "local law defense" whereby a defendant will escape prosecution if he or she proves that, at the time of the offense, the payment given to the foreign official was legal under the foreign country's laws and regulations.¹⁰⁵ The second affirmative defense is the "reasonable and bona fide expenditures defense" whereby companies may pay a foreign official for reasonable and bona fide travel and accommodation expenses, so long as the expenses relate to "the promotion, demonstration, or explanation of a company's products or services" or to the "execution or performance of a contract with a foreign government or agency."¹⁰⁶

The FCPA gives enforcement authority to the U.S. Department of Justice (DOJ) and the SEC.¹⁰⁷ The DOJ and the SEC brought very few enforcement actions under the FCPA until relatively recently. For example, in 2004, the DOJ and the SEC brought two and three enforcement actions, respectively. Between 2008 and 2013, however, the DOJ and the SEC brought an average of approximately twenty-five and sixteen claims each year, respectively.¹⁰⁸ Furthermore, the average rate

for resolving a FCPA enforcement action has grown exponentially. In 2013, for example, the average resolution price, including penalties, fines, prejudgment interest, and disgorgement, was over eighty million USD, representing a four hundred percent increase from 2012.¹⁰⁹

Despite this intense increase in the DOJ and the SEC utilizing their enforcement authority under the FCPA, these entities have yet to prosecute companies for bribing foreign officials in return for the lease or the purchase of land on a large scale in a foreign country. An examination of FCPA records conducted for this report found no instance of a prosecution involving a company bribing a foreign official in return for the leasing or the purchasing of land. Considering the DOJ's and SEC's increased utilization of the FCPA to curb corruption, however, an enforcement action regarding a large-scale land deal may be an eventuality.

Despite opportunities for addressing corruption in the context of land under the FCPA, utilizing the FCPA faces several limitations. For instance, the FCPA's transactional-level approach may limit its ability to tackle grand corruption on a more systematic scale. Investigating concrete evidence that bribes have been paid is also a substantial challenge in FCPA enforcement.

Importantly, the FCPA's definition of a "foreign official" includes both high-level and low-ranking officers and employees of any foreign government "department, agency, or instrumentality."¹¹⁰ The term "instrumentality" is interpreted to include State-owned and State-controlled entities.¹¹¹ This requires an examination of the control, status, function, and ownership of the entity concerned in order to determine whether it is sufficiently linked to the State.¹¹² According to the DOJ's FCPA Resource Guide, a number of facts should be taken into consideration when determining whether a particular entity is an instrumentality of the State, including most notably the following:

1. The foreign State's control over the entity;
2. The foreign State's characterization of the entity and its employees;
3. The purpose of the entity's activities;
4. The power given to the entity to administer designated functions;
5. The foreign State's financial support to the entity;
6. The services the entity provides to the jurisdiction's residents;
7. The perception of the entity in terms of carrying out official or governmental functions.¹¹³

While the FCPA relies on a definition of the “foreign official” that is relatively broad, it remains unclear whether the FCPA’s definition of a foreign official would allow the DOJ or the SEC to bring an enforcement action against a company for bribes made to community representatives in order to purchase or lease land owned or managed by the community.

Although it is likely that the definition above covers community representatives, such as village chiefs or councils, who receive a stipend from the government in order to discharge duties similar to those of a mayor, it is less certain that the definition would cover local leaders who are neither State-appointed nor remunerated, even symbolically, by the government and who appear as representatives of their community rather than as delegates of the State within the community concerned. This could limit the FCPA’s enforcement power over companies’ corrupt business practices when acquiring land on a large scale in cases where a community representative is involved (see Box 5).

box 5

“FOREIGN OFFICIALS” UNDER THE FOREIGN CORRUPT PRACTICES ACT

As exposed in 2012 by the Oakland Institute and Greenpeace International, the business practices of SG Sustainable Oil Cameroon, Ltd. (SGSOC)/Herakles Farms provide a stark illustration of a key implementation gap of the FCPA.

SGSOC is the local Cameroonian subsidiary of Herakles Farms, an American company headquartered in New York City.¹¹⁴ SGSOC sought to lease 73,000 hectares in Cameroon for 99 years to develop a palm oil plantation. According to the Oakland Institute and Greenpeace International, business practices of SGSOC allegedly included field planting before the finalization of the required permits and the lease agreement,¹¹⁵ illegal land clearing and logging,¹¹⁶ and bribing community representatives.¹¹⁷

The Cameroonian Ministry of Wildlife and the Programme for Sustainable Management of Natural Resources (PSMNR) conducted a fact-finding mission in twenty villages and found evidence that SGSOC negotiated land deals through the use of “intimidation and bribery” that specifically targeted community “chiefs and some influential decision-makers.”¹¹⁸ Furthermore, the Oakland Institute and Greenpeace International published evidence that Herakles Farms’ employees used cash gifts, bribery, and promises of employment to gain local support.¹¹⁹ These organizations further reported that a Herakles Farms employee disclosed how envelopes with “huge sums of money” were distributed to local communities because “that’s how you facilitate your way.”¹²⁰

ICAR wrote to (SGSOC)/Herakles Farms in September 2016, asking for comment on these allegations, but did not receive a response. However, in September 2012, the Herakles Farms CEO Bruce Wrobel published an open letter denying illegality in relation to the project.¹²¹ He claimed that the project will create tremendous economic, social, and environmental benefits and that the forests in the project area have been logged and farmed repeatedly and are of little value.

In cases such as these, the DOJ and the SEC would only be able to bring an enforcement action against the company if the recipients of bribes are considered foreign officials. Local community members would not fall under that definition. As to the community chiefs and influential decision-makers, it is debatable whether they can be considered foreign officials under the FCPA's definition.¹²² In order to make such a determination, one would have to conduct a fact-specific inquiry into whether the chiefs and influential decision-makers are considered an "instrumentality" of the foreign government.¹²³ In the Herakles/SGSOC case, for instance, questions would arise as to whether the chiefs and influential decision-makers:

1. Were controlled by the government of Cameroon;
2. Were given power by the government to administer and/or approve land acquisitions;
3. Received funding from the government;
4. Had a government-type relationship with the residents in terms of their services; and
5. Were perceived by the community as permitted to carry out governmental functions.¹²⁴

If the FCPA is to be used as a tool for prosecuting companies for corrupt practices when leasing or buying land in foreign countries, greater clarity is needed regarding the scope of the term "foreign official."

This clarity is especially needed in regards to large-scale land acquisitions in sub-Saharan Africa, where ninety percent of the region's land is administered under customary forms of tenure,¹²⁵ making the involvement of community representatives in corrupt land acquisitions more likely. Indeed, it was stated during a May 2015 USAID's online panel discussion that the international community needs to better take into account the fact that much of the land in rural areas in Africa is held under customary forms of tenure, which may encourage more decentralized forms of corruption. As it stands, this issue is poorly addressed, if at all, under existing anti-corruption regulatory frameworks.¹²⁶

The FCPA presents another limitation when applied to land deals. This limitation relates to situations where a company *benefits from* improper behavior by foreign public officials but has not itself *rewarded* such behavior. Such "beneficiary complicity" is not included in the FCPA. Yet, it is often in the relationships between governmental authorities and local authorities or communities that irregularities occur, even before the investor enters the picture. In numerous countries with a high prevalence of foreign investment in large-scale land, it is unlawful for companies to buy or lease land directly from local communities. Instead, the company must buy or lease land directly from the government.

Tanzania again provides an illustration. Tanzania's Village Land Act of 1999 restricts the possibilities for foreigners to own or lease village land to situations that are deemed to be in the public interest, which can include domestic investment.¹²⁷ Before a foreigner can buy or lease village land, however, he or she must first be allocated to the Tanzanian Investment Center, which converts village land into general land and then grants foreigners derivative rights.¹²⁸ The Act further requires villagers to receive complete and just compensation before their village land is converted into general land.¹²⁹ The earmarking of the land suited for foreign investment is done through the "Tanzanian Land Bank Scheme," established by Tanzania's 1997 Investment Act. The Land Bank Scheme brokers the land concerned to foreigners through the Tanzanian Investment Center (TIC).¹³⁰

Thus, in the case of Tanzania, the use of the FCPA will depend on whether corrupt practices have occurred during the demarcation process or during the conversion of village land into general land. A company could be prosecuted under the FCPA, for example, if it first identified suitable village land and then bribed a foreign official to convert it into general land.¹³¹ This would include a scenario where bribed officials from an institution such as the TIC would attempt to improperly influence the drawing up of "Village Land Use Plans," which is the first step towards the demarcation of land suitable for leases to foreign investors.

However, purely intra-governmental corruption would fall outside the provisions of the FCPA. If the TIC were to seek to influence village-level decisions by resorting to bribery, the investor could not be prosecuted on that basis under the FCPA, despite the fact that the investor may have benefited from such a corrupt practice and may even be aware of it. This is one reason why a due diligence obligation imposed on the investor to seek information as to the conditions under which the land was acquired should be seen as an essential complement to regulatory frameworks such as the FCPA. This point will be explored further in Section IV of this report.

A final limitation in applying the FCPA to instances of corruption in large-scale land deals is that the FCPA may not be able to address the parent company's responsibility for the conduct of its subsidiaries. As evidenced by the Herakles Farms/SGSOC case example in Box 5 above, it is not uncommon for a parent company's local subsidiary to carry out land deals. In such a circumstance, however, the parent company is only liable under the FCPA if it "participated sufficiently" in the corrupt action(s). This requires evidence that the parent company either directed the subsidiary in its corrupt action(s) or somehow directly participated in the

misconduct.¹³² Alternatively, according to traditional agency principles, the parent company could only be held liable if it had knowledge of the subsidiary's conduct and controlled the subsidiary so that the two companies are, in fact, "alter egos."¹³³ The FCPA therefore only allows the lifting of the corporate veil under strict conditions in relation to anti-bribery.¹³⁴

The FCPA may also not reach the full supply chain of a company. In numerous situations, it is more likely that the company's supplier, not the subsidiary, is responsible for bribing foreign officials.¹³⁵ This is problematic in terms of bringing a FCPA enforcement action because, most often, suppliers are neither transnational corporations listed on U.S. stock exchanges nor required to report periodically to the SEC.¹³⁶

box 6

REACHING SUPPLIERS "BEHIND THE BRANDS"

Oxfam's "Behind the Brands" campaign highlights the importance of reaching the suppliers of major agri-food companies. The Oxfam campaign examined ten major food and beverage companies, ranking them across a total of seven criteria. One of these criteria concerned the policy of the company in relation to the land on which the supplier grew its produce. The scorecard measured "whether companies have put in place policies to ensure their supply chains are free from 'land grabs.' This includes policies that promote free, prior, and informed consent through the entire supply chain and insists on zero tolerance for those suppliers who obtain land through violations of land rights and tenure."¹³⁷

The campaign highlighted that some major U.S. food and beverage companies and their subsidiaries did not actually own or lease the large-scale land from which they sourced sugar cane. Instead, these companies typically contracted with major foreign suppliers, some of who had engaged in corrupt practices in order to develop large-scale plantations following land deals.¹³⁸ For example, Oxfam reported in 2013 that the Coca-Cola Company and PepsiCo purchased sugar from several Thai and Cambodian suppliers that operate in Cambodia's notoriously corrupt land sector.¹³⁹

In September 2016, ICAR wrote to both Coca-Cola and PepsiCo, asking for comment on the information above. In Coca-Cola's response, the company provided detail on its land rights work, including a commitment to publish FPIC guidance for its suppliers by the end of 2016. At the time of publishing this report, PepsiCo had not responded. However, in 2014, following Oxfam's campaign, the company committed to take steps to stop land grabs in its supply chain.

b. The OECD Anti-Bribery Convention

Building in part on the experience gained in the United States with the FCPA, OECD Member States reached agreement in December 1997 on the Convention on Combating Bribery of Foreign Public Officials

in International Business Transactions.¹⁴⁰ This OECD Anti-Bribery Convention entered into force in 1999. It currently has forty-one parties—the thirty-seven OECD Member States and seven non-OECD countries (Argentina, Brazil, Bulgaria, Colombia, Latvia, Russia, and South Africa).¹⁴¹

The OECD Anti-Bribery Convention defines corruption as “intentionally to offer, promise, or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.”¹⁴² The Convention therefore only addresses *active* bribery, which is directly committed by the person who promises or gives the bribe.¹⁴³ Moreover, the Convention only refers to the bribery of foreign public officials and does not address business-to-business bribery.¹⁴⁴

The Commentaries to the Convention refer to the same “local law” defense as the FCPA whereby payment or the provision of another advantage shall not be considered corruption if “the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.”¹⁴⁵

In addition, small “facilitation payments” made “to induce public officials to perform their functions, such as issuing licenses or permits” are not to be considered as corruption under the OECD Anti-Bribery Convention.¹⁴⁶ The Commentaries note in this regard that, while such payments are generally illegal in the foreign country concerned, in countries that still allow for such payments, this practice should be addressed “by such means as support for programmes of good governance.” The Commentaries also state that “criminalisation by other countries does not seem a practical or effective complementary action.”¹⁴⁷

This distinction between “corruption” and “facilitation payments” is not based on the amounts concerned, but rather on the fact that “corruption” leads the foreign public official to perform an act, or to refrain from acting, in violation of that official’s duties. In contrast, “facilitation payments” aim to encourage the public official to perform his or her functions. Nevertheless, recognizing that even small facilitation payments have a “corrosive effect, . . . particularly on sustainable economic development and the rule of law,” the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions encourages State Parties to “periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon.”¹⁴⁸ It also calls on State Parties to “encourage companies to

prohibit or discourage the use of small facilitation payments in internal company controls, ethics, and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records."¹⁴⁹

Indeed, in land governance, such facilitation payments can have a serious and problematic effect due to the distortion they introduce. For instance, in certification or "titling" processes, such payments give a premium to those with the means to accelerate administrative procedures. As a result, there is a very thin line between facilitation payments and corruption. Where certification is "facilitated" by a small sum being paid to an official as a reward for his or her diligence, for instance, this could incentivize that official to bypass certain procedures.

Regardless, State Parties to the OECD Anti-Bribery Convention commit to defining corruption or complicity in corruption as a criminal offence, punishable by "effective, proportionate, and dissuasive criminal penalties."¹⁵⁰ Moreover, the State Parties are expected to establish their jurisdiction "when the offence is committed in whole or in part in [their] territory."¹⁵¹ The State Parties who have jurisdiction to prosecute their nationals for offences committed abroad are expected to exercise such jurisdiction in regard to corruption. The OECD Anti-Bribery Convention also explicitly provides that, in addition to individuals, legal persons (including corporations) should be liable for corruption. It recognizes, however, that not all State Parties accept the criminal liability of legal persons. Therefore, non-criminal sanctions could be applied to legal persons, provided such sanctions are "effective, proportionate, and dissuasive."¹⁵²

Much like the FCPA, the OECD Anti-Bribery Convention defines "foreign public official" as "any person holding a legislative, administrative, or judicial office of a foreign country, whether appointed or elected."¹⁵³ The Commentaries acknowledge that, in some cases, individuals may hold public authority even if not formally appointed or elected to that effect: "Such persons, through their de facto performance of a public function, may, under the legal principles of some countries, be considered to be foreign public officials."¹⁵⁴

However, the implementation of the OECD Anti-Bribery Convention is uneven across countries. According to Transparency International, four countries have achieved "active enforcement," namely the United States, the United Kingdom, Germany, and Switzerland.¹⁵⁵ Transparency International defines "active enforcement" as a country investigating foreign bribery offenses, investigations reaching the courts, relevant

authorities pressing charges, courts handing out convictions for ordinary and substantial cases, and offenders being significantly sanctioned.¹⁵⁶

Five other countries (Italy, Canada, Australia, Austria, and Finland) have achieved “moderate enforcement.”¹⁵⁷ Transparency International defines “moderate enforcement” as a country that is making progress, but still insufficient in terms of implementing and enforcing anti-bribery legislation.¹⁵⁸

On the other hand, twenty-two countries have had “little or no enforcement” of the OECD Anti-Bribery Convention,¹⁵⁹ while eight countries have had “limited enforcement.”¹⁶⁰ Transparency International defines “little or no enforcement” as having “no deterrence” in terms of implementing or enforcing anti-corruption legislation.¹⁶¹ “Limited enforcement” refers to countries that “indicate progress” but still have “insufficient deterrence” in terms of implementing and enforcing anti-corruption legislation.¹⁶²

Despite these limitations and uneven willingness of State Parties to invest efforts in implementation and enforcement, the impacts of the OECD Anti-Bribery Convention have been significant. Between its entry into force in 1999 and June 2014, 427 corruption cases have been reported against 263 individuals and 164 companies.¹⁶³

The most affected sector is the extractive industry, accounting for nineteen percent of the cases reported. In contrast, only four percent of the reported cases have been in the agriculture, fisheries, and forestry sectors, where the value of the bribe as a proportion of the total value of the transaction was significantly lower.¹⁶⁴

However, such data should be treated with caution, as only recently, after 2008, has land become a highly valued asset. Moreover, this data refers only to cases that were both reported and completed by June 2014, meaning that cases of corruption that remain undetected or that are still pending are not included.

c. The OECD Guidelines for Multinational Enterprises

Although the 1997 Anti-Bribery Convention is the most important achievement of the OECD in the fight against corruption, the OECD’s contribution to this issue predates the adoption of that instrument. The OECD Guidelines for Multinational Enterprises, initially adopted in 1976 and revised a number of times since then (most recently in

2011), include a chapter on “Combating Bribery, Bribe Solicitation, and Extortion” (Chapter VII).¹⁶⁵ This chapter states that “[e]nterprises should not, directly or indirectly, offer, promise, give, or demand a bribe or other undue advantage to obtain or retain business or other improper advantage.”¹⁶⁶

The OECD Guidelines are a particularly interesting instrument for two reasons. First, they unequivocally express an expectation that a company shall use its leverage to influence business partners, organizations in its supply chain, and other State or non-State actors linked to its business operations or products to prevent or mitigate negative human rights impacts.¹⁶⁷ In practice, this means that, if a purchaser wields power over a supplier, perhaps because it buys a significant percentage of the supplier’s goods or otherwise extends important benefits to the supplier, the purchaser must pressure the supplier to respect human rights and lessen destructive impacts wherever possible.

Second, the OECD Guidelines are particularly relevant to the issue of “tainted lands” because of the role that National Contact Points (NCPs) can play in ensuring the OECD Guidelines are taken into account in business practices and operations. All States that have joined the OECD Guidelines are expected to establish a NCP to ensure the promotion, implementation, and follow-up of the Guidelines. Under the NCP mechanism, interested parties (including individuals, but also non-governmental organizations (NGOs) or unions) can lodge complaints (called “specific instances”) against multinational companies that have committed or condoned human rights violations along their supply chain.¹⁶⁸ Land conflicts that break out between communities and foreign investors, or even between communities and local businesses that supply to multinational corporations, may lead to such a “specific instance” being filed.

Once a complaint has been received and found to be admissible, the NCP plays the role of a neutral mediator, aiming for a resolution of the dispute to the satisfaction of both parties. In the event of such a resolution, the NCP publishes a report that describes the content of the agreement, unless the parties request that it be treated as confidential. If no resolution is reached, the NCP may conclude the procedure by making a public statement that describes the facts alleged to be in violation of the OECD Guidelines. This public statement may also include recommendations to the parties. The whole “specific instance” process usually takes between six months and a year, although this is uneven across NCPs.¹⁶⁹

Notably, the NCP is not a judicial (or even quasi-judicial) mechanism. It has neither the power to force the discovery of evidence nor adopt a binding decision or directly take punitive measures against a company. The fear of adverse publicity involved in specific instances, however, may constitute a strong incentive for the company concerned to cooperate in the search for an amicable solution to the dispute.

However, NCP mechanisms overall have been criticized for their lack of effectiveness in delivering access to remedy for victims of corporate misconduct.¹⁷⁰

box 7

THE U.S. NATIONAL CONTACT POINT (NCP) FOR THE OECD GUIDELINES

In June 2013, the Center for Environment and Development (CED) and the Network to Fight Against Hunger (RELUFUFA) submitted a “specific instance” to the U.S. NCP regarding SGSOC/Herakles Farms’ conduct in Cameroon between 2009 and 2013 (see Box 5). They alleged that SGSOC/Herakles Farms acted in violation of the Chapter VII “Combating Bribery” provisions of the OECD Guidelines. More specifically, they claimed that the company carried out acts of intimidation, as well as bribery of community leaders, government officials, and local citizens, in order to acquire land for their business operations.

The CED and RELUFUFA demanded that the company publicly address these allegations and implement policies and procedures that require regular consultation with affected community members. SGSOC/Herakles Farms responded by denying the allegations and asserting that its conduct was already in conformity with international guidelines.¹⁷¹

Despite the company’s denial of these allegations, the U.S. NCP decided the case “merited further examination” and offered confidential mediation services.¹⁷² On 28 July 2015, the U.S. NCP announced that it had achieved a successful mediation between all parties. The company agreed “to receive a written request from the [CED and RELUFUFA] within one month of the signing of the agreement” to investigate credible and past corruption allegations. The company also agreed to give a “written response back to the NGOs within three months of receipt of the request.”¹⁷³ The parties did not agree on what specific cases should be investigated, but they did agree to meet again after the company’s first investigative report to the CED and RELUFUFA.¹⁷⁴ At the time of this report, no further updates were publicly available as to the fulfillment of these commitments.

However, NCPs are not always able to obtain even this relatively modest outcome. Where cooperation breaks down between the parties, the NCP may have no choice but to conclude the case by a public statement based on its assessment as to whether or not the OECD Guidelines were breached.

As detailed in Chapter III, Section 2a of this report, ICAR wrote to (SGSOC)/Herakles Farms in September 2016, asking for comments on these allegations, but did not receive a response.

Importantly, the OECD Guidelines interpret the concept of “public official” more broadly than the FCPA and the OECD Anti-Bribery Convention. Chapter VII of the Guidelines state that companies should not “offer, promise, or give undue pecuniary or other advantage to public officials or the employees of business partners” (emphasis added).¹⁷⁵ At the very least, this suggests that company-to-company bribery is covered by the Guidelines.

d. The United Nations Convention Against Corruption of 2003

In October 2003, the UN General Assembly adopted the UN Convention Against Corruption (UNCAC), which entered into force in December 2005.¹⁷⁶ To date, 175 countries have ratified the UNCAC, which means its global reach is considerably greater than the OECD Anti-Bribery Convention.¹⁷⁷ The UNCAC requires State Parties to criminalize the following:

1. Giving an undue advantage to a national, international, or foreign public official (“active bribery”);¹⁷⁸
2. The acceptance of an undue advantage from a national public official (“passive bribery”);¹⁷⁹
3. Embezzlement of public funds;¹⁸⁰
4. Obstruction of justice; and¹⁸¹
5. Concealment, conversion, or transfer of criminal proceeds.¹⁸²

The UNCAC also encourages State Parties to criminalize the following:

1. Acceptance of bribes from international and foreign public officials (“passive bribery”);¹⁸³
2. Trading in influence;¹⁸⁴
3. Abuse of functions;¹⁸⁵
4. Illicit enrichment;¹⁸⁶
5. Bribery and embezzlement in the private sector;¹⁸⁷ and
6. Concealment of illicit assets.¹⁸⁸

Importantly, the UNCAC *requires* international cooperation between relevant State Parties in all criminal prosecutions, although such cooperation is only *suggested* when the complaint is civil or administrative.¹⁸⁹ In addition, the UNCAC provides the right to asset recovery and a framework for countries to modify their laws “in order to facilitate tracing, freezing, forfeiting, and returning funds obtained through corrupt activities.”¹⁹⁰

The UNCAC has a comprehensive review process, which proceeds in three phases:

1. Each country conducts a self-assessment report, which requires completion of a checklist;
2. Experts evaluate the self-assessment report from two review countries and conduct a country visit, if requested; and
3. Reviewers (two peer governments supported by the UN Office of Drugs and Crime) produce a final country review report, which is “finalized in agreement with the country under review.”¹⁹¹

However, no formal follow-up process has been created to ensure that countries respond to recommendations made in the country reports.¹⁹² Furthermore, as of September 2013, only 14.9 percent (26 out of 175) of the countries that have ratified the UNCAC had completed self-assessment reports, and only 9.7 percent (17 out of 175) countries have completed country review reports.¹⁹³

Whether the UNCAC may effectively contribute to combating corruption in land deals will, to a certain extent, depend on how it is interpreted in the future. The research conducted for this report only uncovered one UNCAC case involving the corrupt administration of land. In that case, which concerned the Ukraine, a criminal prosecution took place against a deputy mayor who was accused of soliciting and accepting a bribe totaling 500,000 USD in return for a decision regarding a land plot allocation.¹⁹⁴

Similar to the OECD Anti-Bribery Convention, the UNCAC provides a relatively broad definition of “foreign public official”:

1. A person holding an elected or appointed legislative, administrative, executive, or judicial office of a foreign country; or
2. A person that exercises a public function for a foreign country, which can include a public enterprise or public agency.¹⁹⁵

The UNCAC’s review process has failed to provide greater clarity regarding what the term “public official”¹⁹⁶ means. Moreover, countries have also been given inconsistent recommendations in UN country reports in terms of how to define “public official.”¹⁹⁷ For example, a recommendation was given to Bangladesh “to extend the definition of public servant,” while, in contrast, a recommendation was given to Morocco to “criminalize specifically and distinctly bribery of foreign public

officials.”¹⁹⁸ Such ambiguities may restrict the effectiveness of the UNCAC, as State Parties may be tempted to define “public official” narrowly. This is especially a concern regarding the fight against corruption in large-scale land transactions since various actors could potentially be the recipients of bribes from companies in return for the leasing or purchasing of land, including national- and local-level public officials.

e. The United Kingdom’s 2010 Bribery Act

The UK Bribery Act was enacted in April 2010,¹⁹⁹ and its enforcement is in the hands of the UK Serious Fraud Office (SFO).²⁰⁰ The Act applies to any act or omission that takes place within the United Kingdom and forms part of the offence of bribery as defined by the Act, as well as to acts or omissions by any person who has a close connection to the United Kingdom. This includes both UK nationals and persons who are ordinarily residents of the country, as well as organizations that were either established in the United Kingdom or those that conduct at least some part of their business in the United Kingdom.²⁰¹

Section 1 of the Act prohibits a person from offering, promising, or giving a “financial or other advantage to another person” in two main scenarios.²⁰² The first scenario is when a person “intends the advantage to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance.”²⁰³ The second scenario is when a person “knows or believes that the acceptance of the advantage offered, promised, or given in itself constitutes the improper performance of a relevant function or activity,”²⁰⁴ a form of bribery referred to as “active bribery.”²⁰⁵

According to the UK Ministry of Justice, “improper performance” in this context is equivalent to a person breaching an expectation to act “in good faith, impartially, or in accordance with a position of trust.”²⁰⁶ The test for determining “improper performance” is based on the expectation of a reasonable person in the United Kingdom. As such, no exception is given for local custom or practice in a foreign country. However, an exception is given if the “improper performance” is “permitted or required” by the foreign country’s written law.²⁰⁷ Section 2 extends this scope to “passive bribery,” which includes “the requesting, agreeing to receive, or accepting of a bribe.”²⁰⁸

Section 6 creates a stand-alone offense for when a person “offers, promises or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions.”²⁰⁹

According to the UK Ministry of Justice, a “foreign public official” includes the following:

1. Officials (either elected or appointed) in an administrative, judicial, or legislative position outside of the United Kingdom;
2. Persons that “perform public functions in any branch of the national, local, or municipal government”;
3. Persons who “exercise a public function for a public entity or public enterprise”; and
4. Persons who are officials or agents of public international organizations.²¹⁰

Section 6 does not require proof of intent to improperly perform. Indeed, it is considered impractical or extremely difficult to determine the precise functions of foreign public officials. Furthermore, obtaining such evidence would rely on government cooperation, which is rare considering that foreign public officials serve governments.²¹¹ Similar to Section 1, Section 6 also requires prosecutors to prove that the foreign public official was not “permitted or required to be influenced by” the advantage under the State’s written law.²¹²

Section 7 establishes an offense if a “person associated” with a “relevant commercial organization” bribes another person “intending to obtain or retain business or an advantage” in conducting business.²¹³ The standard for whether a corporation is a “relevant commercial organization” is to determine whether it “carries on business” in the United Kingdom, including a commercial organization that was either incorporated in the United Kingdom or “carries on a business or part of a business” in the United Kingdom.²¹⁴

In addition to the provision of the Act that allows it to reach a “person associated” with the company concerned (see Box 8), there are significant differences between the FCPA and the UK Bribery Act. A first notable difference concerns the recipient. Unlike the FCPA, which stipulates that a bribe must be paid or offered to a “foreign official,”²¹⁵ the UK Bribery Act’s scope extends to any person.²¹⁶ However, the Act creates a specific offense against the paying or offering of a bribe to a foreign public official and lowers the requirements to prove such an offense by not requiring evidence of intent to perform improperly.²¹⁷

PROSECUTING THE BENEFICIARY OF BRIBERY COMMITTED BY THE SUPPLIER UNDER THE UK BRIBERY ACT

Section 7 of the UK Bribery Act creates a specific offense against a “relevant commercial organization” if a “person associated” with the organization “bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organization.”²¹⁸ Whereas the Act is silent as to what constitutes a “relevant commercial organization” or an “associated person,”²¹⁹ the UK Ministry of Justice states that an “associated person” can include a contractor or supplier if it “performs services for or on behalf of the organization.”²²⁰

This is an especially important feature of the UK Bribery Act. It is not uncommon for a relevant commercial organization to neither buy nor lease large-scale land, but to have one of its suppliers actually acquire the land. For example, Tate & Lyle (a UK-based sugar supplier) does not own sugar cane producing land in Cambodia, but has purchased sugar from plantations that are owned by Cambodian-based companies such as KSL.²²¹ KSL operates in Cambodia’s notoriously corrupt business environment²²² and has been accused of working with the Cambodian government to forcefully evict villagers from their land.²²³

If evidence were found that KSL is guilty of bribery, it is unclear whether prosecutors could hold Tate & Lyle accountable under the Act’s Section 7 offense because Tate & Lyle claims that “it only ever received two small shipments” of sugar from KSL.²²⁴ As such, the “nature of their relationship” and “the relevant circumstances” may not be enough to deem KSL as an “associated person” of Tate & Lyle.²²⁵

ICAR wrote to Tate & Lyle while researching this report and asked for its response to the allegations outlined above. The company replied that its relationship with KSL was very limited and that the land concessions in questions were granted to KSL by the Cambodian government in 2006, four years before Tate & Lyle signed its contract with KSL. It also stated that it had not purchased any further sugar from KSL.

ICAR also contacted KSL, which stated that it operates in Cambodia via its subsidiary Koh Kong Sugar Industry Co. Ltd. (KSI). KSL denied conspiring with the Cambodian government to evict villagers from their land and claimed it had never committed any bribery.

Another difference between the two instruments is that, whereas the FCPA only applies to bribes paid or offered to a foreign official (“active bribery”), the UK Anti-Bribery Act provides offenses for paying or offering to pay a bribe, as well as for receiving or agreeing to receive a bribe (referred to as “passive bribery”). Because of its broader scope, the UK Anti-Bribery Act could make it a more appropriate tool if examples of corrupt large-scale land deals are discovered where potential investors received bribes as a means to induce them to lease or to buy large-scale land.

Although no examples of such instances were found in the research conducted for this report, this scenario is not farfetched. Many Global South countries' development plans center around attracting foreign investment, including in land.²²⁶ Moreover, local public officials in a position to facilitate land deals may wish to seize the opportunity of being in such a position to propose “easy deals” to foreign investors. They may also approach potential investors in the hope of capturing part of the benefits associated with the selling off of land, even if this occurs at the expense of local land users.

An additional difference is that Section 6 of the UK Anti-Bribery Act does not provide an affirmative defense for the payment of bona fide hospitality and promotional expenses, while the FCPA does.²²⁷ However, the UK Ministry of Justice also makes it clear that it has no intention of criminalizing the payment of reasonable and proportional hospitality and promotional expenses, as such payments are an “established and important part of doing business.”²²⁸ Consequently, certain payments to foreign officials such as travel and accommodation costs may not amount to a bribe, as long as they are not considered to be a “financial or other advantage.”²²⁹ For example, it is highly unlikely that hospitality and promotional expenses will raise suspicion if they are “reasonable and proportional norms for the particular industry.”²³⁰

Moreover, the UK Anti-Bribery Act does not provide an exception for “facilitation payments,” defined as “small bribes to facilitate Government action.”²³¹ As such, an investor could potentially face liability under the Act for any facilitation payment that is given with “an intention to induce improper conduct.”²³² The UK government made this choice in line with a 2009 request by the OECD that Member States prohibit or prevent companies from paying facilitation payments, as these are proven to have detrimental effects.²³³ The OECD's view is that, by permitting facilitation payments or small bribes while prohibiting large bribes, countries “create artificial distinctions” that confuse corporate anti-bribery procedures and that run counter to the promotion of a global culture against corporate bribery.²³⁴

The UK Anti-Bribery Act does not include such detailed accounting provisions as the FCPA. However, Section 7 does provide commercial organizations with a full defense against active bribery if it has “adequate procedures in place” to prevent bribery.²³⁵ The UK government describes such “adequate procedures” as those that follow six key principles:

1. Anti-bribery procedures are proportionate to the bribery risks the commercial organization faces, as well as to the scale, nature, and complexity of the commercial organization's activities;²³⁶

2. The commercial organization’s top-level management is committed to preventing bribery and to fostering zero-tolerance for bribery culture;²³⁷
3. The commercial organization conducts a risk assessment regarding its external and internal risk of bribery occurring by persons associated with it, and the assessment is “periodic, informed and documented;”²³⁸
4. The commercial organization follows due diligence procedures regarding “persons who perform or will perform services for or on behalf of the organization” to mitigate bribery risks;²³⁹
5. The commercial organization provides internal and external communication and training on its anti-bribery policies and procedures to ensure that they are understood throughout the organization;²⁴⁰ and
6. The commercial organization monitors and reviews its anti-bribery procedures and makes improvements when needed.²⁴¹

The UK Anti-Bribery Act has been described as an especially strong piece of anti-bribery legislation. Yet, organizations like Transparency International are hesitant to describe it as exemplary.²⁴² They note that there have been minimal prosecutions under the Act and that any prosecutions that were launched have only included instances of bribery paid within the United Kingdom, as opposed to the “big corporate cases” that were expected.²⁴³

To justify the Act’s minimal enforcement, some argue that it is still relatively new and that the delay in prosecutions is a result of the fact that instances of corporate corruption are still in the process of being revealed and investigated.²⁴⁴ With that said, the SFO (the Act’s enforcement authority) has had its budget slashed in half since the Act was passed, which causes many to question whether the Act “is really backed by political will.”²⁴⁵

Research conducted for this report did not reveal any examples of prosecutions against companies for bribes paid or received in return for the leasing or the purchasing of large-scale land in foreign countries. However, the UK Anti-Bribery Act is generally more robust than the FCPA, and the SFO’s first conviction under the Act, which occurred in December 2014, involved a strong land element.²⁴⁶ In that case, employees of the Sustainable Growth Group (SGG) and its subsidiaries—Sustainable AgroEnergy (SAE) and Sustainable Wealth (UK) Investments (SWI)—were convicted of conspiracy to commit fraud, conspiracy to furnish false information, and fraudulent trading for deliberately misleading UK investors to believe that they owned land in Cambodia, that the land was

planted with jatropha trees, and that the companies had insurance in case the jatropha crops failed.²⁴⁷ Such a case suggests that the SFO is aware of the high prevalence of corruption surrounding the administration of land.

ICAR attempted to contact Sustainable Growth Group (SGG) with regards to the allegations outlined above. However, the company and all of its subsidiaries involved in the SFO case appear to have been liquidated.

Despite minimal prosecutions and uncertainty surrounding future enforcement, the UK Anti-Bribery Act provides an incentive for companies to adopt robust anti-corruption policies in order to be protected from prosecution. One example is Illovo Sugar Limited—a subsidiary of Associated British Foods—which owns approximately 71,000 hectares of sugar cane-producing land in Africa²⁴⁸ and which had been accused of involvement in several illegal large-scale land acquisitions.²⁴⁹ In June 2011, Illovo implemented its Group Anti-Bribery and Corruption Policy, which applies to both its subsidiaries and “joint ventures in which Illovo has an interest.”²⁵⁰ In March 2014, Illovo also implemented its Group Guidelines on Land and Land Rights,²⁵¹ which endorses the UN Guiding Principles on Business and Human Rights and the UN Global Compact.²⁵²

When ICAR wrote to Illovo in September 2016, the company responded to deny any involvement in illegal land acquisitions.



CASE STUDY: PAPUA NEW GUINEA

In 2013, the Oakland Institute and the Pacific Network on Globalisation released a report detailing the allegedly corrupt and fraudulent business practices of logging company Independent Timbers and Stevedoring Limited (IT&S) in Papua New Guinea (PNG).²⁵³

According to the report, IT&S agreed in 2011 to build a highway in the Western Province of PNG in exchange for harvesting logs along the highway corridor. Although the company only received consent from local landowners to develop a 2,400-hectare highway corridor, it ultimately signed a 99-year lease agreement with the PNG government for 2,043,097 hectares. The agreement was in the form of a Special Agricultural and Business Lease (SABL), which is a “lease-leaseback scheme” that foreign companies commonly use to acquire land in PNG.²⁵⁴

According to the Oakland Institute report, investigations into this land deal—including those carried out by the PNG Commission of Inquiry into SABLs—discovered numerous indications that the acquisition was tainted by fraud and corruption and that IT&S circumvented PNG laws and procedures governing SABLs. For example, Greenpeace Australia Pacific found in 2012 that “the leases were based on counterfeit land registration”²⁵⁵ and that other official documents were fraudulent.²⁵⁶ According to the Oakland Institute report, one landowner reported to the Commission of Inquiry in 2012 that his signature was falsified on an official document, while a Provincial Land Officer reported to Radio Australia in 2012 that he was misinformed regarding what he was signing.²⁵⁷

The Oakland Institute report also alleged that IT&S funded “travel and allowances for government officials” and that the company conducted all land investigations without the involvement of the government.²⁵⁸ According to the report, a district land officer told the

Commission of Inquiry in 2011 that he signed a Land Investigation Report (LIR) after being asked by agents of IT&S; however, he never actually conducted the land investigation.²⁵⁹

The lack of government involvement in the land investigations is problematic because IT&S had an inherent interest in ensuring that the investigations did not interfere with its planned business operations. The Oakland Institute report also alleged that IT&S did not properly consult with local landowners, comply with legal requirements governing land investigations and environmental impact assessments,²⁶⁰ or obtain necessary permits and certificates and other legal permission to “operate within the SABLs.”²⁶¹

In September 2016, ICAR contacted IT&S, requesting the company’s response to the allegations described above. At the time of publishing this report, no response had been received. However, in 2014, the company stated that it remained committed to the customary landowners through the course of the project.

This case demonstrates some of the characteristics of how companies operating in PNG typically acquire land. For example, the Commission of Inquiry revealed how “the majority of leases [in PNG between 2003 and 2012] were granted under threat, intimidation, and bribery, and/or without the free, prior, and informed consent of landowners.”²⁶² In 2013, the Minister of the Lands Department also launched an investigation into “all land deals alleged to have been fraudulently acquired or sold,” which had apparently become the “culture among certain officers within the [Land] Department.”²⁶³

Furthermore, PNG’s Vision 2050, which details the government’s development policy, states that corruption is the biggest obstacle in terms of whether Vision 2050 will be successful.²⁶⁴

3. Multi-Stakeholder Initiatives

In the search for solutions to effectively combat corruption and its accelerating impact on communities affected by large-scale land deals, inspiration may be sought in a number of existing multi-stakeholder initiatives.

a. The Extractive Industries Transparency Initiative

The Extractive Industries Transparency Initiative (EITI) is a result of the Publish What You Pay (PWYP) campaign, bringing together a large number of NGOs working toward the improvement of transparency in natural resources exploitation.

EITI was launched in 2003 as a means to ensure that revenue from the exploitation of oil, gas, and minerals would be used for the benefit of the population, rather than pocketed by those in power, and that opportunities for corruption would be reduced as a result of ensuring the full transparency of revenue flows.²⁶⁵

In EITI participating countries (currently fifty-one), companies publish what they pay to governments and governments disclose the payments they receive. An independent administrator then reconciles the figures whenever discrepancies occur. A multi-stakeholder group (MSG)—including representatives from the government, industry, and civil society—is then established in each country to monitor the process. In some countries, the transparency requirements of EITI and the monitoring of the process are stipulated in legislation.

In its current form, EITI applies only to the revenue flows between oil, gas, and mining companies and the governments of the countries where they operate. Additionally, the EITI applies to the government's use of revenue that accrues from the exploitation of mineral resources.

There is no reason in principle not to extend the EITI mechanism to agricultural investment. Indeed, the MSGs established at country level may already choose to extend their work beyond the extractive industries, for instance to timber, fisheries, or investments in land. One such example is Liberia, which has chosen to extend coverage to the forestry and agricultural sectors.²⁶⁶ Furthering this trend, the World Bank floated a proposal for an EITI-inspired process to improve transparency in agricultural investments when it presented its *Rising Global Interest in Farmland* report in 2011.²⁶⁷

If an “EITI-plus” initiative was to be adopted to enhance transparency in land investments, it would ideally need to build on existing initiatives to improve land governance that already have strong political backing, such as the VGGT and the African Union’s 2009 Framework and Guidelines on Land Policy. It would also have to be combined with incentives for States to adhere to the initiative, such as States benefiting from capacity-building support.²⁶⁸

Whether an “EITI-plus” thus conceived would be effective is of course another matter. Investments in the extractive industry are highly centralized. They involve a limited number of players (only a handful of firms possess the technology allowing them to exploit, for instance, oilfields or asbestos mines), and they require high levels of initial investment. Moreover, the royalties received by governments typically represent a significant part of the public budget of the countries concerned. Under such conditions, monitoring the flow of revenues is relatively easy, and governments in principle have an interest in ensuring full transparency. Because agricultural investments are much more decentralized and have much less weight in the public budgets, a new EITI mechanism (or, as is already seen to some extent, the extension of the current EITI to agricultural investment) may be of limited effectiveness as the incentives discussed above are simply less well-aligned with the objectives pursued.

The publication of the contracts concluded between investors and the government or competent public authorities is another means to ensure transparency and accountability in the use of revenues. However, when it comes to large-scale land deals, revenue transparency may not be the primary form of information needing to be disclosed to local communities and the general public as a whole. Instead, the disclosure of contracts would be a much more valuable transparency step in combating corruption in land deals.²⁶⁹

Although secrecy remains the rule, the law in certain countries obliges such contracts to be made public.²⁷⁰ Such is the case in Liberia, where the government has passed legislation to compel the publication of contracts, and all contracts for concessions in the extractives sector are published on the Liberian EITI’s website.²⁷¹ However, many other countries, such as Cameroon, only publish one-page summaries of these contracts, leaving the primary contracts unpublished.²⁷² Sometimes, as recommended by the VGGT, the contracts must also be approved by a parliamentary procedure, allowing parliamentarians from all political parties, as well as civil society, to inquire about the destination of the funds.²⁷³

b. The Open Government Partnership

Launched in 2011, the Open Government Partnership (OGP) is another major multi-stakeholder initiative relevant to the issues of corruption in land deals. Governmental representatives and civil society organizations jointly manage the OGP.²⁷⁴ It aims to support reforms toward governments becoming more open, transparent, and accountable.

Participating governments are expected to adopt an OGP National Action Plan, the implementation of which is monitored through an Independent Reporting Mechanism (IRM). Every two years, the IRM produces a progress report for each participating country that assesses the development and implementation of each country's OGP National Action Plan, highlights progress achieved in fulfilling open government principles, and puts forth technical recommendations for improvements. To date, sixty-nine countries have joined the OGP, mostly from the Americas and Western Europe.²⁷⁵

The expansion of the OGP in Asia and Africa could significantly contribute to the reduction of corruption risks in land deals. Of particular importance in this regard are two of the “minimum eligibility” principles listed by the OGP:

1. The existence of an access to information law guaranteeing the public's right to information and access to government data; and
2. The public disclosure of income and assets for elected and senior public officials.²⁷⁶

As noted by the OGP, such guarantees “are essential to anti-corruption and open, accountable government.”²⁷⁷ However, the requirement that public officials disclose their revenues and assets both prior and following their term(s) in office shall only be truly effective if extended to family members. Corrupt officials may otherwise be tempted to list their interests and holdings under the names of family members in order to circumvent anti-corruption requirements.

IV. THE WAY FORWARD

Despite a range of initiatives intended to monitor and regulate large-scale investments in land, and growing awareness about the role of corruption in facilitating land transactions, the phenomenon continues hardly unabated. The human rights impacts on rural communities are considerable. More must and can be done.

In order to effectively address the human rights implications of “tainted lands,” further measures must be taken by four major categories of actors. This Section addresses in turn initiatives that should be expected from:

1. Investing companies;
2. Banks and other financial institutions;
3. Governments of host countries (where the investment is being made); and
4. Governments of investors’ home countries (where the investor is domiciled or incorporated), in instances of transnational land acquisitions involving foreign investors.

A summary of the key recommendations for each of these four actors is included at the beginning of the relevant section.

1. The Responsibilities of Investing Companies

While guidance to investing companies in relation to land, human rights, and corruption takes many forms, this report prioritizes the following recommendations in the areas of human rights due diligence, disclosure of contract terms and operational transparency, whistleblower protection, and FPIC implementation.

Summary of Key Recommendations for Investing Companies

A process to seek the **free, prior, and informed consent (FPIC)** of all affected communities, including indigenous peoples, should be undertaken by investing companies at all stages of operations. Where FPIC at the pre-investment stage leads to a decision by community members for the project not to proceed, the investment plans should be immediately abandoned. Should the project go ahead with FPIC from affected communities, FPIC processes should continue throughout the course of the project’s lifespan, as well as during the post-project period.

Investing companies should take **human rights due diligence** measures to ensure that their subsidiaries (or the companies with which they are linked through an investment nexus) or their business partners (including suppliers, franchisees, and sub-contractors) do not resort to corruption in the process of obtaining land.

Due diligence should be exercised in five key ways:

1. A prohibition on corruption and a reference to human rights, including the right to not be deprived of one's means of livelihood as a result of being evicted from land, should be inserted systematically in any contract that establishes a long-term, ongoing relationship between an enterprise and a business partner. The contractual provisions should not only impose on both parties that they refrain from corruption themselves, but also that they ensure that their subsidiaries, subcontractors, agents, or any other third parties under their control or determining influence do not rely on corruption.
2. Second, business enterprises should identify general areas where the risk of adverse human rights impacts is most salient (based on scale, scope, and possibility to remedy) and prioritize these for systematic human rights due diligence measures. If, however, due diligence reveals that corruption in a country's land sector is unavoidable, the company should not proceed with the investment.²⁷⁸
3. Third, an investing company should develop and adopt adequate internal controls, ethics and compliance programs, and measures for preventing and detecting both bribery and grand corruption. These measures should be developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the corruption risks facing the enterprise (such as its geographical and industrial sector of operation).
4. Fourth, these risks should be regularly monitored and re-assessed as necessary to ensure the enterprise's internal controls, ethics and compliance programs, and measures are adapted and continue to be effective in mitigating the risk of the enterprise becoming complicit in corruption.
5. Fifth, strongly articulated and visible support and commitment to due diligence should come from senior management, with one or more senior corporate officers exercising independent oversight of human rights due diligence measures regarding corruption.

In terms of **disclosure of contract terms and operational transparency**, investing companies should focus their reporting on "salient human rights issues," which are defined as those with "the most severe potential negative impacts on human rights."²⁷⁹ Whether negative impacts are considered severe or not is measured by their scale, scope, and possibility to remedy. Moreover, investors should:

1. "[R]efrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environment, health, safety, labour, taxation, or other issues,"²⁸⁰ as such exemptions outside of the statutory or regulatory framework typically will depend on the goodwill of individual public officials who may be tempted to use their position as a source of pecuniary gain;

2. “[U]se objectively assessed values, transparent, and decentralised processes and services, and a right to appeal, to prevent corruption with regard to tenure rights, in particular the rights of indigenous peoples and local communities holding customary tenure rights;”²⁸¹ and
3. Disclose contract terms relating to large scale land leasing or acquisition, ensuring that, at the very minimum, basic information about the project (including contract term, size of land, purpose of investment, impact assessments, mitigation plans, and local employment and infrastructure commitments) is made available and accessible to potentially affected communities.

Investing companies should have in place strong **whistleblower protections** to ensure that there are no reprisals against whistleblowers for coming forward. This will, in turn, make a company’s due diligence more effective, as individuals with relevant information may feel safer coming forward. This will “enable the company to elicit early, bona fide information of misconduct that could potentially save the company from both the risk of corruption and the costs involved in exposure and sanctioning.”²⁸²

a. Free, Prior, and Informed Consent (FPIC) Implementation

For indigenous communities, a clear standard of FPIC has been articulated in international conventions and investment standards. Article 32 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples provides that:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.²⁸³

Although the right to FPIC is distinct to indigenous peoples, the principle is increasingly seen as central to all populations affected by large-scale investments involving shifts in land rights.²⁸⁴ Through the right to self-determination of peoples and an expanded understanding of the right to property, FPIC is currently developing into a general principle, benefiting all communities of land users. Indeed, a growing number of companies are beginning to use the concept of FPIC to guide community engagement efforts, and it is gradually becoming a global standard in the industry.²⁸⁵

Where FPIC at the pre-investment stage leads to a decision by community members for the project not to proceed, the investment plans should be immediately abandoned. Should the project go ahead with FPIC from affected communities, FPIC processes should continue throughout the course of the project's lifespan, as well as during the post-project period.

b. Human Rights and Anti-Corruption Due Diligence

The UN Guiding Principles on Business and Human Rights (UNGPs), which were approved by the UN Human Rights Council in June 2011, clarify the respective obligations and responsibilities of States and corporations in protecting and respecting human rights, as well as in providing remedies to victims of human rights violations linked to corporate activity.²⁸⁶

The requirement that business enterprises respect human rights—the second pillar of the UNGPs—includes a requirement that companies “act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved.”²⁸⁷ This means that companies should put in place “a human rights due diligence process to identify, prevent, mitigate, and account for how they address their impacts on human rights.”²⁸⁸

The OECD Guidelines for Multinational Enterprises were also revised in 2011 to include a human rights chapter that highlights human rights due diligence as a key component of responsible business conduct.

Such due diligence obligations require companies to take measures to ensure that their subsidiaries (or, more broadly, the companies with which they are linked through an investment nexus) or their business partners (including suppliers, franchisees, and sub-contractors) do not resort to corruption.

This interpretation is confirmed by Principle 17 of the UNGPs, which provides that human rights due diligence should cover “adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products, or services by its business relationships.”²⁸⁹

Similarly, the OECD Guidelines provide that business enterprises domiciled in OECD countries should “seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products, or services by a business relationship, even if they do not contribute to those impacts.” As explained in the Commentary to these Guidelines, this implies an expectation that:

[A]n enterprise, acting alone or in co-operation with other entities, as appropriate, . . . use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact. ‘Business relationships’ include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise’s leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impacts.²⁹⁰

The OECD Guidelines also provide that companies should “encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines.”²⁹¹

Business enterprises increasingly operate as part of large networks of suppliers, sub-contractors, and clients. As such, it may be difficult for the enterprise to systematically monitor the activities of all its business partners. However, due diligence should be exercised in two ways:

1. A reference to human rights, including the right not to be deprived of one’s means of livelihood as a result of being evicted from land, should be inserted systematically into any contract that establishes a long-term, ongoing relationship between an enterprise and its business partner.
2. Where “due diligence on every individual relationship is impossible, business enterprises should identify general areas where the risk of adverse human rights impacts is most significant, whether due to certain suppliers’ or clients’ operating context, the particular operations, products, or services involved, or other relevant considerations, and prioritize these for human rights due diligence.”²⁹²

In the agri-food sector, for example, where agricultural products are sourced from suppliers in a country where land rights are routinely violated or where land-grabbing is known to occur, the buyer may be expected to be particularly diligent in ensuring that the crops are not grown on land that may have been forcibly acquired or acquired by corrupt means. Oxfam’s “Behind the Brands” campaign sheds light on a number of examples illustrating the need to move in this direction.²⁹³ Importantly, if due diligence reveals that corruption in a country’s land sector is unavoidable, the company should not proceed with the investment.

These human rights due diligence obligations should extend to preventing corruption, given the profound impacts of corruption on human rights where land acquisitions are concerned.²⁹⁴ Indeed, human rights due diligence tools can and have been used, *mutatis mutandis*, to address the risk of corruption. The model Anti-Corruption Clause promoted by the International Chamber of Commerce provides a good example (see Box 9).

box 9

THE ANTI-CORRUPTION CLAUSE OF THE INTERNATIONAL CHAMBER OF COMMERCE²⁹⁵

The Anti-Corruption Clause of the International Chamber of Commerce (ICC) is contained in a set of Rules on Combating Corruption,²⁹⁶ adopted by the ICC and most recently updated in 2011.

In order to ensure that these rules are complied with, the ICC suggests inserting the following Anti-Corruption Clause in contracts in order to reassure both parties about the integrity of their counterparts during the pre-contractual period, the term of the contract, and beyond:

Paragraph 1: Each Party hereby undertakes that, at the date of the entering into force of the Contract, itself, its directors, officers, or employees have not offered, promised, given, authorized, solicited, or accepted any undue pecuniary or other advantage of any kind (or implied that they will or might do any such thing at any time in the future) in any way connected with the Contract and that it has taken reasonable measures to prevent subcontractors, agents or any other third parties, subject to its control or determining influence, from doing so.

Paragraph 2: The Parties agree that, at all times in connection with and throughout the course of the Contract and thereafter, they will comply with and that they will take reasonable measures to ensure that their subcontractors, agents, or other third parties, subject to their control or determining influence, will comply with Part I of the ICC Rules on Combating Corruption 2011, which is hereby incorporated by reference into the Contract, as if written out in the Contract in full.

Paragraph 3: If a Party, as a result of the exercise of a contractually-provided audit right, if any, of the other Party's accounting books and financial records, or otherwise, brings evidence that the latter Party has been engaging in material or several repeated breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011, it will notify the latter Party accordingly and require such Party to take the necessary remedial action in a reasonable time and to inform it about such action. If the latter Party fails to take the necessary remedial action, or if such remedial action is not possible, it may invoke a defence by proving that by the time the evidence of breach(es) had arisen, it had put into place adequate anti-corruption preventive measures, as described in Article 10 of the ICC Rules on Combating Corruption 2011, adapted to its particular circumstances and capable of detecting corruption and of promoting a culture of integrity in its organization. If no remedial action is taken or, as the case may be, the defence is not effectively invoked, the first Party may, at its discretion, either suspend the Contract or terminate it, it being understood that all amounts contractually due at the time of suspension or termination of the Contract will remain payable, as far as permitted by applicable law.

Paragraph 4: Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the Contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with this ICC Anti-Corruption Clause.

The ICC's Anti-Corruption Clause is a means of implementing the recommendation of the Rules on Combating Corruption that “[a]n Enterprise should include in its contracts with Business Partners a provision allowing it to suspend or terminate the relationship, if it has a unilateral good faith concern that a Business Partner has acted in violation of applicable anti-corruption law [or the Rules on Combating Corruption].”²⁹⁷

The Anti-Corruption Clause is not a substitute, however, for the company exercising due diligence in its choice of business partners,²⁹⁸ or for the company and its business partners adopting a robust corporate compliance program (as described in detail in Article 10 of the Rules on Combating Corruption).²⁹⁹

It should be noted that the Anti-Corruption Clause not only requires that both parties refrain from corruption themselves, but also that they ensure their “subcontractors, agents, or any other third parties, subject to [their] control or determining influence,” do not rely on corruption.

The OECD instruments are similarly explicit on the “systems” approach to due diligence. Specifically, the OECD Guidelines encourage companies to:

Develop and adopt adequate internal controls, ethics and compliance programmes, or measures for preventing and detecting bribery, developed on the basis of a risk assessment addressing the individual circumstances of an enterprise, in particular the bribery risks facing the enterprise (such as its geographical and industrial sector of operation). These internal controls, ethics and compliance programmes, or measures should include a system of financial and accounting procedures, including a system of internal controls, reasonably designed to ensure the maintenance of fair and accurate books, records, and accounts, to ensure that they cannot be used for the purpose of bribing or hiding bribery. Such individual circumstances and bribery risks should be regularly monitored and re-assessed as necessary to ensure the enterprise’s internal controls, ethics and compliance programme, or measures are adapted and continue to be effective, and to mitigate the risk of enterprises becoming complicit in bribery, bribe solicitation, and extortion.³⁰⁰

The 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions³⁰¹ complements the chapter of the OECD Guidelines for Multinational Enterprises that concerns anti-corruption. It too recommends that companies “develop and adopt adequate internal controls, ethics and compliance programmes,

or measures for the purpose of preventing and detecting *foreign* bribery” (emphasis added).³⁰² Its Annex II provides good practice guidance on internal controls, ethics, and compliance. Annex II also details which measures companies could take in order to enhance the effectiveness of the monitoring systems put in place.

This guidance highlights the importance of “strong, explicit, and visible support and commitment from senior management” and strongly recommends that the anti-bribery position of the company be “clearly articulated and visible.”³⁰³ The guidance further suggests that one or more senior corporate officers exercise “oversight of ethics and compliance programmes or measures regarding foreign bribery . . . with an adequate level of autonomy from management, resources, and authority.”³⁰⁴ The guidance also confirms that the due diligence of a company extends to its subsidiaries, as the monitoring system should be “applicable to all entities over which a company has effective control, including subsidiaries.”³⁰⁵

As discussed in Section III of this report, the OECD-FAO 2016 Guidance for Responsible Agricultural Supply Chains is even more explicit on this point, clearly acknowledging the high risks of corruption in any land transaction. It recommends that companies refrain from resorting to bribery and cooperate in the implementation of OECD’s 1997 Anti-Bribery Convention. The OECD-FAO Guidance then goes further, stating that companies should:

1. “[R]efrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework related to human rights, environment, health, safety, labour, taxation, or other issues,” as such exemptions typically will depend on the goodwill of individual public officials who may be tempted to use their position as a source of pecuniary gain;
2. Develop adequate “internal controls, ethics and compliance programmes, or measures for preventing and detecting bribery”; and
3. “[U]se objectively assessed values, transparent and decentralised processes and services, and a right to appeal, to prevent corruption with regard to tenure rights, in particular the rights of indigenous peoples and local communities holding customary tenure rights.”³⁰⁶

Each of these measures can significantly reduce the risk of a company being indirectly involved in corruption in the transfer of land rights, and may also be seen as part of the company’s due diligence obligation not to contribute to the materialization of the risk of corruption.

c. Disclosure of Contract Terms and Operational Transparency

Despite arguments in favor of the full transparency of land deals, it is still tempting for investors and governments alike to treat at least certain parts of their contracts as confidential. In order to justify this, States and investors typically seek to hide behind notions such as “privacy” or “commercially sensitive information” (see Box 10). In particular, industry roundtable initiatives designed to improve sustainability of particular agricultural commodities often exempt participating companies from disclosing information if such information is considered commercially sensitive or if disclosure would adversely affect personal privacy or social or environmental outcomes.

Other instruments appear to share the same concern and seek to reconcile the requirements of transparency and disclosure requirements with other, countervailing interests. For instance, the UNECE Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (Aarhus Convention)³⁰⁷ lays out the rights of the public in relation to the environment, such as access to environmental information, and exempts disclosure to protect a legitimate economic interest while at the same time taking into consideration public interest concerns.

box 10

THE LIMITS TO DISCLOSURE OF LAND DEALS IN COMMODITY ROUNDTABLES

How should the demand for transparency, as a source of accountability, be reconciled with competing interests, such as privacy rights or the need to protect commercially sensitive information?

The solutions vary across instruments. Commodity roundtables like the Roundtable on Responsible Soy (RTRS) are more conservative in terms of disclosure, as they state that *only* “non-commercially sensitive information” can be disclosed and that the company should be the one to make such a determination.³⁰⁸

The Roundtable on Sustainable Palm Oil (RSPO) also exempts information from being disclosed if it “affects personal privacy” or if disclosure would adversely affect social or environmental outcomes.³⁰⁹ Additionally, the decision not to disclose such information under the RSPO is determined by the company itself.³¹⁰

Overall, while both the RTRS and the RSPO purport to be setting the standards for responsible conduct, they have been openly criticized for these weak disclosure policies.³¹¹

The OECD Guidelines on Multinational Enterprises are not particularly helpful on this point. The Guidelines rely on a concept of materiality that does not restrictively define the conditions under which information may be withheld. Instead, the Guidelines only define which information, at a minimum, should be divulged.

According to the Guidelines, “disclosure recommendations are not expected to place unreasonable administrative or cost burdens on enterprises. Nor are enterprises expected to disclose information that may endanger their competitive position unless disclosure is necessary to fully inform the investment decision and to avoid misleading the investor.”³¹² Faced with the argument that divulging information may endanger the competitive position of the company, the burden is thereby shifted to the stakeholders requesting information. These stakeholders must argue that the information is in fact relevant to the decision of investors whether or not to invest in the company. Thus, rather than disclosure being the rule, it is in practice limited to information which, if withheld, could mislead potential investors.³¹³

The Global Reporting Initiative (GRI) has attempted to build on this definition of materiality by defining it as “a threshold at which topics or indicators become sufficiently important that they should be reported.”³¹⁴ This too is hardly illuminating as it sounds like a tautological definition of what information should not be withheld.

Other instruments, while sharing the same concern and also seeking to reconcile the requirements of transparency and disclosure requirements with other, countervailing interests, adopt a more balanced approach. This approach is one that favors the right of the public to know, for the sake of improved accountability.

For instance, the Aarhus Convention³¹⁵ lays out the rights of the public in relation to the environment, such as access to environmental information. Although it exempts disclosure to protect “a legitimate economic interest,” the Aarhus Convention “contains the most promising provisions against confidentiality,” according to Global Witness, as it takes the right of the public to have access to information concerning environmental impacts as its departure point.³¹⁶

Indeed, the Aarhus Convention states that justifications for non-disclosure should be viewed “in a restrictive way, taking into account public interest.”³¹⁷ Global Witness further states that this is “in contrast” to the approach followed, for instance, by the International Finance Corporation (IFC). The IFC's procedures allow project proposals to be

confidential if they contain “sensitive client information.”³¹⁸ Because this term is never defined, however,³¹⁹ it can easily be manipulated in order to escape any requirement of transparency.

The Human Rights Reporting and Assurance Frameworks Initiative (RAFI) of the non-profit organization Shift is based on the UNGPs and requires a company to disclose information relating to large-scale land deals if the risk of corruption surrounding such deals is considered to be a “salient” human rights issue.³²⁰ Such issues are defined as those with “the most severe potential negative impacts on human rights.”³²¹ Whether negative impacts are considered severe or not is measured by their scale, scope, and possibility to remedy. Shift also justifies why companies should report on salient human rights issues, as opposed to including material information in their reporting, by drawing attention to the fact that “materiality can center on value-based decisions by shareholders” and therefore fail to “adequately reflect human rights issues.”³²² By basing reporting on salient human rights issues, however, a company will consistently ensure that it identifies and reports on “human rights issues that can be expected to converge strongly with risk to the business.”³²³

In a 2012 joint report, Global Witness, the International Land Coalition, and the Oakland Institute called for the adoption across all land and natural resource decision-making of a precautionary principle of “if in doubt, disclose.”³²⁴ This means 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.³²⁵ However, despite substantial evidence that this enhanced level disclosure could play a major role in reducing corruption in large-scale land deals, it has yet to be taken up by States or other actors.

d. Whistleblower Protection

Perhaps the most significant lesson from the data collected on the cases of corruption over the past fifteen years is that self-reporting by companies has played a far more important role in detecting corruption than media coverage or even investigations by public authorities.

In the 137 cases where corruption was detected through self-reporting, this was the result of internal auditing procedures (31 percent of the cases), due diligence being performed in the context of mergers and acquisitions (28 percent), or whistleblowers’ actions addressed to the head of the company (17 percent).³²⁶ This last statistic highlights the importance of

setting up strong whistleblower protection mechanisms that “will enable the company to elicit early, bona fide information of misconduct that could potentially save the company from both the risk of corruption and the costs involved in exposure and sanctioning.”³²⁷

Thus, it will not come as a surprise that OECD instruments encourage companies to provide protection for whistleblowers. In particular, the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions recommend that companies should:

provide channels for communication by, and protection of, persons not willing to violate professional standards or ethics under instructions or pressure from hierarchical superiors, as well as for persons willing to report breaches of the law or professional standards or ethics occurring within the company in good faith and on reasonable grounds, and should encourage companies to take appropriate action based on such reporting.³²⁸

2. The Role of the Financial Sector

The financial sector has a key role to play in combating land grabbing in general and in preventing corrupt practices that facilitate land grabbing in particular.³²⁹

Summary of Key Recommendations for the Financial Sector

The financial sector has a key role to play in combating land grabbing in general and in preventing corresponding corrupt practices in particular.

Financial sector regulations should require investors and those providing financial services to projects involving land tenure risks to undertake **human rights due diligence** to ensure that business partners do not cause human rights violations or resort to corruption. As such, financial institutions, like any other multi-national enterprise, should “avoid causing or contributing to adverse impacts, and seek to prevent or mitigate those impacts when their operations, products, and services can be directly linked to them by a business relationship.”³³⁰ Moreover, prosecuting authorities should impose sanctions on the individual bank executives themselves, otherwise these executives will remain tempted to treat the risk of their institution being fined for lack of due diligence in dealing with funds of suspect origin as a mere “business risk.”

Furthermore, financial sector regulation plays an important role at the other end of the chain—without a mechanism to launder the money, corrupt elites would be less

tempted to engage in corrupt practices, broadly speaking. As such, banks and other financial sector actors should undertake “**customer due diligence**” (CDD) upon establishing business relationships with new clients, for occasional transactions that reach a certain level, or where there is suspicion of money laundering. CDD includes identifying and verifying the identification of both the customer and the “beneficial owner” to understand who is behind the corporate structure, as well as conducting ongoing due diligence on the business relationship and scrutiny of transactions to ensure consistency with the institution’s knowledge of the customer and its source of funds. Particular diligence should also be taken in regard to politically exposed persons (PEPs) and their family members or close associates, whether these persons are clients or beneficial owners. Moreover, as recommended by the AML/CMT Standards, financial institutions should:

1. Have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person;
2. Obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;
3. Take reasonable measures to establish the source of wealth and source of funds; and
4. Conduct enhanced ongoing monitoring of the business relationship.³³¹

In addition, information on **beneficial ownership** should also be included in publicly available land registries, and attorney-client privilege over this information should be lifted where circumstances allow.³³² Home governments should adopt regulations to ensure that information concerning beneficial ownership of any entity incorporated under its laws is available to a person who is a resident in that country.³³³ Governments should also consider prohibitions on public sector employees from opening bank accounts in foreign jurisdictions.

a. Human Rights and Anti-Corruption Due Diligence

First, although land investors often get involved in countries where the land sector is rife with corruption, they generally do not perceive this as a serious liability. This perception of land investments being “low-risk” is particularly fueled by the fact that the chance of prosecution is very low. Because corruption is so widespread, it would seem to many investors that it benefits from an official tolerance. Were this risk perception to change, investors would be encouraged to take due diligence obligations far more seriously.

Second, part of the global phenomenon of land grabbing can be linked not only to global dynamics such as increased pressures on resources and higher levels of volatility on markets for agricultural commodities (both of which result in land becoming a more desirable asset for investors), but also to more local dynamics that include the use of real estate markets by elites to launder money of illicit origin.

The case of Cambodia is an illuminating example in this regard. Contrary to the meta-narrative of global land grabs, land prices in Cambodia actually *fell* after they reached a peak in 2007. Moreover, the inflated prices from 2000 to 2007 primarily seem attributable to the tendency of local urban elites and, to a lesser extent, foreign investors to use investments in land in rural areas in order to launder money.³³⁴ The phenomenon only slowed down after stricter financial regulations were put in place in the country at the request of the United States, as part of the global fight against the financing of terrorist activities.³³⁵ This illustrates the relationship between speculation on land that results in a rush of investors on the land that is available and the availability of capital liquidities markets of sometimes dubious origin. Combating money laundering, therefore, is also a means of combating what may be a major factor behind the “land grab” phenomenon in recent years.

Third, an additional result of globalization is the increased involvement of international financial investors (banks, pension funds, and private equity) in projects carrying risks of land grabbing, human rights violations, and corruption. For example, by the beginning of 2015, the top EU-based financial institutions (including banks, institutional investors, and alternative investment funds) had provided nearly eighteen billion USD outstanding loans and recent underwriting services to agriculture companies, many of which are domiciled in OECD countries and operate in developing countries.³³⁶

European Union financial institutions are also major holders of shares in stock market-listed agricultural companies based in developing countries. In early 2015, the top twenty institutional investors held 2.8 billion USD.³³⁷ Such involvement poses both reputational and financial risks for financial investors, the two of which are closely linked.³³⁸ In response, European civil society groups are increasingly calling for such financial institutions to be required to undertake more robust due diligence prior to becoming financially involved in risky land tenure projects.

The “direct link” between the financial sector and the adverse impacts of the projects they invest in was also recognized by the OECD’s Working Party on Responsible Business Conduct in 2014, which recommended

that “[f]inancial institutions, like any other [multinational enterprises], should thus avoid causing or contributing to adverse impacts, and seek to prevent or mitigate those impacts when their operations, products, and services can be directly linked to them by a business relationship.”³³⁹

Fourth, financial sector regulation also plays an important role at the other end of the chain, when land has been acquired through corrupt means. Without a mechanism to launder the money, corrupt elites will be less tempted to engage in corrupt practices. Yet, as Global Witness and others have warned, many regulations aimed at combating laundering have been ignored or circumvented by financial actors.³⁴⁰

This comes at a considerable price for developing countries. For instance, a World Bank study found that, from 1980 to 2010, 200 large-scale cases of corruption led to a loss of 56.4 billion USD for governments—a considerable sum that could have been used to improve the health, education, or housing of the population.³⁴¹ These cases involved 140 different banks across the world, including more than a third of the 50 largest financial institutions.³⁴² In 2015, the UN Office on Drugs and Crime estimated that the amount of the money laundered each year was the equivalent of 2 to 5 percent of total GDP, or 800 billion USD to 2 trillion USD.³⁴³

b. Customer Due Diligence

The Financial Action Task Force (FATF)—an independent intergovernmental body established in 1989 to support the fight against money laundering—adopted a set of relevant recommendations addressed to its Member States. Known as the International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (AML/CFT Standards), the recommendations, initially drafted in 1990 and most recently updated in 2012, have been endorsed by 180 countries.³⁴⁴ While it is not possible within the scope of this report to describe in detail the full set of recommendations provided by the AML/CFT Standards, it is relevant to note that the standards recommend requiring financial institutions to undertake customer due diligence (CDD) upon establishing business relationships with new clients or for occasional transactions, whether because they reach a certain level or there is a suspicion of money laundering or terrorist financing.

CDD means identifying the customer, verifying that customer’s identity, identifying the “beneficial owner” (defined as the person who actually enjoys the benefits of the company even though title may be in another name), and “taking reasonable measures to verify the identity of the

beneficial owner, such that the financial institution is satisfied that it knows who the beneficial owner is.”

Where the client is a corporation, CDD means understanding the corporate structure to know who is “behind” the corporate structure, “understanding and . . . obtaining information on the purpose and intended nature of the business relationship,” and “conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution’s knowledge of the customer, their business, and risk profile, including, where necessary, the source of funds.”³⁴⁵

The 2015 EU Anti-Money Laundering and Terrorist Financing Directive, for instance, provides that such due diligence imposed on financial institutions and other obliged entities should at least include development of internal policies, controls and procedures, including model risk management practices, customer due diligence, reporting, record-keeping, internal control, [and] compliance management, including, where appropriate with regard to the size and nature of the business, the appointment of a compliance officer at management level, and employee screening.³⁴⁶

The due diligence process should also include, “where appropriate with regard to the size and nature of the business, an independent audit function to test the internal policies, controls, and procedures” that have been established, with the approval of the senior management.³⁴⁷

The AML/CFT Standards also recommend particular diligence as regards politically exposed persons (PEPs) and their family members or close associates, whether these persons are clients or beneficial owners.³⁴⁸ PEPs are defined as “individuals who are or have been entrusted with prominent public functions . . . for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.”³⁴⁹ In many cases, this definition would include middle-level public officials, for instance within the land administration in charge of registering property and delivering titles.³⁵⁰ Moreover, the definition of PEPs also includes family members “who are related to a PEP either directly [by blood] or through marriage or similar (civil) forms of partnership,” which is important to note as many corrupt land deals are conducted using the names of family members rather than the public officials themselves.³⁵¹

The AML/CFT Standards also recommend that financial institutions be required, “in addition to performing normal customer due diligence measures,” to:

- (a) have appropriate risk-management systems to determine whether the customer or the beneficial owner is a politically exposed person;
- (b) obtain senior management approval for establishing (or continuing, for existing customers) such business relationships;
- (c) take reasonable measures to establish the source of wealth and source of funds; and
- (d) conduct enhanced ongoing monitoring of the business relationship.³⁵²

c. Beneficial Ownership

The above-mentioned FATF recommendations on the need to seek information about beneficial owners are also of particular importance. A major obstacle to the enforcement of money laundering regulations is that the identity of the real owners of corporate structures may remain hidden, or can only be known to the authorities in the home country by seeking information from the host country.

Noting that, in many cases, financial institutions do not seek to identify the beneficial owner when establishing a business relationship, the World Bank 2011 “Puppet Masters” study highlighted the importance of imposing due diligence obligations on banks and other financial intermediaries such as trust and company service providers. Such obligations, the study noted, would oblige service providers to “collect information and conduct due diligence on matters about which they might prefer to remain ignorant.”

Moreover, “[i]f a service provider is obligated to gather full due diligence information, it becomes impossible for the intermediary to legitimately plead ignorance regarding the background of a client or the source of his or her funds.”³⁵³ The collection of such information by the financial intermediaries thus facilitates inquiries and provides investigators with an adequate source of information.

Even apart from the fact that they are not, by any means, fully implemented by participating countries, the AML/CFT Standards remain insufficient to effectively combat the laundering of funds received by officials bribed in the context of large-scale land acquisitions.

First, where investigators seek to have access to information detained by an attorney, the attorney-client privilege is routinely invoked to shield information from scrutiny. Such a barrier should be lifted where circumstances allow. The 2011 World Bank study notes that many jurisdictions have introduced exceptions to the legal professional privilege “in cases in which the attorney is acting as a financial intermediary or in some other strictly fiduciary or transactional capacity, *rather than as a legal advocate*” (emphasis added).³⁵⁴

The 2015 EU Anti-Money Laundering and Terrorist Financing Directive adopts a similar position. It provides that, when the “obliged entities . . . know, suspect or have reasonable grounds to suspect” that funds result from criminal activity or are related to terrorist financing, they should report their suspicion to the authorities.³⁵⁵ It adds, however, that this duty may not apply to “notaries, other independent legal professionals, auditors, external accountants and tax advisors *only to the strict extent that* such exemption relates to information that they receive from, or obtain on, one of their clients, in the course of ascertaining the legal position of their client, or performing their task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, whether such information is received or obtained before, during or after such proceedings” (emphasis added).³⁵⁶

In addition, another provision of the same instrument shields the directors or employees from any liability (for instance, for violation of their duties of confidentiality towards their client) if they divulge information that they suspect may be revealing money laundering, “even in circumstances where they were not precisely aware of the underlying criminal activity and regardless of whether illegal activity actually occurred.”³⁵⁷ The Directive thus seeks to carefully delineate the scope of the legal professional privilege that may be invoked by such professionals, balancing the confidentiality of the lawyer-client relationship against the need to combat money laundering.

A second limitation of the AML/CFT Standards is that international cooperation is essential to the success of the provisions concerning the need to identify the beneficial owner. The World Bank’s 2011 Puppet Masters study also concludes that, in order to save the considerable costs involved in having to seek information concerning the “real owners” of companies from authorities of a country other than the country where the company is registered, States may adopt regulations to ensure that information concerning beneficial ownership of any entity incorporated under its laws is available with a person who is *resident* in

that country.³⁵⁸ This will allow the local authorities to seek information from that person resident under their jurisdiction, rather than to have to turn to foreign authorities.³⁵⁹

Third, in order for the AML/CFT standards to be truly effective, the incentives of bankers should be aligned with the legal duties imposed on the financial institutions themselves. This is not currently the case. Global Witness notes that, as long as prosecuting authorities remain hesitant to impose sanctions on bank executives themselves, as individuals, these executives will remain tempted to treat the risk of their institution being fined for lack of due diligence in dealing with funds of suspect origin as a mere “business risk,” that may be worth taking as long as the benefits outweigh the potential costs to the institution.

It is encouraging to note, however, that in recent years prosecuting authorities, particularly in the United States, have appeared more willing to impose sanctions not only on financial institutions, but also on individuals working within such institutions—although more frequently on middle-level employees than on the “directing minds” such as CEOs and board members.³⁶⁰

The recent EU Anti-Money Laundering and Terrorist Financing Directive again represents a promising step in this direction: it provides that where legal persons are found to have breached their obligations under the national law implementing the directive, “sanctions and measures can be applied to the members of the management body and to other natural persons who under national law are responsible for the breach.”³⁶¹

Lastly, imposing a prohibition on public sector employees to open bank accounts in foreign jurisdictions could further strengthen the AML/CFT standards. Some countries have moved in this direction. In Nigeria, such a rule allows the local authorities to easily identify any suspect enrichment of officials in charge, for instance, of attributing land to investors or of granting land deeds. Where such a rule does exist, financial institutions outside the jurisdiction concerned should contribute to its enforcement by refusing to receive funds from the individuals to whom the prohibition applies.

3. The Duties of Host States

States targeted by large-scale land investments have a key role to play in addressing corruption. Corruption significantly diminishes any benefits that the local population could hope to reap from the arrival of investors. In many cases, it will allow investors to circumvent regulatory obstacles designed to protect the rights and interests of local land users, depriving them of access to the resources on which they depend for their livelihoods.

Summary of Key Recommendations for Host States

Host States must **fully protect and secure** the land and natural resource rights of local communities who depend on the land concerned. These forms of protection should include both the specific protection granted to the lands and territories of indigenous peoples as well as the right of all peoples to freely make use of their natural wealth and resources. Where representatives of the community cede communal lands to external investors, anti-corruption norms, such as those obliging public servants to publish the assets they own at the start and end of their tenure or rules protecting whistleblowers, should be applied.

The **principles of transparency and accountability**, as emphasized by initiatives such as EITI or OGP, should inspire legislative reforms that reduce the opportunities for corruption in land deals. Host States must also ensure that local communities who depend on the land concerned are fully involved in the negotiations, FPIC protocols are followed for potentially impacted communities, and measures are taken to guard against the bribery of community representatives. Host States should also ensure the negotiations with the prospective investor are fully transparent, key contract terms and conditions are fully disclosed before the contract is signed, and the agreement reached is in the best interests of the local population, as required by the right to self-determination and many other human rights.

In particular, Host States should prioritize implementation of:

1. The “publish what you pay, publish what you receive” principle;
2. Access to information acts that allow civil society and the media to effectively perform their monitoring roles; and
3. Legislation ensuring that public servants divulge the assets they and their family members own at the start and at the end of their tenure in office and regularly throughout.

Such reforms would be particularly effective if combined with a prohibition for public sector employees to hold bank accounts outside the jurisdiction concerned, in order to avoid any expatriation of illicit funds—a rule which, in order to be effectively enforced, requires the collaboration of the financial sector.

Both **judicial and non-judicial grievance mechanisms** must be independent and free from pressure from political or business elites involved in the land sector. In particular, courts should have the capacity and legal authority to review any decision to allocate land. In particular, the use of “public purpose” or “public interest” should refer to the specific purposes of the investment concerned, as well as to whether or not it shall improve the situation of the local communities concerned. If needed, reforms to judicial systems should take place to ensure that courts are fit for purpose and that they have not been corrupted.

Protect **civil society space** so that communities, NGOs, and other actors, including journalists, are able to monitor and expose land grabbing by powerful elites and ensure they are held accountable for their crimes.

a. Full Protection and Security of Land and Natural Resource Rights

An ongoing and essential step is to ensure that the land and natural resource rights of local communities, who depend on the land concerned, are fully protected and secure. Indigenous peoples are generally considered deserving of a heightened level of protection in this regard. Indeed, under the International Labour Organization (“ILO”) Convention Concerning Indigenous and Tribal Peoples in Independent Countries³⁶² and under the UN Declaration on the Rights of Indigenous Peoples (which may be seen as reflecting the standards of customary international law³⁶³), international law recognizes the right of indigenous peoples over the lands and territories that they have traditionally occupied. Indigenous peoples have the right to have their lands demarcated; relocation is only allowed under narrowly defined circumstances and, in principle, with the FPIC of the groups concerned. These instruments in principle should protect indigenous peoples from encroachments on their land, such as for the development of industrial projects or for large-scale investments in agricultural production.³⁶⁴

Though there is a strong consensus on the above-mentioned principles, two questions nevertheless arise. A first question asks who may legitimately represent the indigenous communities in negotiations through which FPIC is sought. The key principle here is that of autonomy—it is for the communities themselves to determine how they should be governed. As noted by the UN High Commissioner for Human Rights:³⁶⁵

The issue as to from whom the State can seek consent is critical. In this regard, several communities around the world are working on establishing their own protocols on how outsiders should communicate with them to obtain their free, prior, and informed consent. The consent of indigenous peoples should be determined in accordance with their customary laws and practices. This does not necessarily mean that every single member must agree, but rather that the consent process will be undertaken through procedures and institutions determined by indigenous peoples themselves. Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.

A second question is whether these principles that apply to indigenous peoples may extend to other communities that enjoy a similar relationship to the land that they occupy and on which they depend. Such an extension is in fact taking place currently through two channels. A first channel is the right to self-determination of peoples and, specifically, the right of all peoples to freely dispose of their natural wealth and resources, which is articulated under Article 1 of both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁶⁶ The Human Rights Committee has read this norm to prohibit depriving any people of traditional uses of the land and resources on which they rely.³⁶⁷

Another channel is the right to property, as protected in particular under Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination and under Article 21 of the American Convention on Human Rights.³⁶⁸ The right to property, indeed, is not limited to the right to *individual* property. According to the Committee on the Elimination of Racial Discrimination, it includes the “rights of all indigenous communities to own, develop and control the lands which they traditionally occupy, including water and subsoil resources”;³⁶⁹ and the Inter-American Court of Human Rights has explicitly noted that property should not be understood in a restrictive sense but can be an attribute of the group or the community.³⁷⁰ The international courts and treaty bodies are not isolated in this regard. Indeed, certain domestic courts have adopted decisions that point in the same direction.³⁷¹

There is no reason in principle why indigenous peoples³⁷² should be the only beneficiaries of this recognition of communal forms of ownership. There are in fact a number of arguments in favor of recognizing the relevance to other groups of this renewed recognition of communal notions of property, which questions the privileged position that individual property in land enjoys in Western capitalist legal systems.³⁷³ Furthermore, some industry-based initiatives (such as the Roundtable on Sustainable Palm Oil (RSPO)), several companies (such as Coca-Cola and Pepsi), and some government initiatives (such as the Chinese government’s recent guidelines on conflict minerals) already require that FPIC be applied to all communities, not just indigenous communities.³⁷⁴

Where representatives of the community cede communal lands to external investors, anti-corruption norms, such as those obliging representatives to publish the assets they own at the start and end of their tenure or rules protecting whistleblowers, should be applied. There is no reason not to extend the reach of such norms to the transactions that

representatives conduct on behalf of the community. In effect, community representatives “consenting” to land being ceded in the name of the community are acting similarly to governmental officials ceding land considered to be State property. For the land and resource users who have no legal title to the land they depend on, the threat is similar, and the safeguards against corruption should apply per analogy. Such safeguards are meant to ensure that negotiations will be conducted exclusively with the “public interest” in mind and shall not be tainted by the private interests of the particular individuals involved.

b. Transparency and Accountability

A second step is to ensure that negotiations with the prospective investor are fully transparent, key contract terms and conditions are fully disclosed before the contract is signed, and that the agreement reached is in the best interests of the local population, as required by the right to self-determination. Host States should ensure that contract terms relating to large-scale land deals are disclosed and that, as a minimum standard, basic information about the project (including contract term, size of land, purpose of investment, impact assessments, mitigation plans, and local employment and infrastructure commitments) is made available and accessible to potentially affected communities

The principles of transparency and accountability in public budgets, as emphasized by initiatives such as EITI or OGP, should also inspire legislative reforms that reduce the opportunities for corruption in land deals. Such should reforms include:

1. The full implementation of the “publish what you pay, publish what you receive” principle;
2. Access to information acts that allow civil society and the media to effectively perform their monitoring roles; and
3. Legislation ensuring that public servants divulge the assets they and their family members own at the start and end of their tenure in office and regularly throughout the term of ownership.

Such reforms would be particularly effective if combined with a prohibition for public sector employees to hold bank accounts outside the jurisdiction concerned, in order to avoid any expatriation of illicit funds—a rule which, in order to be effectively enforced, requires the collaboration of the financial sector.

While such rules have been designed in order to reduce corruption in the public sector, they can be transposed, almost without modification, to ensure that decisions made by community leaders are not tainted by corruption.

c. Judicial and Non-Judicial Grievance Mechanisms

As a third step, both judicial and non-judicial grievance mechanisms must be independent and free from pressure from political or business elites involved in the land sector. In particular, courts should be in a position to review any decision to allocate land, both on procedural and on substantive grounds. As mentioned earlier in this report, a key element to this review is how courts define the “public purpose” or “public interest” that authorities should demonstrate in order to justify expropriating the land. These expressions should refer not to some abstract and general notion that investment shall contribute to economic growth and therefore to economic progress, but to the specific purposes of the investment concerned, as well as to whether or not it shall improve the situation of the local communities concerned. This also follows from the right to self-determination. If needed, reforms to judicial systems should take place to ensure that courts are fit for purpose and that they have not been corrupted.

d. Civil Society Space

Finally, host States must ensure that civil society has space within which to operate. Freedom of association and expression must be fully protected so that community-based organizations and other non-governmental actors, including journalists, are able to monitor land allocations, defend the right to land, and challenge land grabbing by powerful elites when necessary without fear of reprisals from the authorities.

4. The Duties of Home States

The UN human rights treaty bodies have repeatedly expressed the view that a home State should take steps to prevent human rights contraventions abroad by business enterprises that are incorporated under its laws or that have their main seat or their main place of business under the State’s jurisdiction.

The Committee on Economic, Social and Cultural Rights in particular affirms that State Parties should “prevent third parties from violating the right [protected under the ICESCR] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and

applicable international law.”³⁷⁵ Specifically in regard to corporations, the Committee has further stated that “State Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host states under the Covenant.”³⁷⁶

Other human rights treaty bodies have expressed similar views. The Committee on the Elimination of Racial Discrimination considers that a State Party should also protect human rights by preventing its own citizens, companies, or national entities from violating rights in other countries.³⁷⁷ Under the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee noted in 2012 in its Concluding Observations addressed to Germany:

The State party is encouraged to set out clearly the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the Covenant throughout their operations. It is also encouraged to take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.³⁷⁸

These positions are supported not only by legal doctrine, but also by civil society,³⁷⁹ and the International Court of Justice.³⁸⁰ One of the areas in which this development manifests itself most clearly is in the duty of the State to combat corruption by regulating the corporate actors that it is in a position to influence. Consistent with the principle of active personality,³⁸¹ this refers to corporations that are registered under the State’s laws, have a principal place of business under the State’s jurisdiction, or have their central place of administration located in the State’s territory.

Summary of Key Recommendations for Home States

Home States should make corruption in both the public and private sectors a **criminal offence** and should ensure that entities within the State responsible for investigating and enforcing such laws have **adequate resources and training** to do so effectively.

A home State should take **policy-making, legislative, regulatory, and adjudicative steps** to prevent human rights contraventions abroad by business enterprises that are incorporated under the State’s laws or that have a main seat or a main place of business under its jurisdiction.

In particular, the home State should require **human rights due diligence**, as well as the strengthening of corporate mechanisms to avoid corruption. This should be applied both to companies investing directly in land, as well as to the financial backers of these companies through appropriate financial regulations. Home States should also require businesses to disclose details about their land acquisitions in other

countries. This requirement should include a description of the negotiation process, information on how the requirement to seek the free, prior and informed consent of the local communities was complied within the process, and key contract terms such as the size of the land leased or bought, the exact location of the land, the final sale or leasing price, and commitments made to affected communities such as roads, schools, and other infrastructure projects.

The State should provide victims with **access to its courts** to address human rights harms caused by, contributed to by, or linked to companies incorporated under the State's laws or that have a main seat or a main place of business under its jurisdiction.

Finally, home States should use their leverage with host States to oppose the closing down of **civil society space**. Where a host State is using repressive measures to prevent freedom of expression and association, home States should advise investors and companies to avoid investing in land.

a. Criminalization of Corruption

International instruments such as the OECD Anti-Bribery Convention and the UN Convention Against Corruption define the State duty to criminalize corruption and to effectively control companies under the State's jurisdiction in this regard. This duty should be read in accordance with international human rights law, taking into account the close connections between corruption and human rights violations. This justifies a broad reading of the duty of the home State under these instruments, as well as a close monitoring of how diligently home States discharge their obligations.

This report has highlighted why the 2010 UK Anti-Bribery Act could be seen as defining a benchmark in this regard. In particular, the UK Anti-Bribery Act could target companies who buy agricultural products from suppliers who themselves may have relied on bribery to buy or lease the land on which such products are grown. As illustrated in particular by Oxfam's "Behind the Brands" campaign, this expansion of the reach of anti-bribery legislation is of great practical significance due to the current organization of global supply chains in the agri-food industry. Moreover, the UK Anti-Bribery Act provides a strong incentive for a company to implement due diligence, strengthen the mechanisms it has established in order to avoid corruption, and continuously improve such mechanisms in line with the best practices observed within its sector. Due diligence, indeed, functions as an evolving benchmark that responds to changing regulatory frameworks and evolving public expectations.

b. Human Rights Due Diligence and Access to Courts

Overall, home States should take policy-making, legislative, regulatory, and adjudicative steps to prevent human rights contraventions abroad by business enterprises that are incorporated under the State's laws or that have a main seat or a main place of business under its jurisdiction. In particular, home States should require human rights due diligence, as well as the strengthening of corporate mechanisms to avoid corruption. Home States should also require businesses domiciled in their jurisdictions to disclose details about their land acquisitions in other countries. This requirement should include a description of the negotiation process, information on the obtainment of FPIC in the process, and key contract terms, such as the size of the land leased or bought, the exact location of the land, the final sale or leasing price, and commitments made to affected communities such as roads, schools, and other infrastructure projects. The State should also provide victims with access to its courts to address human rights harms caused by, contributed to by, or linked to companies incorporated under the State's laws or that have a main seat or a main place of business under its jurisdiction.

c. Civil Society Space

Finally, home States should exercise, to the greatest extent possible, their leverage to ensure that host nations are protecting civil society space, including, most crucially, through the protection of the freedoms to association and expression. Where repression by authorities in host States prevents communities and NGOs from being able to monitor land deals or expose when abuses have taken place, the likelihood of those deals being tainted by corruption increases substantially. Where home States are unable to prevent the closing down of civil society space in the country where the investment is made, the home State should advise investors and companies that large-scale investments in land should not proceed.

CONCLUSION

Corruption in the administration of land remains rampant. It occurs at all phases and all levels of large-scale land deals. These various forms of corruption make it easy for investors to circumvent even the most carefully crafted regulations. Corruption also allows investors to transform their economic dominance into political influence and to obtain various forms of special treatment.

The problem is not new. The international community has been concerned with corruption since the early 1990s. Instruments have been adopted, both at regional and international levels, to combat the bribery of foreign public officials. Despite this, corruption in land deals remains an underexplored and underreported phenomenon. It is a blind spot for current regulatory frameworks, which are so far failing to prevent tainted land deals from multiplying across the world.

This report shows that much more can and should be done.

The anti-corruption instruments developed so far fail to address issues that are particularly salient in the context of large-scale land deals. Not all instruments cover so-called “facilitation payments” that encourage an official to do what he or she legally has the power to do, but may be encouraged to do perhaps more efficiently once promised a (generally minor) monetary reward. In addition, the definition of a “foreign public official” is generally understood restrictively in these instruments, failing to include community chiefs who may be tempted to give away the land of the community they represent if offered certain advantages in return. Moreover, most anti-corruption instruments address active bribery by a company under the jurisdiction of the State concerned, but very few extend to bribery committed by another actor whose conduct benefits the company, such as when the other actor supplies the company with products from land obtained through corrupt means. Lastly, not all anti-corruption instruments are strong in imposing human rights due diligence obligations on corporate actors, which would require companies to put procedures in place to prevent corruption, facilitate strong and explicit backing from the top levels of management, and necessitate independent supervision of compliance.

This report shows that the United Kingdom’s 2010 Bribery Act goes further than many other instruments on these various issues. This perhaps signals a new generation of instruments that will be more effective in tackling corruption in all its forms, thus hopefully also reducing corruption’s impact on large-scale land deals. However, it is also under the jurisdiction of the United Kingdom that some of the most well-known tax havens are allowed to flourish, providing an easy way for corrupt elites in developing countries to hide assets from tax authorities and from public scrutiny. For instance, after reviewing the situation in the United Kingdom, the Committee on Economic, Social, and Cultural Rights recommended in June 2016 that the

country “intensify its efforts, in coordination with its Overseas Territories and Crown Dependencies, to address global tax abuse.”³⁸² The Committee also noted that financial secrecy legislation is currently a major obstacle in mobilizing State resources for the realization of economic, social, and cultural rights.³⁸³ The failure to clamp down on tax havens also makes it much more difficult for other States to address corruption effectively. As long as they can safely shelter money in secretive tax havens, corrupt public officials will be tempted to enrich themselves at the expense of the general public. As this report shows, those who control land are particularly well placed to abuse the system and negatively impact the full spectrum of human rights.

Rooting out corruption in land administration will not solve all impacts of the move towards privatization of land. Even perfectly transparent land deals can have destructive impacts on rural livelihoods, accelerate rural flight, and ultimately cause more damage than good. However, harms are seriously exacerbated when corruption factors into the various phases of land transactions. As this report demonstrates, the tools used thus far to address these harms provide insufficient coverage and have, to date, been poorly enforced in the context of land. The policy recommendations provided in this report are a key step in facilitating concrete change in this context, and investors, financial actors, and home and host States in particular must show greater leadership by transforming these recommendations into reality.

ENDNOTES

- 1 See U.N. OFFICE ON DRUGS AND CRIME, GLOBAL PROGRAM AGAINST CORRUPTION, UN ANTI-CORRUPTION TOOLKIT, Ch. 1 (2004), available at http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Supplemental/UN_Anti_Corruption_Toolkit_pages_10to16.pdf; see also MEGAN MACINNES, *Land is Life: An Analysis of the Role 'Grand' Corruption Plays in Enabling Elite Grabbing of Land in Cambodia*, in CONSERVATION AND DEVELOPMENT IN CAMBODIA: EXPLORING FRONTIERS OF CHANGE IN NATURE, STATE AND SOCIETY (Sarah Milne & Sango Mahanty eds., Routledge 2015), available at <https://www.routledge.com/products/9780415706803> [hereinafter MacInnes, Land is Life].
- 2 MacInnes, Land is Life, *supra* note 1, at 10-11.
- 3 *Id.*
- 4 LAURENCE COCKCROFT, GLOBAL CORRUPTION: MONEY, POWER AND ETHICS IN THE MODERN WORLD 2 (I.B. Tauris, 2012).
- 5 See UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), FREE PRIOR AND INFORMED CONSENT OF INDIGENOUS PEOPLES (2013), available at <http://www.fao.org/3/a-i3496e.pdf> (defining free, prior, and informed consent (FPIC) as requiring, "States to consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.").
- 6 It should be noted that, while this is the only globally agreed definition of land grabbing, it is a contested term and definition nonetheless. See *Tirana Declaration: Securing Land Access for the Poor in Times of Intensified Natural Resources Competition*, INTERNATIONAL LAND COALITION (2011), <http://www.landcoalition.org/sites/default/files/documents/resources/tiranadeclaration.pdf>.
- 7 See generally, WAEL ZAKOUT, ET. AL., GOOD GOVERNANCE IN LAND ADMINISTRATION: PRINCIPLES AND GOOD PRACTICES, FAO (2006) available at <http://www.fao.org/3/a-ak375e.pdf>; Food and Agriculture Organisation of the United Nations (FAO) and Transparency International, *Corruption in the Land Sector*, (Working Paper No. 04/2011, 2011) <http://www.fao.org/docrep/014/am943e/am943e00.pdf>.
- 8 Oxfam, *Poor Governance, Good Business. How land investors target countries with weak governance*, Oxfam media briefing No. 03/2013, (Feb. 7, 2013) available at <https://www.oxfam.org/sites/www.oxfam.org/files/poor-governance-good-business-oxfam-mb070213.pdf>.
- 9 This is the key result of empirical studies performed separately by Dani Rodrik and David Kucera. See Dani Rodrik, *Democracies pay Higher Wages*, 114 Q. J. OF ECONOMICS, 707-738 (1999); David Kucera, *The Effects of Core Workers' Rights on Labour Costs and Foreign Direct Investment: Evaluating the 'Conventional Wisdom'*, (IILS, Working Paper No. 130, 2001). These studies and the study mentioned in the following note are cited by the helpful review of the literature made by Drusilla K. Brown, Alan V. Deardorff & Robert M. Stern, *The Effects of Multinational Production on Wages and Working Conditions in Developing Countries*, (NBER, Working Paper No. 9669, 2003), available at <http://www.nber.org/papers/w9669>. For a discussion of the various studies having sought to identify correlations or to establish causality links between respect for human rights and attractivity to foreign investment, see Matthias Sant'Ana, *Foreign Direct Investment and Human Development: Two Approaches to Assessing Impacts on Human Rights*, 3 HUM. RTS. & INT'L LEGAL DISCOURSE, 2, 229-262, 232-248. (2009).
- 10 See Matthias Bujko, et al., *How institutions shape land deals: The role of corruption 1-2* (CESifo Working Paper Series No. 5178, 2015), <http://ssrn.com/abstract=2559718> (using panel data for 157 countries for the period 2000-2011, and arriving at the conclusion that corruption is significantly correlated with the conclusion of land deals, particularly relatively smaller-size deals).
- 11 *Id.*; see Derek Byerlee et al., *Rising Interest in Farmland: Can it Yield Sustainable and Equitable Benefits?* THE WORLD BANK (2010), available at <http://siteresources.worldbank.org/DEC/Resources/Rising-Global-Interest-in-Farmland.pdf>.
- 12 LAND MATRIX, <http://www.landmatrix.org/en/> (last visited Oct. 24, 2015). The data referred to here are those presented by the Land Matrix Project on Oct. 24, 2015. The Global Observatory of the Land Matrix Project is coordinated by the International Land Coalition, the Centre de recherche internationale en coopération agronomique pour le développement (CIRAD), the Centre for Development and Environment (CDE) at the University of Bern, the Hamburg-based German Institute for Global and Area Studies (GIGA), and the Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ).
- 13 *By Target Region*, LAND MATRIX, <http://www.landmatrix.org/en/get-the-detail/by-target-region/> (last visited Oct. 24, 2015).
- 14 *Id.*
- 15 *By Target Country*, LAND MATRIX, <http://www.landmatrix.org/en/get-the-detail/by-target-country/> (last visited Oct. 24, 2015).
- 16 *Id.*

- 17 A wide range of studies has been published on the potential benefits, risks, and challenges involved in the increase of large-scale investments in land for agricultural production. See Sappho Haralambous et al., *THE GROWING DEMAND FOR LAND: RISKS AND OPPORTUNITIES FOR SMALLHOLDER FARMERS*, INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (Discussion Paper, 2009), available at <https://www.ifad.org/documents/10180/72144de7-3ef9-4c96-8e6b-f545964fe6e4> [hereinafter IFAD Discussion Paper 2009]; Lorenzo Cotula et al., *LAND GRAB OR DEVELOPMENT OPPORTUNITY? AGRICULTURAL INVESTMENT AND INTERNATIONAL LAND DEALS IN AFRICA*, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT (IIED), FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO), AND IFAD, (2009), available at <http://pubs.iied.org/12561IIED.html> (providing a detailed examination of land deals in Sudan, Ethiopia, Madagascar, Mozambique, and Tanzania); Klaus Deininger et al., *Rising global interest in farmland: Can it yield sustainable and equitable benefits?*, WORLD BANK (Sept. 2010), available at http://siteresources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf; Deutsche Gesellschaft für Technische Zusammenarbeit [hereinafter GTZ], *Foreign direct investment (FDI) in land in developing countries*, (Dec. 2009) available at <http://www2.gtz.de/dokumente/bib-2010/gtz2010-0478en-foreign-direct-investment-food-security.pdf>; Michael Kugelman & Susan L. Levenstein (eds.), *Land grab? The race for the world's farmland*, WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS (2009), available at https://www.wilsoncenter.org/sites/default/files/ASIA_090629_Land%20Grab_rpt.pdf; Howard Mann & Carin Smaller, *Foreign land purchases for agriculture: What impact on sustainable development?*, 8 SUSTAINABLE DEVELOPMENT INNOVATION BRIEFS (2010); CENTER FOR HUMAN RIGHTS AND GLOBAL JUSTICE, *FOREIGN LAND DEALS AND HUMAN RIGHTS: CASE STUDIES ON AGRICULTURAL AND BIOFUEL INVESTMENT* (New York: NYU School of Law, 2010) (providing an in-depth study of four cases in Tanzania, Southern Sudan, Pakistan, and Mali).
- 18 KEVIN WOODS, *Timber Trade Flows and Actors in Myanmar: The Political Economy of Myanmar's Timber Trade* in FOREST TRENDS REPORTS SERIES: FOREST TRADE AND FINANCE 10 (2013), available at http://forest-trends.org/releases/uploads/Conversion_Timber_in_Myanmar.pdf (citing to Central and regional government data from 2013).
- 19 GLOBAL WITNESS, *GUNS, CRONIES, AND CROPS: HOW MILITARY, POLITICAL, AND BUSINESS CRONIES CONSPIRED TO GRAB LAND IN MYANMAR* (2015), available at <https://www.globalwitness.org/en-gb/campaigns/land-deals/guns-cronies-and-crops/> [hereinafter GUNS, CRONIES, AND CROPS].
- 20 See Klaus Deininger, *Challenges posed by the new wave of farmland investment*, 38 J. OF PEASANT STUDIES, 217-244 n.2 (2011); KLAUS DEININGER, ET. AL. *RIISING GLOBAL INTEREST IN FARMLAND: CAN IT YIELD SUSTAINABLE AND EQUITABLE BENEFITS?* (Agriculture and Rural Development, World Bank 2011), available at <https://openknowledge.worldbank.org/handle/10986/2263>.
- 21 *Ntwala Mwilima, Foreign direct investment in Africa, Social OBSERVATORY PILOT PROJECT 41-42* (2003) available at http://www.sarprn.org/documents/d0000883/P994-African_Social_Observatory_PilotProject.pdf#page=31.
- 22 See generally THE AFRICAN UNION COMMISSION, THE UNITED NATIONS ECONOMIC COMMISSION FOR AFRICA, AND THE AFRICAN DEVELOPMENT BANK, *FRAMEWORK AND GUIDELINES ON LAND POLICY IN AFRICA*, (2009) available at <http://www.pambazuka.org/aumonitor/images/uploads/Framework.pdf> [hereinafter The African Framework]. The African Framework developed a set of guidelines for use by African Union Member States in formulating land policy. See also African Union, *Declaration on land issues and challenges in Africa*, Assembly of the African Union, Thirteenth Ordinary Session, July 1-3, 2009, Assembly/AU/Decl.1(XIII) (2009) (referring to the “Framework and Guidelines on Land Policy in Africa”).
- 23 The African Framework, §2.7.4, “The new scramble for Africa’s land resources.” (Articulating that the “changes in State-society relationships” in Africa—i.e., democratization and the greater accountability of elites towards the population—should be seen as an opportunity for improved governance of land tenure. *Id.* at §2.3.2. According to the Framework, Member States should also take into account environmental factors such as climate change, environmental degradation from mining, and the need for sustainable farming practices. *Id.* at §2.7.2, 3.4.3 and 3.5, respectively. The Framework also recognizes that ineffective land governance can be due to corruption, patronage, and underdeveloped land administration systems, *Id.* at §3.6, and encourages special protections for the land rights of women and minority groups, as well as the involvement of vulnerable groups at all stages of the policymaking process to ensure their needs are not overlooked; *Id.* at §4.1).
- 24 The African Framework, §3.2.2.
- 25 *Id.* at §3.3.2 & 3.3.3.
- 26 See also MacInnes, *Land is Life*, *supra* note 1.
- 27 Paul Collier & Anke Hoefler, *On Economic Causes of Civil War*, 50 OXFORD ECONOMIC PAPERS 563, 563-573 (1998); Jeffrey D. Sachs & Andrew M. Warner, *Natural resource abundance and economic growth*, (National Bureau of Economic Research Working Paper no. w5398, original 1995, revised 1999) <http://www.nber.org/papers/w5398>; Frederick Van der Ploeg, *Challenges and Opportunities for Resource Rich Economies*, (CEPR Discussion Paper no. 5688, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=921856.

- 28 See JOHN E. TILTON, *ON BORROWED TIME: ASSESSING THE THREAT OF MINERAL DEPLETION* (2010); ESCAPING THE RESOURCE CURSE 8 (Marcatan Humphreys et al. eds., Columbia University Press, 2007).
- 29 See generally Alain Durand-Lasserve & Harris Selod, *The Formalization of Urban Land Tenure in Developing Countries*, URBAN LAND MARKETS 101-132, Springer Netherlands (2009) (detailing how urban land tenure can benefit developing nations when there is structural support to do so); ALAIN DURAND-LASSERVE & LAUREN ROYSTON, *HOLDING THEIR GROUND: SECURE LAND TENURE FOR THE URBAN POOR IN DEVELOPING COUNTRIES*, (Earthscan, 2012) (speaking to how the security of land tenure for the urban poor is now a major problem for developing cities in Africa, Asia and Latin America); JOHN W. BRUCE & SHEM E. MIGOT-ADHOLLA, *SEARCHING FOR LAND TENURE SECURITY IN AFRICA* (Kendall/Hunt publishing company, 1994) (focusing on critical propositions about the relationship between security of tenure and agricultural development).
- 30 See generally Alain Durand-Lasserve & Harris Selod, *The Formalization of Urban Land Tenure in Developing Countries*, URBAN LAND MARKETS 101-132 (Springer Netherlands, 2009) (detailing how urban land tenure can benefit developing nations when there is structural support to do so); ALAIN DURAND-LASSERVE & LAUREN ROYSTON, *HOLDING THEIR GROUND: SECURE LAND TENURE FOR THE URBAN POOR IN DEVELOPING COUNTRIES* (Earthscan, 2012) (speaking to how the security of land tenure for the urban poor is now a major problem for developing cities in Africa, Asia, and Latin America); JOHN W. BRUCE & SHEM E. MIGOT-ADHOLLA, *SEARCHING FOR LAND TENURE SECURITY IN AFRICA* (Kendall/Hunt publishing company, 1994) (focusing on critical propositions about the relationship between security of tenure and agricultural development).
- 31 Saturnino Borrás, *Questioning the Pro-Market Critique of State-Led Agrarian Reforms*, 15 *THE EUR. J. OF DEV. RES.* 2 (2003).
- 32 Gershon Feder & Raymond Noronha, *Land rights systems and agricultural development in Sub-Saharan Africa*, 2 *WORLD BANK RES. OBSERVER*, 2, 143-169 (1987); WORLD BANK, *WORLD DEVELOPMENT REPORT 2008: AGRICULTURE FOR DEVELOPMENT*, 138 (2008).
- 33 Antoine Bouhey, *Call of Civil Society Organizations to Their Government on the New Alliance for Food Security and Nutrition in Africa*, ACTIONAID (June 3, 2015), <http://www.actionaid.org/2015/06/call-civil-society-organizations-their-governments-new-alliance-food-security-and-nutrition->; *Critiques of the G8 New Alliance on Food Security and Nutrition*, ACTIONAID, <http://www.actionaidusa.org/critiques-g8-new-alliance-food-security-and-nutrition> (last visited July 18, 2016).
- 34 Lorenzo Cotula et al., *Agricultural investment and international land deals: evidence from a multi-country study in Africa*, 3 *FOOD SECURITY* 1, 99 (2011) (supporting the theory that agricultural investments may deliver local benefits and include small-scale producers in value chains).
- 35 WORLD BANK, *LAND POLICIES FOR GROWTH AND POVERTY REDUCTION: A WORLD BANK POLICY RESEARCH REPORT* 96-98 (2003).
- 36 *Id.*
- 37 See Olivier De Schutter, *Access to Land and the Right to Food*, UN Doc. A/65/281 (Aug. 11, 2010), available at <http://www.srfood.org/index.php/en/documents-issued> (referring to the risks associated with such commodification of land). While ensuring security of tenure is vital for land users who must be better protected from evictions as the pressures on land increase, the strengthening of property rights over land through titling schemes may in fact result in counter-agrarian reforms, and increased concentration of land in the hands of those having access to capital: this is illustrated for instance by the cases of Mexico, Chile, and Guatemala (see Susana Gauster and Ryan Isakson, *Eliminating market distortions, perpetuating rural inequality: An evaluation of market-assisted land reform in Guatemala*, 28(8) *THIRD WORLD QUARTERLY* 1519 (2007); Michael R. Carter, Bradford L. Barham and D. Mesbah, *Agro-export booms and the rural poor in Chile, Paraguay and Guatemala*, 31(1) *LATIN AM. RES. REV.* 33 (1996); Lovell S. Jarvis, *The unraveling of Chile's agrarian reform, 1973-1986*, in William C. Thiesenhusen, ed., *SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA*, (Boston: Unwin Hyman, 1989), 240; William Assies, *Land tenure and tenure regimes in Mexico*, 8(1) *J. OF AGRARIAN CHANGE* 33 (2008).
- 38 Lazar M.K., *Plantation rubber, land grabbing and social property transformation in Southern Laos*, 39 *J. OF PEASANT STUDIES* n.3-4 1023 (2012); Karen McAllister, *Rubber, Rights and Resistance: the evolution of local struggles against a Chinese rubber concession in Northern Laos*, *INTERNATIONAL CONFERENCE ON GLOBAL LAND GRABBING II*, 3 (2012); MICHAEL EPPRECHT, ET. AL., *CONCESSIONS AND LEASES IN LAO PDR: TAKING STOCK OF LAND INVESTMENTS* 9, 75 (2006), available at https://www.researchgate.net/publication/257780558_Concessions_and_Leases_in_the_Lao_PDR_Taking_Stock_of_Land_Investments; LAND ISSUES WORKING GROUP (LIWG), *MANAGING LAND, FOREST, AND NATURAL RESOURCES* 4 (2012) available at <http://laocs-kis.org/wp-content/uploads/2015/02/Introduction-to-Lao-Land-Issues-2012-ENG-final.pdf>.
- 39 *Cambodia's Concessions*, LICADHO, http://www.licadho-cambodia.org/land_concessions/ (last visited July 28, 2016); *Cambodia: 60,000 new victims of government land grabbing policy since January 2014*, FIDH (July 22, 2015) <https://www.fidh.org/en/region/asia/cambodia/cambodia-60-000-new-victims-of-government-land-grabbing-policy-since>.

40 GLOBAL WITNESS, RUBBER BARONS: HOW VIETNAMESE COMPANIES AND INTERNATIONAL FINANCIERS ARE DRIVING A LAND GRABBING CRISIS IN CAMBODIA AND LAOS 2 (2013), available at <https://www.globalwitness.org/fr/campaigns/land-deals/rubberbarons/>.

41 *Id.* at 3, 19, 26.

42 *Id.*

43 Global Witness personal communications (2016). In preparing this report, ICAR attempted to contact both HAGL and VRG for responses to the allegations contained herein. No response was received from either company by the time of this report's publication. In the event that HAGL or VRG does furnish a response, it will be made available at www.icar.ngo.

44 Silas Kpanan'AYoung Siakor & Rachael Knight, *A Nobel Laureate's Problem at Home*, THE NEW YORK TIMES (Jan. 20, 2012), <http://www.nytimes.com/2012/01/21/opinion/in-liberia-a-nobel-laureates-problem.html>. The same op-ed piece claims that, "Between 2006 and 2011, Mrs. Johnson Sirleaf granted more than a third of Liberia's land to private investors to use for logging, mining and agro-industrial enterprises. Today, more than seven million acres have become forestry and agricultural concessions." In preparing this report, ICAR contacted Sime Darby for a response to the allegations contained herein. The report has aimed to reflect the information contained in Sime Darby's response, which included the following:

"Sime Darby is proud of our record and long-history in Liberia. We are the first to admit that we did not always get everything right when we re-entered the country following the end of the civil war, but we have constantly re-assessed and updated our processes to ensure positive outcomes for all involved. We are clear: if community members do not provide consent, Sime Darby will not develop their land.

Sime Darby's operations in Liberia can be traced back to 1954 when BF Goodrich established a presence in the country. Sime Darby, which bought BF Goodrich's concession area in 1980, signed an Amended and Restated Concession Agreement with the Government of Liberia that was based on the historic BF Goodrich agreement. The Concession Agreement was also ratified by the Liberian Parliament. The Government has been consistent in its objective of trying to attract foreign direct investment into the country, one of the world's poorest, to help rebuild the nation which suffers from the legacy of damaged and under-invested social services and infrastructure brought about by the civil war that ended in 2003.

We acknowledge that our first planting in 2011 ran into some issues with the communities present within the concession. Both we and the Government could have done a better job at raising communities' awareness and consulting with them more extensively. That is why, after many months of negotiations, in May 2012 a tripartite agreement was concluded between the company, the communities and the Government, whereby we committed to 12 remedial activities aimed at restoring and enhancing livelihoods of those within the Project Affected Community.

The creation of the Sustainable Partnership Initiative (SPI), a multi-stakeholder consultative forum consisting local NGOs, communities, government and the company, allows Sime Darby Plantation Liberia (SDPL) to obtain regular guidance on the most sustainable way to manage social and environmental challenges. The forum has been successful in bringing together all relevant stakeholders including the communities, the Government, civil society and our company. We are also pleased to provide schools, medical clinics, water-pumps and other essential infrastructure such as roads and bridges, to all the communities in which we operate. We currently employ about 2,800 Liberians, 1,300 more than the required number of employees, and paying the highest wages in the agricultural sector in the country. These wages are subject to regular increases based on negotiations with our workers' union, the General Agriculture and Allied Workers Union of Liberia (GAAWUL), through the Collective Bargaining Agreement (CBA) and with an endorsement by the Ministry of Labour . . .

The concession agreement, signed in 2009 by Sime Darby Plantation with the Government of Liberia, was for a gross area of 311,187ha (768,959.823 acres) and a nett area of 220,000ha (543,631.839 acres). However, in the last seven years, SDPL has only managed to develop 10,437ha; 7,876ha of which were old rubber plantations that belonged to the former Guthrie Plantation Liberia. To avoid repeating any of the mistakes of the past, we have proceeded very cautiously, going above and beyond the Roundtable on Sustainable Palm Oil (RSPO) guidelines, including the Free Prior and Informed Consent (FPIC) process and New Planting Procedures (NPP).

At Sime Darby, we pride ourselves on being a responsible corporate citizen and we are constantly looking for ways we can improve. Since 2009, the Environmental Protection Agency (EPA) and RSPO have been monitoring our environmental compliance and there have been no issues to date. In fact, over the last two years, SDPL has not expanded our land bank following a self-imposed, world-wide moratorium on new planting that was made on September 22, 2014. All new development activities in Liberia have therefore been put on hold while we await the results of a High Carbon Stock (HCS) assessment. This process ensures that no high carbon stock forest is affected by plantation development and Sime Darby has committed to ensure that all new developments are on low carbon stock lands.

We have also launched the Responsible Agriculture Charter (RAC) in September 2016 which reaffirms our commitments to continuous improvement and to address the continuing challenges around no-deforestation, no-peat and no-exploitation. Just like any other investor, we look at civil and political stability of a country as an important investment criterion. Sime Darby believes in the future of Liberia and we are committed to continuing to invest in the country. We will always work with all stakeholders to find the right balance between the needs of local communities the need for development and preserving the forest and environment.”

Letter from Ahmad Shahrman Johari, Group Communications, Sime Darby Berhad to Sara Blackwell, Legal and Policy Coordinator, International Corporate Accountability Roundtable (Oct. 27, 2016) (on file with ICAR).

- 45 *Ellen Ends Deadlock in Grand Cape Mount County . . . Maintains Sime Darby Must Be Allowed To Operate*, THE INQUIRER, http://www.theinquirer.com.lr/content1.php?main=news&news_id=156 (last visited Oct. 7, 2016).
- 46 This is the key result of empirical studies performed separately by Dani Rodrik and David Kucera. See Dani Rodrik, *Democracies pay Higher Wages*, 114 Q. J. OF ECONOMICS, 707-738 (1999); David Kucera, *The Effects of Core Workers' Rights on Labour Costs and Foreign Direct Investment: Evaluating the 'Conventional Wisdom'*, (Decent Work Research Programms DP/130/2001, 2001), <http://people.umass.edu/econ797f/Syllabus%20and%20Readings/Readings/kucera.ilo.fdi.pdf>. These studies and the study mentioned in the following note are cited by the helpful review of the literature made by Drusilla K. Brown et al., *The Effects of Multinational Production on Wages and Working Conditions in Developing Countries*, (NBER Working Paper No. 9669, 2003), available at <http://www.nber.org/papers/w9669>. For a discussion of the various studies having sought to identify correlations or to establish causality links between respect for human rights and attractivity to foreign investment, see Matthias Sant'Ana, *Foreign Direct Investment and Human Development: Two Approaches to Assessing Impacts on Human Rights*, 3 HUM. RTS. & INT'L LEGAL DISCOURSE, 2, 229-262, 232-248 (2009).
- 47 See generally FABRICE HATEM, INTERNATIONAL INVESTMENT: TOWARDS THE YEAR 2001 (New York, United Nations, 1997).
- 48 As pointed out by Drusilla K. Brown et al., *Effects of Multinational Production*, *supra* note 9 at 51, this constitutes one of the most interesting results from the research by David Kucera for the International Labour Organization: “FDI is attracted to countries with a higher civil liberties index of one point (on a 10-point scale), controlling for wages, is associated with an 18.5 percent increase in FDI flows. When the negative impact of increased wages in democracies is factored in, a one-unit increase in the civil-liberties index raises FDI inflows by 14.3 percent. So even though democracies pay higher wages for a given level of worker productivity, they still provide an attractive location for foreign investors.”
- 49 GLOBAL WITNESS, THE NEW SNAKE OIL? THE VIOLENCE, THREATS AND FALSE PROMISES DRIVING RAPID PALM OIL EXPANSION IN LIBERIA (July 2015), <https://www.globalwitness.org/fr/campaigns/land-deals/new-snake-oil/>; Kaitlin Cordes, *Making Agricultural Investments Work for Land Users & Communities*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT (2014), <http://ccsi.columbia.edu/files/2015/01/Focus-on-Land-in-Africa-Making-Agricultural-Investments-Work-for-Land-Users-Communities-Dec-20141.pdf>.
- 50 GLOBAL WITNESS, THE NEW SNAKE OIL? THE VIOLENCE, THREATS AND FALSE PROMISES DRIVING RAPID PALM OIL EXPANSION IN LIBERIA (July 2015), <https://www.globalwitness.org/fr/campaigns/land-deals/new-snake-oil/>. In preparing this report, ICAR attempted to contact Golden Veroleum for a response to the allegations contained herein. No response was received by the time of this report's publication. In the event that Golden Veroleum does furnish a response, it will be made available at www.icar.ngo.
- 51 OXFAM, LAND AND POWER: THE GROWING SCANDAL SURROUNDING THE NEW WAVE OF INVESTMENTS IN LAND, 13-14 (2011) available at https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/bp151-land-power-rights-acquisitions-220911-en_4.pdf.
- 52 Jeffrey C. Milder, et. Al., *A Green Growth Investment Framework for SAGCOT: The SAGCOT Greenprint*, SAGCOT (2012), http://www.sagcot.com/uploads/media/SAGCOT_Greenprint.pdf.
- 53 NEW ALLIANCE FOR FOOD SECURITY AND NUTRITION, TANZANIA: PROGRESS IN PUBLIC PRIVATE PARTNERSHIP IN AGRICULTURE TRANSFORMATION 5 (2014).
- 54 Christopher Chiza, Minister for Agriculture, Food Security and Cooperatives, *SAGCOT Investment Partnership Program: Opportunities for Investors in the Rice and Sugar Sectors* (Nov. 27, 2012), available at www.sagcot.com.
- 55 NEW ALLIANCE FOR FOOD SECURITY AND NUTRITION, TANZANIA: PROGRESS IN PUBLIC PRIVATE PARTNERSHIP IN AGRICULTURE TRANSFORMATION at 5 (2014).
- 56 USAID, G8 COOPERATION FRAMEWORK TO SUPPORT THE “NEW ALLIANCE FOR FOOD SECURITY AND NUTRITION” IN TANZANIA 4 (2012).
- 57 See Anna Tibaijuka, Minister for Lands, Housing & Human Settlements Development, Presentation Before the Tanzania Agribusiness Investment Showcase Event (Nov. 27, 2012) available at http://www.sagcot.com/uploads/media/3_SAGCOT_Showcase_Min_Land.pdf (By November 2012, the government of Tanzania had completed 391 Village Land Use Plans in SAGCOT districts, a process which led to identify 900,000 hectares of “potential land for investment.” This is a considerable surface of land since, on average, only 15 percent of “village land”

- was identified as “unused” by the local community and thus as land that can be leased out. The intention was for the process to continue, to cover 700 more villages (including all the villages in the SAGCOT area.))
- 58 See generally Food and Agriculture Organisation of the United Nations (FAO) and Transparency International, *Corruption in the Land Sector*, (Working Paper No. 04/2011, 2011) <http://www.fao.org/docrep/014/am943e/am943e00.pdf> (connecting weak land governance to social instability, and the undermining of investment, economic growth, and sustainable development).
- 59 Paul Van der Molen & Arbind Tuladhar, *Corruption and Land Administration*, INTERNATIONAL FEDERATION OF SURVEYORS FIG (Mar. 2007) https://www.fig.net/resources/monthly_articles/2007/march_2007/march_2007_vandermolen_tuladhar.pdf [hereinafter Van der Molen, *Corruption and Land Administration*].
- 60 See, e.g., *Cambodia: Land Titling Campaign Open to Abuse*, HUMAN RIGHTS WATCH (June 12, 2013) <https://www.hrw.org/news/2013/06/12/cambodia-land-titling-campaign-open-abuse>.
- 61 TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION BAROMETER 2013, at 11 (2013), available at <http://www.transparency.org/gcb2013/report>.
- 62 *Id.*
- 63 *Global Hunger Index*, INTERNATIONAL FOOD POLICY RESEARCH INSTITUTE, <https://www.ifpri.org/topic/global-hunger-index>.
- 64 *Id.*
- 65 See, e.g., Samira Lindner, *Ethiopia: Overview of Corruption in Land Administration*, 5 (June 3, 2014), available at <http://www.u4.no/publications/ethiopia-overview-of-corruption-in-land-administration/>; *Cambodia: Land Titling Campaign Open to Abuse*, HUMAN RIGHTS WATCH (June 12, 2013), <https://www.hrw.org/news/2013/06/12/cambodia-land-titling-campaign-open-abuse>; Transparency International, *Corruption in the Land Sector*, 2, 7 (Working Paper No. 04/2011, 2011), available at <http://www.fao.org/docrep/014/am943e/am943e00.pdf>; Van der Molen, *Corruption and Land Administration*, *supra* note 59 at 9; Ambreena Manji, *Whose Land is it Anyway?*, AFRICA RESEARCH Institute (Aug. 1, 2015), <http://www.africaresearchinstitute.org/publications/whose-land-is-it-anyway/#S5> (discussing the Ndung’u Report, which found at least 200,000 instances of illegal titles to public land being created in Kenya from 1962 to 2002).
- 66 See Oxfam & Grow, *Land and Power: The Growing Scandal Surrounding the New Wave of Investment in Land*, Briefing Paper 8 (2011), available at <https://www.oxfam.org/sites/www.oxfam.org/files/bp151-land-power-rights-acquisitions-220911-en.pdf>; WARD ANSEEUW ET AL., LAND RIGHTS AND THE RUSH FOR LAND, INT’L LAND COALITION, 35 (2012) (stating that “[t]hese communally held lands, or ‘commons,’ often make up the major land and resource asset of rural communities. Far from being idle or unused, such lands are in fact crucial elements in the system of customary or indigenous landholding and use.”).
- 67 GUNS, CRONIES, AND CROPS, *supra* note 19, at 5, 28. “Shifting cultivation” is “a form of agriculture, used especially in tropical Africa, in which an area of ground is cleared of vegetation and cultivated for a few years and then abandoned for a new area until its fertility has been naturally restored.” *Shifting Cultivation*, ENGLISH OXFORD LIVING DICTIONARIES, https://en.oxforddictionaries.com/definition/shifting_cultivation (last visited Oct. 20, 2016).
- 68 *Id.* at 7-9.
- 69 See Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, *The Basic Principles and Guidelines on Development-Based Evictions and Displacement*, U.N. Doc. A/HRC/4/18 (2007), Annex 1 at ¶21 [hereinafter *Adequate Housing Report*] for a more detailed set of prescriptions.
- 70 Resettlement should be the preferred option, and monetary compensation for the land at market value should not be seen in principle as equivalent. See *Id.* at ¶60: “Cash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better.”
- 71 See *id.* at ¶8, ¶11.
- 72 See *id.* at ¶ 21.
- 73 *A Proclamation to Provide for the Expropriation of Land Holdings for Public Purposes and Payment of Compensation*, Proc. No. 455/2005, Art. 2, 5^o (2005), Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia (July 15, 2005).
- 74 See *id.* at Art. 3, 1^o: “A woreda or an urban administration shall, upon payment in advance of compensation in accordance with this Proclamation, have the power to expropriate rural or urban landholdings for public purpose where it believes that it should be used for a better development project to be carried out by public entities, private investors, cooperative societies or other organs, or where such expropriation has been decided by the appropriate higher regional or federal government organ for the same purpose.”
- 75 GLOBAL WITNESS, ON DANGEROUS GROUND 4 (2016), available at https://www.globalwitness.org/documents/18482/On_Dangerous_Ground.pdf.

76 *Id.*

77 See ALAIN DURAND-LASSERVE & LAUREN ROYSTON, *HOLDING THEIR GROUND: SECURE LAND TENURE FOR THE URBAN POOR IN DEVELOPING COUNTRIES* (Earthscan, 2012).

78 *Countries Adopt Global Guidelines on Tenure of Land, Forests, Fisheries*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (May 11, 2012), <http://www.fao.org/news/story/en/item/142587/icode/>.

79 UN FOOD AND AGRICULTURE ORGANIZATION (FAO), *VOLUNTARY GUIDELINES ON THE RESPONSIBLE GOVERNANCE OF TENURE OF LAND, FISHERIES AND FORESTS IN THE CONTEXT OF NATIONAL FOOD SECURITY*, Guideline 3.1, para. 5 (2012).

80 *Id.* at Guideline 5.8.

81 *Id.* at Guideline 6.9; see also *id.* at Guideline 8.9 and, with regard to tenure systems of indigenous peoples and other communities with customary tenure systems, *id.* at Guideline 9.12; with regard to informal tenure systems, see *id.* at Guideline 10.5; with regard to markets of land tenure rights, *id.* at Guideline 11.7; with regard to the implementation of redistributive land reform programmes, *id.* at Guideline 15.9; with regard to dispute settlement, *id.* at Guideline 21.5.

82 *Principles for Responsible Agricultural Investment that Respect Rights, Livelihood and Resources*, UN FOOD AND AGRICULTURE ORGANIZATION (FAO) (2010), http://www.fao.org/fileadmin/templates/est/INTERNATIONAL-TRADE/FDIs/RAI_Principles_Synoptic.pdf [hereinafter PRAI Principles]. These were released initially on January 25, 2010, and they were presented at the annual meeting of World Bank held in Washington, D.C., on 25-27 April 2010, and at a side-event to the High-level segment of the 65th General Assembly of the United Nations, on September 24, 2010.

83 Committee on World Food Security, *Thirty-sixth session, CFS: 2010/FINAL REPORT* (Oct. 2010) para. 26(ii), available at <http://www.fao.org/docrep/meeting/020/k9551e.pdf>.

84 PRAI Principles, *supra* note 82, at Principle 9.

85 *Id.* at Principle 9.

86 *Id.* at Principle 29(i).

87 *Id.* at Principle 59.

88 See OECD, *OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS* (2016), available at <http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf> [hereinafter OECD-FAO Guidance].

89 *Id.* at 24 (stating, “To the greatest extent possible, we will commit to transparency and information disclosure on our land-based investments, including transparency of lease/concession contract terms, with due regard to privacy restrictions.”).

90 *Id.* at 43 (stating, “To the greatest extent possible, we will commit to transparency and information disclosure on our land-based investments, including transparency of lease/concession contract terms, with due regard to privacy restrictions.”).

91 OECD, *FAO-OECD GUIDANCE FOR RESPONSIBLE AGRICULTURE SUPPLY CHAIN: DRAFT FOR COMMENT* ¶64 (Jan. 2015) available at <http://www.oecd.org/daf/inv/mne/FAO-OECD-guidance-responsible-agricultural-supply-chains.pdf>.

92 GLOBAL WITNESS ET AL., *DEALING WITH DISCLOSURE: IMPROVING TRANSPARENCY IN DECISION-MAKING OVER LARGE-SCALE LAND ACQUISITIONS, ALLOCATIONS AND INVESTMENTS* 3 (2012) [hereinafter *DEALING WITH DISCLOSURE*].

93 *Id.*

94 *Id.*

95 *Id.* at 32 (citing Peter Rosenblum and Susan Maples, *Contracts Confidential: Ending Secret Deals in the Extractive Sector*, REVENUE WATCH INSTITUTE (2009)), <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/contracts.pdf>.

96 CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE & THE ENFORCEMENT DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, *FCPA: GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 2* (2012) available at <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> [hereinafter FCPA Resource Guide].

97 *Id.* at 38.

98 *Id.* at 22.

99 *Id.* at 10.

100 *Id.* at 10.

101 *Id.* at 2.

102 *Id.* at 11; ALLEN & OVERY, *The Foreign Corrupt Practices Act Guide: A Retreat on Correspondent Bank Account Jurisdiction under Section 78dd-3?* (Feb. 17, 2013), available at <http://www.allenoverly.com/publications/en-gb/Pages/The-Foreign-Corrupt-Practices-Act-Guide-A-Retreat-on-Correspondent-Bank-Account-Jurisdiction-Under-Section-78dd-3.aspx>.

103 FCPA Resource Guide, *supra* note 96, at 22.

- 104 *Id.*
- 105 *Id.* at 23.
- 106 *Id.*
- 107 *Id.*
- 108 2013 Year-End FCPA Update, GIBSON DUNN, available at <http://www.gibsondunn.com/publications/pages/2013-Year-End-FCPA-Update.aspx> (last visited June 10, 2016).
- 109 *Id.*
- 110 FCPA Resource Guide, *supra* note 96, at 20.
- 111 *Id.*
- 112 *Id.*
- 113 *Id.*
- 114 OAKLAND INSTITUTE & GREENPEACE INTERNATIONAL, HERAKLES FARMS IS DESTROYING RAINFORESTS AND LOCAL LIVELIHOODS IN CAMEROON FOR PALM OIL PLANTATIONS 2 (2012) available at http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Report_Herakles_Exposed.pdf.
- 115 *Id.*
- 116 *Id.* at 5.
- 117 *Id.* at 4.
- 118 *Id.*
- 119 *Id.*
- 120 *Id.* In preparing this report, ICAR attempted to contact SG Sustainable Oil Cameroon (SGSOC) / Herakles Farm for a response to the allegations contained herein. No response was received by the time of this report's publication. In the event that SG Sustainable Oil Cameroon (SGSOC) / Herakles Farm does furnish a response, it will be made available at www.icar.ngo.
- 121 DR. VALENTINE NDE FRU, ESQ., INTERNATIONAL CENTRE FOR ENVIRONMENTAL EDUCATION AND COMMUNITY DEVELOPMENT (ICENECDEV), LAND GRABBING: THE CASE OF HERAKLES FARMS IN CAMEROON 10 (n.d.), available at <http://www.icenecdev.org/Land-Grabbing-in-Cameroon.pdf>.
- 122 FCPA Resource Guide, *supra* note 96, at 20.
- 123 *Id.*
- 124 *Id.*
- 125 Dr. Steven Lawry, *In Sub-Saharan Africa: Time to Legally Recognize Customary Land Rights*, USAID (Aug. 19, 2013), <https://www.oxfam.org/sites/www.oxfam.org/files/nothingsweetaboutitmediabrief-embargoed2october2013.pdf>.
- 126 Dr. Joan Cuka Kagwanja, Chief of the Land Policy Initiative of the African Union, United Nations Economic Commission for Africa, Presentation at USAID: Why Land Still Matters Panel Discussion (May 7, 2015) available at <http://www.usaidlandtenure.net/video/three-years-voluntary-guidelines>.
- 127 USAID Country Profile, *Property Rights and Resource Governance: Tanzania*, USAID (2011), http://www.usaidlandtenure.net/sites/default/files/country-profiles/full-reports/USAID_Land_Tenure_Tanzania_Profile.pdf.
- 128 Godfrey Eliseus Massay & Telemu Kassile, *Land-based investments in Tanzania* 4 (citing §4(1)-(2) of the Village Land Act) (Land Deal Politics Initiative (LDPI), working paper No. 56, 2014) <http://www.plaas.org.za/sites/default/files/publications-pdf/LDPIWP56Massay%26Kassile.pdf>.
- 129 *Id.* at 12 (citing §4(8) of the Village Land Act).
- 130 *Id.* at 13.
- 131 *Id.*
- 132 *Id.*
- 133 *Id.* at 27.
- 134 It is important to note, however, that the books and records provisions of the FCPA apply strict liability to majority-owned (fifty percent or more) subsidiaries. In situations where the issuer holds less than fifty percent, the FCPA requires the parent to use "good faith effort" to assist the subsidiary in devising a system consistent with the issuer's obligations under the FCPA. 15 U.S.C. § 78m(b)(6) ("Where an issuer which has a class of securities registered pursuant to section 78l of this title or an issuer which is required to file reports pursuant to section 78o(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such circumstances include the

relative degree of the issuer's ownership of the domestic or foreign firm and the laws and practices governing the business operations of the country in which such firm is located. An issuer which demonstrates good faith efforts to use such influence shall be conclusively presumed to have complied with the requirements of paragraph (2).”)

- 135 Oxfam, *Nothing Sweet About it: How Sugar Fuels Land Grabs*, Media Briefing Ref. 06/2013 (Oct. 12, 2013), available at <https://www.oxfam.org/sites/www.oxfam.org/files/nothingsweetaboutitmediabrief-embargoed2october2013.pdf> [hereinafter *Nothing Sweet About It*].
- 136 *Id.* Many suppliers cited are neither transnational corporations listed on U.S. stock exchanges nor requested to report periodically to the SEC.
- 137 Oxfam, *Behind the Brands. Food Justice and the 'Big 10' food and beverage companies 24* (Oxfam Briefing paper No. 166, 2013), <https://www.oxfam.org/sites/www.oxfam.org/files/bp166-behind-the-brands-260213-en.pdf>. The campaign achieved some significant results. On 8 November 2013, following the publication by Oxfam of the briefing note referred to above (*Nothing Sweet About It*), Coca-Cola (one of the most important buyers of sugar and representing 25 % of soft drink market) “committed to take steps to stop land grabs from happening in its supply chain after more than 225,000 people signed petitions and took action as part of Oxfam’s campaign to urge food and beverage companies to respect community land rights” and “committed its bottlers to do the same. Coca-Cola also said it will do sweeping social and environmental assessments across its supply chains beginning with Colombia, Guatemala and Brazil, then moving on to India, South Africa and other countries, and that it will publicly reveal its biggest sugarcane suppliers.”
- 138 *Id.*
- 139 OXFAM, SUGAR RUSH: LAND RIGHTS AND THE SUPPLY CHAINS OF THE BIGGEST FOOD AND BEVERAGE COMPANIES 8 (2013), available at https://www.oxfam.org/sites/www.oxfam.org/files/bn-sugar-rush-land-supply-chains-food-beverage-companies-021013-en_1.pdf; see also Sok Khemara, *Beverage Companies Wary of 'Blood Sugar' in Supply Chain*, VOICE OF AMERICA (Feb. 17, 2015), <http://www.voacambodia.com/content/beverage-companies-wary-of-blood-sugar-in-supply-chain/2647451.html>.
- 140 OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, (Feb. 15, 1999) available at http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf [hereinafter OECD Convention on Combating Bribery].
- 141 *Id.*
- 142 *Id.* at art. 1.1.
- 143 OECD Convention on Combating Bribery, ¶ 1, p. 14 (defining “active bribery” as “the offence committed by the person who promises or gives the bribe”).
- 144 Nicola Ehlermann-Chache, *The Impact of the OECD Anti-Bribery Convention*, OECD 2 (2008), <https://www.oecd.org/mena/competitiveness/39997682.pdf>.
- 145 OECD Convention on Combating Bribery, *supra* note 140, at para. 8.
- 146 *Id.* at 40.
- 147 *Id.* at para. 9.
- 148 Adopted by the OECD Council on 26 November 2009.
- 149 OECD, *OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, OECD Doc. No. C (2009)159/REV1/FINAL, para. VI (Nov. 26, 2009) available at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=258&Lang=en> [hereinafter OECD Recommendation for Combating Bribery].
- 150 *OECD Recommendation for Combating Bribery*, art. 10; OECD Guidelines on MNEs, at art. 3.1.
- 151 OECD Convention on Combating Bribery, *supra* note 140, at art. 4.
- 152 *Id.* at art. 3.2.
- 153 OECD Guidelines on MNEs at art. 1.4(a).
- 154 OECD Convention on Combating Bribery, *supra* note 140, at para. 16.
- 155 TRANSPARENCY INTERNATIONAL, EXPORTING CORRUPTION, PROGRESS REPORT 2014: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY 5 (2014), http://issuu.com/transparencyinternational/docs/2014_exportingcorruption_oecdprogre?e=2496456/9826003 [hereinafter TNI, Exporting Corruption].
- 156 *Id.* at 3.
- 157 *Id.* at 5.
- 158 *Id.* at 3.
- 159 This includes the following: Japan, Netherlands, South Korea, Russia, Spain, Belgium, Mexico, Brazil, Ireland, Poland, Turkey, Denmark, Czech Republic, Luxembourg, Chile, Israel, Slovak Republic, Colombia, Greece, Slovenia, Bulgaria, and Estonia.
- 160 *Id.* Countries showing limited enforcement are France, Sweden, Norway, Hungary, South Africa, Argentina, Portugal, and New Zealand.
- 161 *Id.* at 3.

- 162 *Id.*
- 163 OECD FOREIGN BRIBERY REPORT, AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS (2014) available at <http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>. This is the latest data available at the time of writing.
- 164 *Id.* at 27 (Noting the average bribe in the “agriculture, fisheries and forest” sector amounted to 4 % of the total value of the transaction; in contrast, the average bribe in the extractive industry represented 21 % of the transaction).
- 165 OECD Guidelines on MNEs, *supra* note 150, at 47.
- 166 *Id.*
- 167 *Id.* at 33.
- 168 See OECD WATCH, THE OECD GUIDELINES FOR RESPONSIBLE BUSINESS PRACTICES: A TOOL FOR RESPONSIBLE BUSINESS CONDUCT (2012), <http://www.indianet.nl/pdf/OECDGuidelines.pdf> (assessing the procedure).
- 169 See generally OECD Guidelines for Responsible Business Conduct, *Specific Instance Procedure – Dutch National Contact Point OECD Guidelines for MNEs, March 2015*, OECD (Mar. 2015), <https://www.oecdguidelines.nl/notifications/contents/specific-instance-procedure>.
- 170 See generally, CAITLINE DANIEL ET AL., REMEDY REMAINS RARE, OECD WATCH (2015), available at http://www.oecdwatch.org/publications-en/Publication_4201 (providing an analysis of 15 years of NCP cases and highlighting the primary areas for improvement in the future).
- 171 U.S. Dept. of State, Bureau of Economic and Business Affairs, *U.S. NCP Final Statement CED/RELUFA on the Specific Instance between the Center for Environment and Development (CED) with Network to Fight against Hunger (RELUFA) and Herakles Farms’ affiliate SG Sustainable Oils Cameroon (SGSOC) in Cameroon*, U.S. DEPT. OF STATE (JULY 28, 2015), <http://www.state.gov/e/eb/oecd/usncp/links/rls/245393.htm>. In preparing this report, ICAR attempted to contact SG Sustainable Oil Cameroon (SGSOC) / Herakles Farm for a response to the allegations contained herein. No response was received by the time of this report’s publication. In the event that SG Sustainable Oil Cameroon (SGSOC) / Herakles Farm does furnish a response, it will be made available at www.icar.ngo.
- 172 *Id.*
- 173 *Id.*
- 174 *Id.*
- 175 OECD Convention on Combating Bribery, *supra* note 140, at ch. VII, art. 39.
- 176 *Background of the United Nations Convention against Corruption*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), <http://www.unodc.org/unodc/en/treaties/CAC/> (last visited June 10, 2016).
- 177 *United Nations Convention against Corruption Signature and Ratification Status as of 1 December 2015*, UNODC, <https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited June 10, 2016).
- 178 *UNCAC in a Nutshell: A quick guide to the United Nations Convention against Corruption for embassy and donor agency staff*, U4 ANTI-CORRUPTION RESOURCE CENTRE 2 (Sept. 2010), <http://www.cmi.no/publications/file/3769-uncac-in-a-nutshell.pdf> (citing the United Nations Convention Against Corruption (UNCAC), Ch. III, art. 15-16(1)).
- 179 *Id.* (citing UNCAC, Ch. III, art. 15).
- 180 *Id.* (citing UNCAC, Ch. III, art. 17).
- 181 *Id.* (citing UNCAC, Ch. III, art. 25).
- 182 *Id.* (citing UNCAC, Ch. III, art. 23).
- 183 *Id.* (citing UNCAC, Ch. III, art. 16(2)).
- 184 *Id.* (citing UNCAC, Ch. III, art. 18).
- 185 *Id.* (citing UNCAC, Ch. III, art. 19).
- 186 *Id.* (citing UNCAC, Ch. III, art. 20).
- 187 *Id.* (citing UNCAC, Ch. III, art. 22).
- 188 *Id.* (citing UNCAC, Ch. III, art. 24).
- 189 *Id.* (citing UNCAC, Ch. IV, art. 43(1)).
- 190 *Id.* at 2-3 (citing UNCAC, Ch. V).
- 191 TRANSPARENCY INTERNATIONAL, EXPORTING CORRUPTION, PROGRESS REPORT 2014: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING FOREIGN BRIBERY 2 (2014), https://issuu.com/transparencyinternational/docs/2014_exportingcorruption_oecdprogre?e=2496456/9826003.
- 192 *Id.* at 4.

- 193 *Id.* at 23.
- 194 *Country Review Report of Ukraine*, UNODC 29 (2010-2015), http://www.unodc.org/documents/treaties/UNCAC/CountryVisitFinalReports/2013_07_05_Ukraine_Final_Country_Report.pdf.
- 195 U.N. G.A. Res., *United Nations Convention against Corruption*, U.N. Doc. A/58/422, art. 2(b) (Oct. 31, 2003) available at https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.
- 196 *Id.*
- 197 TRANSPARENCY INTERNATIONAL, *UN CONVENTION AGAINST CORRUPTION PROGRESS REPORT 2013 15* (2013), available at https://www.transparency.de/fileadmin/pdfs/Themen/Internationales/UNCAC_progress_report_final.pdf.
- 198 *Id.* at 18.
- 199 *The Bribery Act Guidance*, UK MINISTRY OF JUSTICE 8 (2014), <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> [hereinafter *The Bribery Act Guidance*].
- 200 *Id.*
- 201 *Id.* at 9.
- 202 *Id.* at 10.
- 203 *Id.*
- 204 *Id.*
- 205 *Id.* at 2.
- 206 *Id.* at 10.
- 207 *Id.*
- 208 *Id.* at 2.
- 209 *Id.* at 11.
- 210 *Id.*
- 211 *Id.*
- 212 *Id.* at 12.
- 213 *Id.* at 15.
- 214 *Id.*
- 215 FCPA Resource Guide, *supra* note 96, at 10.
- 216 *The Bribery Act Guidance*, *supra* note 199, at 8.
- 217 *Id.* at 11.
- 218 *Id.* at 15.
- 219 *Id.* at 15-16.
- 220 *The Bribery Act Guidance*, *supra* note 199, at 16.
- 221 Kate Hodal, *Cambodia's Sugar Rush Leaves Farmers Feeling Bitter at 'Land Grab'*, THE GUARDIAN (July 9, 2013), <https://www.theguardian.com/world/2013/jul/09/cambodia-sugar-land-grab-claims>.
- 222 Sok Khemara, *Beverage Companies Wary of 'Blood Sugar' in Supply Chain*, VOICE OF AMERICA (Feb. 17, 2015), <http://www.voacambodia.com/content/beverage-companies-wary-of-blood-sugar-in-supply-chain/2647451.html>.
- 223 Hodal, *Cambodia Sugar Rush*, *supra* note 221. In preparing this report, ICAR contacted KSL for a response to the allegations contained herein. KSL's response included the following: "We affirm that we had never conspired with the Cambodian Government to evict the villagers nor committed any bribery. There has been no case of bribery charge at all. Besides, the company operating in Cambodia is not KSL but its subsidiaries – Koh Kong Sugar Industry Co., Ltd. (KSI)." E-mail from Dhajjai Subhapholsiri, Company Secretary, Khon Kaen Sugar Industry PLC to Amol Mehra, Director, International Corporate Accountability Roundtable (Oct. 27, 2016) (on file with ICAR).
- 224 Jamie Merrill, *Oxfam accuses Coke and Pepsi of taking land from the poor*, THE INDEPENDENT (Oct. 2, 2013), <http://www.independent.co.uk/environment/green-living/oxfam-accuses-coke-and-pepsi-of-taking-land-from-the-poor-8852161.html>. In preparing this report, ICAR attempted to contact PepsiCo for a response to the allegations contained herein. No response was received by the time of this report's publication. In the event that PepsiCo does furnish a response, it will be made available at www.icar.ngo.
- 225 *The Bribery Act Guidance*, *supra* note 199, at 16. In preparing this report, ICAR contacted Tate & Lyle for a response to the allegations contained herein. Tate & Lyle's response included the following: "This report seems to imply that Tate & Lyle Sugars worked to secure land through KSL to ensure it was subsequently not linked to any improper allegations. This is entirely false. KSL was simply a supplier that Tate & Lyle Sugars refined two small raw material shipments from. It was in 2006, four years prior to this contract being agreed, that the Cambodian Government granted concessions for this land to KSL, a company based in Thailand. Tate & Lyle Sugars has not purchased any further sugar

from this supplier and has no long-term relationship with it. Notwithstanding that our commercial relationship was very limited, we continue to work positively to this day with all of the stakeholders involved to find a satisfactory outcome to this difficult situation.” E-mail from Ross Hall, Director, Corporate, Technology & Public Affairs, Ketchum to Sara Blackwell, Legal and Policy Coordinator, International Corporate Accountability Roundtable (Oct. 30, 2016) (on file with ICAR).

226 David Hallam, *Foreign Investment in Developing Country Agriculture – Issues, Policy Implications, and International Responses*, OECD 5 GLOBAL FORUM ON INTERNATIONAL INVESTMENT (Dec. 7-8, 2009), <http://www.oecd.org/investment/globalforum/44231828.pdf>.

227 FCPA Resource Guide, *supra* note 96, at 23.

228 The Bribery Act Guidance, *supra* note 199, at 12.

229 *Id.*

230 *Id.* at 13.

231 *Id.* at 18.

232 *Id.*

233 *Id.* (citing OECD Recommendation for Combating Bribery, *supra* note 149).

234 *Id.*

235 The Bribery Act Guidance, *supra* note 199, at 15.

236 *Id.* at 21.

237 *Id.* at 23.

238 *Id.* at 25.

239 *Id.* at 27.

240 *Id.* at 29.

241 *Id.* at 31.

242 Robert Barrington, *How Effective is the UK Bribery Act*, TRANSPARENCY INTERNATIONAL UK (Jul. 31, 2014), available at <http://www.transparency.org.uk/rss/12-blog/1118-how-effective-is-the-uk-bribery-act/1118-how-effective-is-the-uk-bribery-act>.

243 *Id.*

244 *Id.*

245 *Id.*

246 Carolyn Cohn & Kirstin Ridley, *SFO nails its first convictions under new bribery laws*, REUTERS (Dec. 8, 2014) <http://uk.reuters.com/article/2014/12/08/uk-courts-britain-bribery-idUKKBN0JM22M20141208>.

247 *City Directors convicted in £23m Green biofuel trial*, SFO (Dec. 5, 2014), <https://www.sfo.gov.uk/2014/12/05/city-directors-convicted-23m-green-biofuel-trial/>. In preparing this report, ICAR attempted to contact the Sustainable Growth Group (SGG) and its subsidiaries for a response to the allegations contained herein. However, the company and each of the subsidiaries have been liquidated. In the event that contact information for Sustainable Growth Group (SGG) is obtained, and the company does furnish a response, it will be made available at www.icar.ngo.

248 *Group Overview: Land*, ILLOVO SUGAR LTD., <https://www.illovosugar.co.za/About-Us/Group-Overview/Land> (last visited June 1, 2015).

249 *See Nothing Sweet About It*, *supra* note 135, at 6-7.

250 *Group Anti-Bribery and Corruption Policy*, ILLOVO SUGAR LTD., available at <http://www.illovosugar.co.za/Group-Governance/Anti-Bribery-and-Corruption-Policy> (last visited Jun. 1, 2015).

251 *Group Guidelines on Land and Land Rights*, ILLOVO SUGAR LTD (2014), http://www.illovosugar.co.za/UserContent/Documents/Announcements/Illovo-Launches-Group-Guidelines-on-Land-and-Land_Rights.pdf

252 *Id.* In preparing this report, ICAR contacted Illovo for a response to the allegations contained herein. The report has aimed to reflect the information contained in Illovo’s response, which included the following:

“1. Illovo owns approximately 71,000 hectares of sugar cane producing land in Africa. 2. The company’s group anti-bribery and corruption policy was implemented long before 2014. Indeed, it was implemented throughout the Associated British Foods plc group in June 2011 and its implementation had absolutely nothing to do with accusations about illegal land acquisition. 3. The Illovo policy on land and land rights does include provision that specifically addresses and mitigates the risk of corrupt large-scale land deals. Note 3:3.1 ‘Historically, Illovo has not engaged in agricultural land acquisitions. Our business practices seek to avoid the transfer of land rights away from local communities and national government and we prioritise alternative models of investment, such as the development of small grower farming operations in the areas in which we operate, rather than acquiring their land for our own development’... [T]he accusations that Illovo was involved in illegal land acquisitions have been refused by Illovo.”

Letter from Rosalyn Schofield, Director of Company Secretariat and Solicitor, Associated British Foods plc to Amol Mehra, Director, International Corporate Accountability Roundtable (Oct. 28, 2016) (on file with ICAR).

- 253 *On Our Land: Modern Land Grabs Reversing Independence in Papua New Guinea*, THE OAKLAND INSTITUTE (2012), http://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/OI_Report_On_Our_Land.pdf.
- 254 *Id.* at 15 (citing Transcripts from the Commission of Inquiry into SABLs (Nov. 16, 2011)).
- 255 *Id.* at 15 (citing *Up for Grabs: Millions of Hectares of Customary Land in PNG Stolen for Logging*, GREENPEACE AUSTRALIA PACIFIC (2012), http://www.greenpeace.org/australia/PageFiles/441577/Up_For_Grabs.pdf).
- 256 *Id.* at 15 (citing Jemima Garrett, *Australians Involved in PNG Scandal*, RADIO AUSTRALIA PACIFIC (Oct. 14, 2012)). In terms of the role of financial institutions in this case study, Australia's ANZ bank issued a 595,000 kina bank guarantee in 2010 to IT&S for its operations in PNG. However, to date, there has been no follow-up action into ANZ's financing of IT&S by Australian or PNG investigators. Shona Hawkes, OXFAM AUSTRALIA, *STILL BANKING ON LAND GRABS* 34 (2016), available at <https://www.oxfam.org.au/still-banking-on-land-grabs/>.
- 257 *Id.*
- 258 *Id.* at 15 (citing Transcripts from the Commission of Inquiry into SABLs (Nov. 16, 2011)).
- 259 *Id.*
- 260 *Id.*
- 261 *Id.* at 15 (citing *Up for Grabs: Millions of Hectares of Customary Land in PNG Stolen for Logging*, GREENPEACE AUSTRALIA PACIFIC (2012), http://www.greenpeace.org/australia/PageFiles/441577/Up_For_Grabs.pdf). In preparing this report, ICAR attempted to contact IT&S for a response to the allegations contained herein. However, the company's CEO officially resigned in January 2016, and the company now appears to no longer be in existence. In the event that contact information for IT&S is obtained, and the company does furnish a response, it will be made available at www.icar.ngo.
- 262 *Id.* at 13 (citing *Squatting on My Own Land: A Summary of the Observations during the Commission of Inquiry into the Special Purpose Agricultural Business Leases*, ACTNOW (2012), <http://www.coi.gov.pg/sabl.html>).
- 263 *Id.* at 14 (citing *Probe Underway for Land Deals*, POST COURIER (Mar. 14, 2013)).
- 264 *Id.* (citing *The Papua New Guinea Vision 2050*, GOVERNMENT OF PAPUA NEW GUINEA, 30-31 (2009)).
- 265 The most recent version of the EITI Standard is from May 2013, and it is complemented by a Civil Society Protocol initially adopted in 2011, but revised in January 2015. Article 2 of the EITI's Articles of Association states: "The objective of the EITI Association is to make the EITI Principles and the EITI requirements the internationally accepted standard for transparency in the oil, gas and mining sectors, recognising that strengthened transparency of natural resource revenues can reduce corruption, and the revenue from extractive industries can transform economies, reduce poverty, and raise the living standards of entire populations in resource-rich countries." (See Extractive Industries Transparency Initiative, *Articles of Association for The Extractive Industries Transparency Initiative (EITI)*, art. 2 (Feb. 2, 2009), <https://eiti.org/files/EITI%20Articles%20of%20Association.pdf>).
- 266 Extractive Industries Transparency Initiative, *Liberia*, <https://eiti.org/Liberia/innovations> (last visited July 19, 2016).
- 267 See generally Klaus Deininger et al., *Rising Global Interest in Farmland. Can It Yield Sustainable and Equitable Benefits*, WORLD BANK (2011), available at <http://siteresources.worldbank.org/DEC/Resources/Rising-Global-Interest-in-Farmland.pdf>.
- 268 *Id.* at 139-140.
- 269 DEALING WITH DISCLOSURE, *supra* note 92, at 44-45 (stating "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").
- 270 Currently, more than 25 countries mandate that these contracts be published publicly, these countries include: Niger, the Philippines, the Republic of Congo and Guinea. See Open Contracting Partnership et al., *Promises are vanity, contracts are reality, transparency is vanity*, OPEN CONTRACTING PARTNERSHIP 1 (2016) http://www.open-contracting.org/wp-content/uploads/2016/02/OCP2016_EITI_brief.pdf.
- 271 An Act Establishing the Liberia Extractive Industries Transparency Initiative (LEITI) (2009) (Liberia), available at <http://www.leiti.org.lr/uploads/2/1/5/6/21569928/act.pdf>; *Contracts and Agreements*, LIBERIA EXTRACTIVE INDUSTRIES TRANSPARENCY INITIATIVE, <http://www.leiti.org.lr/contracts-and-concessions.html> (last visited July 19, 2016).
- 272 See e.g., RELUFA, THE LEGAL AND INSTITUTIONAL FRAMEWORK ON ACCESS TO INFORMATION IN THE GRANTING AND MANAGEMENT OF LAND CONCESSIONS IN CAMEROON. A DIAGNOSTIC STUDY, 24-25 (2015), available at <http://www.relufa.org/documents/GUIDERELUFAENGLISHTOPRINT.pdf> (stating that "there is no provision in the current legal framework or rules requiring provision of information on land transactions, nor an obligation to publish land contracts. In particular, no land policy document, no land use plan" at 11).

- 273 *Statement on Current Repression of Farmers in Poland*, LA VIA CAMPESINA (Oct. 15, 2015), <http://viacampesina.org/en/index.php/main-issues-mainmenu-27/human-rights-mainmenu-40/1885-statement-on-current-repression-of-farmers-in-poland> (recommending that: “States should provide safeguards to protect legitimate tenure rights, human rights, livelihoods, food security and the environment from risks that could arise from large-scale transactions in tenure rights. Such safeguards could include introducing ceilings on permissible land transactions and regulating how transfers exceeding a certain scale should be approved, such as by parliamentary approval.”).
- 274 *About*, OPEN GOVERNMENT PARTNERSHIP (OGP), <http://www.opengovpartnership.org/about> (last visited Oct. 12, 2016).
- 275 *Mission and Goals*, OPEN GOVERNMENT PARTNERSHIP (OGP), <http://www.opengovpartnership.org/about/what-open-government-partnership/mission-and-goals> (last visited Oct. 12, 2016).
- 276 *Eligibility Criteria*, OPEN GOVERNMENT PARTNERSHIP (OGP), <http://www.opengovpartnership.org/how-it-works/eligibility-criteria> (last visited Oct. 12, 2016).
- 277 *Id.*
- 278 Similarly, where banks operate in contexts of rampant land-related corruption, banks should place a freeze on dealing with affected industries.
- 279 *Human Rights Reporting and Assurance Frameworks Initiative (RAFI)*, THE SHIFT PROJECT, <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi> (last visited June 9, 2016) [hereinafter Shift Project, RAFI].
- 280 Organization for Economic Co-Operation and Development, Declaration on International Investment and Multinational Enterprises, C/MIN(2011)/11/FINAL (2011), available at <http://webnet.oecd.org/oecdacts/Instruments/ShowInstrumentView.aspx?InstrumentID=241&InstrumentPID=270&Lang=en&Book=>.
- 281 See generally OECD, OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS (2016), <http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>.
- 282 *Id.*
- 283 Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295, U.N. Doc. A/RES/61/295 (September 13, 2007).
- 284 See Shanta Martin, *Free, prior and informed consent: The role of mining companies*, OXFAM 4 (2007), <http://www.oxfam.org.au/resources/filestore/originals/OAus-FreePriorInformedConsentMining-1007.pdf>.
- 285 Lorenzo Cotula, et al., *Land grab or development opportunity? Agricultural investment and international land deals in Africa*, IIED, FAO & IFAD 71 (2009), <http://www.iied.org/pubs/display.php?o=12561IIED>.
- 286 Human Rights Council Res. 17/4, Rep. of the Hum. Rts. Council, 17th Sess., June 16, 2011, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011); Special Rep. of the Sec’y Gen., Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Hum. Rts. Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UN Guiding Principles].
- 287 *Id.*, UN Guiding Principles at para. 6.
- 288 For a more detailed description of what this entails, see UN Guiding Principles at Principle 17.
- 289 *Id.*
- 290 OECD Guidelines on MNEs, *supra* note 150, ch. IV. Human Rights, para. 43.
- 291 OECD Guidelines on MNEs, *supra* note 150, ch. II. General Policies, para. 13.
- 292 Office of the High Commissioner for Human Rights (OHCHR), *The Corporate Responsibility to Respect Human Rights - An Interpretive Guide*, U.N. Doc. HR/PUB/12/02, para. 7.8 (2011), http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.
- 293 Oxfam, *Behind the Brands*, *supra* note 137.
- 294 See, e.g., ANN ELLIOTT KIMBERLY (ed.), CORRUPTION AND THE GLOBAL ECONOMY, (Washington: Institute for International Economics, 1997); GEORGE MOODY-STUART, GRAND CORRUPTION: HOW BUSINESS BRIBES DAMAGE DEVELOPING COUNTRIES, (Oxford: Worldview, 1997).
- 295 INTERNATIONAL CHAMBER OF COMMERCE (ICC), ICC ANTI-CORRUPTION CLAUSE, ICC Publication No. 740E (2012), <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Anti-corruption-Clause/>.
- 296 <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Corporate-Responsibility-and-Anti-corruption/Buisness-Ethics-Documents/ICC-Anti-corruption-Clause/>
- 297 INTERNATIONAL CHAMBER OF COMMERCE, ICC RULES ON COMBATING CORRUPTION, art. 3, E. (2011), <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2011/ICC-Rules-on-Combating-Corruption/>.
- 298 *Id.* at art. 3, F., “An Enterprise should conduct appropriate due diligence on the reputation and the capacity of its Business Partners exposed to corruption risks to comply with anti-corruption law in their dealings with or on behalf of the Enterprise.”
- 299 *Id.* at art. 10.
- 300 See OECD Guidelines on MNEs, *supra* note 150.
- 301 OECD Recommendation for Combating Bribery, *supra* note 149.

- 302 *Id.* at section X, para. (c)(i).
- 303 *Id.* at Annex II, section A(2).
- 304 *Id.* at Annex II, section A(4).
- 305 *Id.* at section A, para. 5.
- 306 See generally OECD, OECD-FAO GUIDANCE FOR RESPONSIBLE AGRICULTURAL SUPPLY CHAINS (2016), <http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>.
- 307 United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)*, 2161 UNTS 447; 38 ILM 517 (1999), available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> [hereinafter Aarhus Convention].
- 308 *RTRS Principles and Criteria for Responsible Soy: Field Testing Version*, ROUND TABLE ON RESPONSIBLE SOY ASSOCIATION 2 (2009), <http://www.saiplatform.org/uploads/Library/GA-OUT-01.2-ENGRTRSPrinciplesandCriteriaforFieldTestingVersion.pdf>.
- 309 *RSPO Principles and Criteria for Sustainable Palm Oil Production*, ROUNDTABLE ON SUSTAINABLE PALM OIL 5 (2007) <http://www.rspo.org/file/RSPO%20Principles%20&%20Criteria%20Document.pdf>.
- 310 Round Table on Responsible Soy (RTRS), International Technical Group, *RTRS Standard for Responsible Soy Production*, Version 1.0. Round Table on Responsible Soy (RTRS) International Technical Group (ITG), Criterion 2b; DEALING WITH DISCLOSURE, *supra* note 92, at 31 (stating that “commodity roundtables are relatively conservative regarding disclosure”).
- 311 See GMWatch et al., *Certified Responsible? Critical Assessment of the Round Table on Responsible Soy* (2011), http://www.toxicsoy.org/toxicsoy/RTRS_files/RTRS%20backgrounder%20v2.pdf; Emma Howard, *Critics Fear RSPO’s Stricter Palm Oil Standards Will Create Two-Tier System*, THE GUARDIAN (Feb. 9, 2016), <https://www.theguardian.com/sustainable-business/2016/feb/09/palm-oil-stricter-standards-rspo-next-deforestation-human-rights-boots-ferrero-danone>; Voices for Diversity, *Consumer groups slam greenwashing in sustainable palm oil marketing*, NATIONAL GEOGRAPHIC (Aug. 8, 2013), <http://voices.nationalgeographic.com/2013/08/08/consumer-groups-slam-greenwashing-in-sustainable-palm-oil-marketing/>.
- 312 See OECD Guidelines on MNEs *supra* note 150, chap. III (Disclosure), Commentary, para. 30; see also OECD, *Recommendation of the Council on Principles of Corporate Governance*, (July 8, 2015) C (2015) 84, Art. 7, available at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=322&InstrumentPID=358&Lang=en&Book=False>.
- 313 *Id.* at art. 6.
- 314 Global Reporting Initiative, *Materiality*, G4ONLINE, <https://g4.globalreporting.org/how-you-should-report/reporting-principles/principles-for-defining-report-content/materiality/Pages/default.aspx> (last visited Oct. 12, 2016).
- 315 Aarhus Convention, *supra* note 307.
- 316 DEALING WITH DISCLOSURE, *supra* note 92, at 33.
- 317 Aarhus Convention, *supra* note 307, at Art. 4(4)(h).
- 318 International Finance Corporation (IFC), *Contract Disclosure*, http://www.ifc.org/wps/wcm/connect/industry_ext_content/ifc_external_corporate_site/industries/oil,+gas+and+mining/transparency/contract+disclosure (last visited June 9, 2016); see also DEALING WITH DISCLOSURE, *supra* note 92, at 33.
- 319 From all available IFC sources, there is no definition of materiality.
- 320 Shift Project, RAFI, *supra* note 279.
- 321 *Id.*
- 322 THE SHIFT PROJECT & MAZARS, UN GUIDING PRINCIPLES REPORTING FRAMEWORK WITH IMPLEMENTATION GUIDANCE 23 (2015), available at http://www.ungpreporting.org/wpcontent/uploads/2015/02/UNGuidingPrinciplesReportingFramework_withimplementationguidance_Feb2015.pdf.
- 323 *Id.* at 8.
- 324 DEALING WITH DISCLOSURE, *supra* note 92, at 4.
- 325 *Id.*
- 326 Anti-Bribery Ministerial Meeting, *Prevention: Frameworks to Encourage and Recognise Anti-Bribery Compliance*, OECD 2 (Mar. 16, 2016), <https://www.oecd.org/daf/anti-bribery/Anti-Bribery-Ministerial-Prevention-Compliance-Discussion-Paper.pdf>; see also OECD FOREIGN BRIBERY REPORT, AN ANALYSIS OF THE CRIME OF BRIBERY OF FOREIGN PUBLIC OFFICIALS 17 (2014) available at <http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>.
- 327 OECD FOREIGN BRIBERY REPORT at 17.
- 328 OECD Recommendation for Combating Bribery, *supra* note 149, at X(C)(v).

- 329 Shift Project, RAFI *supra* note 279. For example, in Australia, Oxfam has explicitly reported on Australia's big four bank links to land grabs overseas. In some cases, this highlighted the risk of bank's having facilitated companies connected to fraudulent land deals or that relied on the issuing of a state lease to a government official. As a result, three of Australia's four biggest banks now have public land-specific policies. See, e.g., OXFAM AUSTRALIA, BANKING ON SHAKY GROUND (2014), available at https://www.oxfam.org.au/wp-content/uploads/site-media/pdf/2014-47%20australia%20big%204%20banks%20and%20land%20grabs_fa_web.pdf.
- 330 See *Money-Laundering and Globalization*, UNODC, <https://www.unodc.org/unodc/en/money-laundering/globalization.html> (last visited June 10, 2016).
- 331 See, e.g., *id.* at art. 20.
- 332 For example, the Papua New Guinea Investment Promotion Authority database now provides free access to company filings through a searchable online website. This enables researchers to identify current and historic company shareholders, directors, and registered charges (for example, bank financing) of foreign investors. INVESTMENT PROMOTION AUTHORITY, PAPUA NEW GUINEA, <http://www.ipa.gov.pg/> (last visited Nov. 1, 2016). Example provided by Oxfam Australia.
- 333 *Id.* at art. 7.
- 334 See Ian G. Baird, *The Global Land Grab Meta-Narrative, Asian Money Laundering and Elite Capture: Reconsidering the Cambodian Context*, 19 *GEOPOLITICS* 2, 431-453 (2014).
- 335 *Id.* at 447; The National Assembly of Cambodia approved the Law on Anti-Money Laundering and Combating the Financing of Terrorism on Apr. 30, 2007, and the Cambodian Financial Intelligence Unit was established in January 2008. Ian Baird comments that "While it now appears that the above legislative and subsequent actions have done little to put a stop to money laundering in Cambodia, in early 2008 some money launderers were undoubtedly cautiously wondering if the Cambodian government would begin seriously cracking down on them, and this may have been an important factor in the large withdrawal of foreign capital from Cambodia at the time, rather than the influx of funds suggested as part of the global land grab meta-narrative."
- 336 FERN, EU INVESTORS, LAND GRABS AND DEFORESTATION: CASE-STUDIES 1 (2015), available at http://www.fern.org/sites/fern.org/files/Land%20grabs%20and%20deforestation_FINAL.pdf.
- 337 See EMILE VAN DER DOES DE WILLEBOIS ET AL., THE PUPPET MASTERS. HOW THE CORRUPT USE LEGAL STRUCTURES TO HIDE STOLEN ASSETS AND WHAT TO DO ABOUT IT (Stolen Asset Recovery Initiative, The World Bank/UNODC, 2011).
- 338 GLOBAL WITNESS, BANKS AND DIRTY MONEY. HOW THE FINANCIAL SYSTEM ENABLES STATE LOOTING AT A DEVASTATING HUMAN COST (2015), available at <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/banks-and-dirty-money/> (research in 2012 demonstrated that the financial risks for companies posed from not addressing land tenure were multiple, ranging from a delay in construction and cash flow losses due to suspension. Further information available at http://www.rightsandresources.org/documents/files/doc_5715.pdf. The escalation of such risk can be extremely rapid and irreversible, with the report concluding that the average global operating costs of a three-year investment of around 10 million USD could be as much as 29 times higher than normal if the project were forced to stop its activities because of local opposition. The same group were responsible for an assessment in 2014 of 73,000 mining, oil and gas, logging and agribusiness concessions in eight tropical forested countries mentioned above which found that 93% of them involved land already inhabited by indigenous peoples and local communities. [RRI (2014) Communities as Counterparties: Preliminary review of concessions and conflict in emerging and frontier market concessions, Rights and Resources Initiative, 30th October 2014]. A 2014 World Bank and UNCTAD study found that whilst "initial consultations [with local communities] proved time consuming . . . attempts to short-cut these processes . . . led to negative long-term ramifications, for both the business and for local communities, over a protracted period."
- 339 See *Money-Laundering and Globalization*, UNODC, <https://www.unodc.org/unodc/en/money-laundering/globalization.html> (last visited June 10, 2016).
- 340 See generally GLOBAL WITNESS, UNDUE DILIGENCE: HOW BANKS DO BUSINESS WITH CORRUPT REGIMES (2009), available at <http://www.u4.no/recommended-reading/undue-diligence-how-banks-do-business-with-corrupt-regimes/> [hereinafter *Undue Diligence*].
- 341 See EMILE VAN DER DOES DE WILLEBOIS ET AL., THE PUPPET MASTERS. HOW THE CORRUPT USE LEGAL STRUCTURES TO HIDE STOLEN ASSETS AND WHAT TO DO ABOUT IT (Stolen Asset Recovery Initiative, The World Bank/UNODC, 2011). GLOBAL WITNESS, BANKS AND DIRTY MONEY. HOW THE FINANCIAL SYSTEM ENABLES STATE LOOTING AT A DEVASTATING HUMAN COST (2015), available at <https://www.globalwitness.org/en/campaigns/corruption-and-money-laundering/banks-and-dirty-money/>.
- 342 *Id.*
- 343 See *Money-Laundering and Globalization*, UNODC, <https://www.unodc.org/unodc/en/money-laundering/globalization.html> (last visited June 10, 2016).

- 344 See generally FINANCIAL ACTION TASK FORCE (FATF), INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS (2012) http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (last visited on June 10, 2016) [hereinafter FATF Recommendations].
- 345 *Id.* at Recommendation 10.
- 346 Directive 2015/849 of the European Parliament and the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ L 141, 5.6.2015, p. 73-117 [hereinafter EU Anti-Money Laundering and Terrorist Financing Directive], Article 8(4)(a).
- 347 *Id.*
- 348 See *id.* at art. 21, art. 23.
- 349 See FATF Recommendations, *supra* note 347, at 119-120.
- 350 See also EU Anti-Money Laundering and Terrorist Financing Directive, *supra* note 349, at art. 3 (containing a definition of “politically exposed persons” that also explicitly excludes middle-ranking or more junior officials).
- 351 See FATF GUIDANCE, POLITICALLY EXPOSED PERSONS (RECOMMENDATIONS 12 AND 22), 5 (2013), available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/Guidance-PEP-Rec12-22.pdf>.
- 352 See, e.g., *id.* at art. 20.
- 353 EMILE VAN DER DOES DE WILLEBOIS, ET AL., THE PUPPET MASTERS, *supra* note 340, at 5.
- 354 *Id.* at 6.
- 355 EU Anti-Money Laundering and Terrorist Financing Directive, *supra* note 349 at art. 33(1)(a).
- 356 *Id.* at art. 34(2).
- 357 *Id.* at art. 34(2), 37.
- 358 EMILE VAN DER DOES DE WILLEBOIS, ET AL., THE PUPPET MASTERS, *supra* note 340, at 7.
- 359 *Id.*
- 360 EU Anti-Money Laundering and Terrorist Financing Directive, *supra* note 349, at art. 20(1)
- 361 *Id.* at art. 58(4).
- 362 International Labour Organisation (ILO), Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO No. 169 (Sept. 5, 1991), available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> (Only 22 states had ratified the convention at the time of this writing. The list includes only one African state (the Central African Republic ratified the convention in 2010), and only one country from Asia (Nepal ratified the convention in 2007); For the table of ratifications, see ILO, NORMELEX, *Information System on International Labour Standards*, available at <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169> (last visited June 10, 2016)).
- 363 G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sep. 13, 2007); see Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, Hum. Rts. Council, ¶ 41, U.N. Doc. A/HRC/9/9 (Aug. 1, 2008) [hereinafter Declaration on the Rights of Indigenous Peoples] (by S. James Anaya) (“Albeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of states, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms, and hence can be seen as embodying to some extent general principles of international law. In addition, insofar as they connect with a pattern of consistent international and state practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law. In any event, as a resolution adopted by the General Assembly with the approval of an overwhelming majority of Member states, the Declaration represents a commitment on the part of the United Nations and Member states to its provisions, within the framework of the obligations established by the United Nations Charter to promote and protect human rights on a non-discriminatory basis.”)
- 364 U.N. G.A.O.R., 61st sess., Suppl. no. 49, Annex: *UN Declaration on the Rights of Indigenous Peoples*, 1-11, arts. 28, 32 (Oct. 2, 2007), A/RES/61/295, available at <http://www.refworld.org/docid/471355a82.html> (Article 28 defines the scope and content of the right to redress of indigenous peoples for “the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.” Article 32 ¶ 2 provides that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”)
- 365 Navi Pillay, United Nations High Commissioner for Human Rights, *Free, Prior and Informed Consent of Indigenous Peoples*, OHCHR (Sept. 2013), <http://www.ohchr.org/Documents/Issues/IPeoples/FreePriorandInformedConsent.pdf>.

- 366 See International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171 at Article 1 (2) (“All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law.”).
- 367 See *Apirana Mahuika et al. v. New Zealand*, Hum. Rts. Comm., Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993, ¶ 9.7 (2000), in which the Committee reads Article 1(2) of the International Covenant on Civil and Political Rights as allowing an arrangement concerning the management of fishing resources, emphasizing that the Maori people “were given access to a great percentage of the quota, and thus effective possession of fisheries was returned to them,” and that the new control structure put in place ensures not only a role for the Maori in safeguarding their interests in fisheries but, in addition, their “effective control.” The Human Rights Committee observed that “minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture [which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.” *General Comment No. 23: The Rights of Minorities (Art. 27)*, Hum. Rts. Comm., U.N. Doc. CCPR/C/21Rev.1/Add.5, ¶¶ 1, 3.2 (Aug. 4, 1994).
- 368 Article 21 establishes, *inter alia*, that: “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.” American Convention on Human Rights, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36; see also International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A, U.N. Doc. A/RES/2106A, art. 5(d)(v) (Dec. 21, 1965).
- 369 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), *Concluding Observations: Guyana*, CERD/C/GUY/14, ¶ 16 (Apr. 4, 2006).
- 370 See *Case of the Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 148 (June 15, 2005) (stating, “indigenous communities might have a collective understanding of the concepts of property and possession, in the sense that ownership of the land ‘is not centered on an individual, but rather on the group and its community’”); *Saramaka People v. Suriname*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 ¶ 120 (Nov. 28, 2007).
- 371 National courts have occasionally held that, by virtue of traditional occupation and use, the ownership of natural resources is vested collectively in an indigenous people. See, e.g., *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶¶ 194, 199, 201 (Dec. 11, 1997) [Supreme Court of Canada]; *Alexkor Ltd and the Republic of South Africa v. The Richtersveld Cmty. and Others*, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC), ¶ 62 (Oct. 14, 2003) [South African Constitutional Court].
- 372 See *Case of the Moiwana*, *supra* note 373, at ¶¶ 132-33 (extending the protection recognized to indigenous peoples to all groups who entertain a similar “profound and all-encompassing relationship to their ancestral lands” centered on “the community as a whole” rather than on the individual, such as the Maroon communities living in Suriname, which are not indigenous to the region, but are tribal communities of former slaves that settled in Suriname in the 17th and 18th centuries); see also *Saramaka People* *supra* note 373, at ¶ 132-33 (finding that “the Court’s jurisprudence regarding indigenous peoples’ right to property is also applicable to tribal peoples because both share distinct social, cultural, and economic characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival”).
- 373 As noted as early as 1921 by the Privy Council in *Amodu Tijani v. The Secretary, Southern Nigeria*, “in interpreting the native title to land [in the British Empire], much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms that are appropriate only to systems that have grown up under English law. But this tendency has to be held in check closely. . . . The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. . . . To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.” [1921] 2 AC 399 (PC), 402-4.
- 374 In preparing this report, ICAR contacted the Coca-Cola Company for a response to the allegations contained herein. The report has aimed to reflect the information contained in Coca-Cola’s response, which included the following:
- In addition to the information mentioned in your letter on the history of Coca-Cola’s commitment on land rights, I would like to share with you additional information on our actions since the November 2013 commitment: - To date, we have published 5 sugar studies on child labor, forced labor and land rights: Brazil, Colombia, Guatemala, El Salvador, and Honduras. You can find the complete studies as well as an overview of our land rights work here (<http://www.coca-colacompany.com/our-company/addressing-global-issues#1>). There are currently 8 other studies underway including Mexico and India. - Our land rights issue guidance, which we published in February 2014, is available here (<http://www.coca-colacompany.com/content/dam/journey/us/en/private/fileassets/pdf/2014/02/issuance-guidance.pdf>). We will publish FPIC guidance for our suppliers by the end of this year (a commitment made in the following blog from Brent Wilton). - Last week,

we published a blog from Brent Wilton (<http://www.coca-colacompany.com/coca-cola-unbottled/sustainability/2016/land-rights-the-path-forward-on-coca-cola-s-sugar-studies>) outlining the way forward on Coca-Cola's Brazil sugar study, published in February 2016, as well as the *ACTION PLAN* for our studies more broadly. We have shared our progress publicly on these studies numerous times since we made our initial commitment, and you can find additional details here (<http://www.coca-colacompany.com/tags/human-rights>), including on Brazil (<http://www.coca-colacompany.com/coca-cola-unbottled/on-the-road-to-sustainable-sugar-in-brazil>) and the release of our studies on El Salvador and Honduras (<http://www.coca-colacompany.com/coca-cola-unbottled/building-a-framework-for-action-progress-on-coca-colas-country-studies>) in December 2015. In addition, we recently published a Sourcing Map (<http://www.coca-colacompany.com/sustainable-agriculture/SourcingMap>) highlighting the countries from which we source our ingredients as well as various projects underway supporting sustainable agriculture and farmer livelihoods. You can read more here (<http://www.coca-colacompany.com/stories/from-farm-to-market-what-coca-colas-new-sourcing-map-means-for->)."

E-mail from Jennifer Ragland, Director, International Government Relations & Public Affairs, The Coca-Cola Company to Amol Mehra, Director, International Corporate Accountability Roundtable (Oct. 28, 2016) (on file with ICAR).

- 375 Committee on Economic, Social and Cultural Rights, General Comment No. 14 (2000), *The right to the highest attainable standard of health* (article 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2000/4 (2000), para. 39; Committee on Economic, Social and Cultural Rights, General Comment No. 15 (2002), *The right to water* (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/2002/11 (26 November 2002), para. 31.
- 376 Committee on Economic, Social and Cultural Rights, 'Statement on the obligations of State Parties regarding the corporate sector and economic, social and cultural rights', E/C.12/2011/1 (20 May 2011), para. 5.
- 377 See Committee on the Elimination of Racial Discrimination, Concluding Observations: Canada, CERD/C/CAN/CO/18, para. 17; Concluding Observations: United States, CERD/C/USA/CO/6, para. 30.
- 378 CCPR/C/DEU/CO/6, par. 16.
- 379 The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, adopted in Maastricht on 28 September 2011 by a number of human rights experts, NGOs, and academic research institutes, testify to the growing consensus around this requirement. See *in particular*, Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 4, 1084-1171 (2012); CASES AND CONCEPTS ON EXTRATERRITORIAL OBLIGATIONS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, Fons Coomans and Rolf Künemann (eds.), (Intersentia, 2012); GLOBAL JUSTICE, STATE DUTIES. THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW, Malcolm Langford, et al. (eds.), (Cambridge Univ. Press, 2013) (regarding the duty of the State to regulate corporations, see *in particular* the chapter by Smita Narula). The Maastricht Principles are increasingly referred to by the Special Procedures of the Human Rights Council, as well as by the UN Office of the High Commissioner for Human Rights: see, e.g., *Analytical study on the relationship between human rights and the environment. Report of the United Nations High Commissioner for Human Rights*, U.N. doc. A/HRC/19/34 (Dec. 19, 2011), para. 71.
- 380 The International Court of Justice has affirmed the extraterritorial reach of human rights instruments on a number of occasions including; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. Rep. 103, ¶109 (July 9); *Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2000 I.C.J. Rep. 126, ¶178-180, 216-217 (July 1).
- 381 See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (2), vol. 2 (AM. LAW INST., 1987) ("...a state has jurisdiction to prescribe law with respect to ... (2) the activities, interests, status, or relations of its nationals outside as well as within its territory").
- 382 UN Committee on Economic, Social and Cultural Rights, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, UN doc. E/C.12/GBR/CO/6 (14 July 2016), para. 17(d). Under Prime Minister Theresa May, the UK Government is making it a priority to make it easier to prosecute companies for a wider range of corruption issues. Suzi Ring, *U.K. Companies Could Face Tougher Corruption Laws Under May*, BLOOMBERG (Sept. 5, 2016), <http://www.bloomberg.com/news/articles/2016-09-05/u-k-government-to-open-talks-on-new-criminal-laws-for-companies>.
- 383 UN Committee on Economic, Social and Cultural Rights, Concluding Observations: United Kingdom of Great Britain and Northern Ireland, UN doc. E/C.12/GBR/CO/6 (14 July 2016), paras. 16-17.