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Articulating a Rights-Based Argument for Land Contract Disclosure

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Responsible Land Governance: Towards an Evidence Based Approach

**ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 20-24, 2017**



ARTICULATING A RIGHTS-BASED ARGUMENT FOR LAND CONTRACT DISCLOSURE

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**Paper prepared for presentation at the
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Abstract

This paper explores whether and how existing state obligations under human rights law require disclosure of land contracts and more transparent contracting processes around land investments. It focuses on the extent to which guidelines for responsible land-based investment, which encourage greater transparency, reflect existing host and home state obligations. Based on a review of relevant human rights law and authoritative interpretations thereof, the paper articulates rights-based arguments for land contract disclosure, based in particular on rights to participation and the right of access to information. This rights-based approach, which has not been fully articulated to date, bolsters understanding of the extent to which best practice recommendations regarding transparency in land investments are reflected in binding human rights obligations, and thereby provides arguments for pushing the transparency agenda forward with states. Moreover, where uncertainty exists regarding how best to implement recommendations regarding land contract disclosure, rights-based arguments can serve to inform and shape measures adopted in pursuit of implementation. The paper also seeks to encourage greater discussion of the links between human rights law and transparency in land investments within the various fora and communities of practice focused on these issues, and to lend legal weight to policy arguments.

Key Words: human rights, land governance, monitoring compliance, responsible investment, transparency

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Introduction

In many countries targeted for large-scale land-based investment, land contracts are negotiated without public participation or awareness, and remain opaque once concluded. As the impacts of land-based investment are increasingly recognized and debated, a clear consensus is emerging on the need for greater transparency around these investments. This consensus is reflected in multiple guidelines and principles that touch on responsible land-based investment and land governance. However, even the most authoritative of these guidelines and principles (for example, the Voluntary Guidelines on the Responsible Governance of Tenure¹) are at best “soft law”—quasi-legal rules that help in interpreting legal obligations but do not create new ones. Missing from discussions so far are arguments for greater transparency – and for land contract disclosure specifically – articulated on the basis of existing, legally binding obligations. These can be found in international human rights law. Yet to date, the links between best practices, recommendations, and existing host and home state obligations under international and regional human rights treaties have been overlooked or only partially applied in the context of land investments.

The present paper seeks to bridge this gap by connecting existing legal obligations found in human rights law with emerging consensus on the need for greater transparency in land-based investment. Based on a review of relevant human rights law and authoritative interpretations thereof, the paper articulates rights-based arguments for land contract disclosure based on rights to participation and the right of access to information. This rights-based approach, which has not been fully articulated to date, bolsters understanding of the extent to which best practice recommendations regarding transparency in land-based investment are reflected in binding human rights obligations, and thereby provides arguments for pushing the transparency agenda forward with host and home states. Moreover, where uncertainty exists regarding how best to implement recommendations regarding land contract disclosure, rights-based arguments can serve to inform and shape measures adopted in pursuit of implementation.

¹ Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, referred to herein as “VGGT”.

The paper also seeks to encourage greater visibility and discussion of the links between human rights law and transparency in land-based investment within the various fora and communities of practice focused on these issues. In doing so, the paper aims to complement existing approaches to promoting transparent, responsible investment, and to lend legal weight to policy arguments. Crucially, rights-based arguments can inform and reinforce ongoing advocacy efforts seeking to implement greater contract transparency around land investments. Beyond supporting or informing legal and policy reforms in host and home states, rights-based arguments for land contract disclosure can also lend support to human rights claims regarding the impacts of land investments brought before human rights tribunals and bodies at the international, regional, and domestic levels. National human rights institutions may also find rights-based arguments instructive for their own work, which may in turn catalyze legal and policy reforms on transparency in land investments at the national level.

Part I provides a brief discussion of the current context regarding transparency in land-based investment, noting that disclosure of investor-state contracts for large-scale agricultural and forestry projects lags far behind disclosure of such agreements for oil, gas, and mining projects. In Part II, the paper describes the emerging consensus on the need for transparency in land-based investment, as seen in guidelines, principles, and commitments that call for disclosure of land contracts. Part III provides an overview of rights enshrined in binding international and regional human rights treaties that are particularly relevant to the articulation of rights-based arguments for land contract disclosure. In Part IV, the paper clarifies the links between these rights, corresponding host and home state obligations, and land contract disclosure. Part IV also provides an overview of the practical implications of state obligations with respect to land contract disclosure.

Several limitations on the scope of this paper should be noted at the outset. While a range of stakeholders have a role to play in promoting responsible, rights-compliant investment, the paper focuses primarily on the obligations of host states under human rights law, although Part IV also refers to the extraterritorial obligations of home states. In order to lend legal weight to policy arguments, the paper prioritizes binding treaty obligations and authoritative interpretations

thereof;² the paper does not include a comprehensive review of relevant soft law instruments, though such instruments can be of important persuasive value, and can guide interpretation and application of hard law. In addition, this paper focuses on international and regional obligations that are applicable to host states commonly targeted for land-based investment; it does not, therefore, examine obligations under the European Convention on Human Rights, nor does it include an assessment of relevant obligations arising under domestic human rights law, though any rights-based argument for disclosure could be strengthened in this manner. Lastly, while the focus of the paper is on land contract disclosure, the authors recognize that transparency throughout the contracting process – and the investment life cycle generally – is critical for ensuring responsible, rights-compliant investment. Moreover, the authors wish to stress that the present paper’s focus on land contracts should not be interpreted as a recommendation for the use of such agreements in the governance of land-based investment: to the extent feasible, rules governing inward investment should be enshrined in the domestic law of the host state.³

I. Context: Transparency in Land-Based Investment

Large-scale investments in commercial agriculture and forestry projects can have profound and diverse implications for the lives of affected individuals and communities, and more generally for host states and their citizens. While the specific implications of these deals are dependent on the context in which they are made, land investments offer the potential to either support or undermine the sustainable development priorities of host states, with improved governance of land and natural resources underpinning several of the Sustainable Development Goals (SDGs). To date, negative impacts arising from land investments have included *inter alia*: displacement, loss of land and resources, and related implications for livelihoods and socio-political identities; detrimental impacts on the environment and sites of cultural significance; increased instability and conflict following repression of land rights, in addition to other land grievances; and corruption (see e.g., Cordes et al., 2016; Cotula, 2014; Boone, 2014; Narula, 2013; De Schutter, 2011, 2010).

² Where an obligation is ‘binding’ it is considered to be hard law, i.e. a state is required to comply with it.

³ Governance of land investments by means of domestic law rather than investor-state contracts is, in most cases, preferable for a range of reasons. For further information, see e.g., Cordes and Bulman, pp. 147-150.

The complex legal framework that governs land investments plays a critical role in determining the impact of these projects (Cotula, 2016, pp. 9-13). Among the relevant sources of law within this legal framework are “land contracts,” defined herein as: (1) written agreements; (2) between host states (including their sub-entities) and domestic and/or foreign investors; (3) to transfer rights to use, control, or own land; (4) for the purposes of large-scale commercial agriculture or timber extraction (“OpenLandContracts.org,” n.d.). These agreements, also referred to as “investor-state contracts,” allocate rights and obligations between parties, and assign risks and benefits associated with an investment (Cordes et al., 2016, p. 16).

While land contracts should not form the primary source of legal rules governing land investments, as noted above, they often play a significant role in many host states targeted for such investment, particularly where relevant domestic laws are weak or still developing (International Institute for Sustainable Development [IISD], 2014, pp. 5-6). In this context, land contracts can strongly influence – or indeed determine – a range of fiscal, operational, environmental, social, and human rights issues. Furthermore, the impact of land contracts can be amplified in cases where international investment treaties are applicable.⁴ In such instances, foreign investors may seek to rely on an investment treaty to, for example, enforce a land contract that is contrary to the domestic law of the host state or conflicts with the host state’s obligations under international human rights law (Cordes et al., 2016, p. 17-18; IISD, 2014, p. 5).

Despite their significance, land contracts are rarely publicly disclosed. Indeed, only a handful of states have taken steps to proactively disclose these agreements. Liberia is the only host state to have consistently published its agricultural and forestry contracts, in addition to its extractive sector contracts. Several other states, including the Democratic Republic of the Congo and Ethiopia, have disclosed some of their land contracts. Sierra Leone has committed to disclosing 70 percent of its agricultural lease agreements (Open Government Partnership [OGP] National Action Plan [NAP], Sierra Leone, 2014-2015, p. 22); however, the extent to which this commitment has been implemented remains unclear. By contrast, as of March 2017, at least 29 host states had published

⁴ International investment treaties are binding agreements concluded between states regarding the promotion and protection of investments made by investors from the respective states. They include bilateral investment treaties (BITs) between two states, and free trade agreements (FTAs) with investment chapters.

some contracts, licenses, or leases concluded with extractive sector companies (Hubert and Pitman, 2017, p. 18).⁵

This lack of transparency tends to permeate the entire contracting process around land investments (Columbia Center on Sustainable Investment [CCSI] and Open Contracting Partnership [OCP], 2016, p. 1). In addition to the failure by most states to publicly disclose land contracts once concluded, these agreements are also often negotiated behind closed doors, without the involvement of project-affected individuals and communities.

Addressing this systemic lack of transparency in land-based investment is critical for a range of reasons (CCSI and OCP, 2016, pp. 1-2). Disclosure of land contracts can, for example, enable stakeholders, including civil society and host state citizenries, to monitor host state and investor compliance with relevant obligations. Affected individuals and communities can be empowered by greater access to land contracts, which can provide more evidence-based leverage to demand accountability for the impacts of land investments on the lives of land-dependent individuals and groups. Land contract transparency can also facilitate the negotiation of improved investments by giving host states access to information regarding the terms used in comparable contexts. Disclosure and transparent engagement around land contracts may also help to mitigate the risk of instability and conflict associated with these projects. Moreover, as discussed below, host states may be required to disclose land contracts in order to comply with their existing obligations under human rights law.

II. Consensus in Best Practice Recommendations and Commitments

In recent years, prominent guidelines and principles concerning responsible land-based investment and land governance have consistently called for greater transparency around land investments, with several such documents specifically calling for disclosure of land contracts or their terms

⁵ Further details can be found in the following table released alongside Hubert and Pitman's March 2017 report: <https://goo.gl/a2VNDj>.

(CCSI, 2016).⁶ This consensus on the need for greater transparency is evident across a range of fora, and is reflected in best practice recommendations targeted at states, their sub-entities, and investors.

The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (“VGGT”), for example, recommend that “[a]ll forms of transactions as a result of investments in land, fisheries and forests should be done transparently,” and that “[c]ontracting parties should provide *comprehensive information* to ensure that *all relevant persons* are engaged and informed in the negotiations, and should seek that the agreements are documented and understood by *all who are affected* [emphases added]” (Food and Agriculture Organization of the United Nations [FAO] and the Committee on World Food Security [CFS], 2012, p. 21, 23). While the VGGT do not explicitly call for public disclosure of land contracts, these recommendations at a minimum imply that contracts and other project information should be disclosed to affected individuals and communities during the negotiation phase of an investment project, given the centrality of land contracts for the governance of land investments.

Similarly, while the Principles for Responsible Investment in Agriculture and Food Systems do not refer explicitly to the disclosure of land contracts, they call for *inter alia* the “[s]haring of information relevant to the investment” in a “transparent manner at all stages of the investment cycle” (CFS, 2014, p. 17). Moreover, the Principles call for “[e]ffective and meaningful consultation with indigenous peoples... in order to obtain their free, prior and informed consent” (FPIC) (CFS, 2014, p. 17). As discussed in Parts III and IV below, meaningful consultation and obtaining FPIC in the context of land-based investment invariably requires access to information concerning the investment, including land contracts. The Principles for Responsible Agricultural Investment (“PRAI”), jointly developed by the FAO, IFAD, UNCTAD, and the World Bank, also include a general recommendation regarding transparency, and note the need to ensure that relevant information regarding agricultural investments is made available to all relevant actors (FAO, IFAD, UNCTAD,

⁶ For further information regarding the recommendations concerning transparency in land investments made by the guidelines and principles discussed in Part II, see: Columbia Center on Sustainable Investment (2016) “Recommending Transparency in Land-Based Investment: A Summary of Relevant Guidelines and Principles,” available at: <http://ccsi.columbia.edu/work/projects/transparency-in-land-based-investment/>.

World Bank, 2010, p. 9). In 2010, the G20 encouraged all states and companies to uphold these Principles (“UNCTAD,” n.d.).

The Guiding Principles on Large Scale Land Based Investments in Africa go one step further with respect to land contracts specifically. The Principles call for “investors to disclose comprehensive project information,” and explicitly provide that “[t]here should be a presumption by all parties that results of impact assessment studies and investment contracts should be disclosed” (African Union [AU] et al., 2014, p. 9). Similarly, the Guide to Due Diligence of Agribusiness Projects that Affect Land and Property Rights, published by the French Agency for Development (AFD) to assist France’s institutional actors to operationalize the VGGT in the context of outward agricultural investment, recommends that “[t]he terms of every contract need to be transparent to ensure that consultations are meaningful and that the public can hold governments and investors to account” (AFD, 2014, p. 27, 46). Moreover, the Guide calls for the entire contract negotiation process to be transparent in order to limit the risk of corruption affecting land transactions (AFD, 2014, p. 27, 46).

Calls for land contract disclosure are echoed in guidelines specifically designed to assist investors in aligning their projects with principles on responsible investment. The model enterprise policy contained in OECD-FAO Guidance for Responsible Agricultural Supply Chains, which outlines standards that enterprises should observe, calls for enterprises to “commit to transparency and information disclosure on... land-based investments, including transparency of lease/ concession contract terms” (Organisation for Economic Co-operation and Development [OECD] and FAO, 2016, p. 24). The New Alliance for Food Security and Nutrition’s Analytical Framework for Land-Based Investments in African Agriculture, which seeks to assist the private sector in aligning projects with best practices (including the VGGT), again recommends that all relevant information be made available to the public at all stages of the investment, and that “contracts, especially those involving large tracts of land, should be made public” (New Alliance for Food Security and Nutrition, 2015, p. 15). The United States Agency for International Development’s (USAID’s) Operational Guidelines for Responsible Land-Based Investment recommend that investors “consider making the terms of the agreement public” (USAID, 2015, p. 39).

Beyond the specific consensus evident in guidelines and principles concerning responsible investment and land governance, a broader push for open and transparent governance has become more prominent in recent years. In 2011, the Open Government Partnership (OGP) was launched as a multilateral initiative to secure commitments from governments regarding transparency and anti-corruption in governance (“OGP,” n.d.). Launched by eight founding member governments, the partnership has quickly expanded to a total of 75 participating states. Several such states have made specific commitments with respect to transparency in natural resource governance, and a handful have committed to land contract transparency specifically. Mongolia, for example, has committed to ensuring transparency around “all agreements on investment” regarding “public-owned resources such as water, minerals, oil and land” (OGP NAP: Mongolia, 2014-2015, p. 4). Moreover, as noted above, Sierra Leone has committed to disclosing “70% of mining and agricultural contracts” (OGP NAP: Sierra Leone, 2014-2015, p. 22), though whether and how this commitment has been implemented remains unclear.⁷ The growing consensus that land contract disclosure constitutes best practice was underscored during the OGP Global Summit in 2016, where several representatives from civil society and participating states proposed a “collective action” calling on states to “publish contracts, licenses and leases... which detail the agreements made by companies and the government on natural resources and land projects and the sales of commodities” (OGP Paris Declaration, 2016, Action 8).⁸

General consensus regarding the importance of transparency and public access to information has been further underscored by Goal 16 of the Sustainable Development Goals (SDGs), which were endorsed by heads of state and governments in September 2015 as part of the 2030 Agenda for Sustainable Development. SDG Target 16.10 calls on states and other stakeholders to *inter alia* “[e]nsure public access to information and protect fundamental freedoms, in accordance with

⁷ Note that Sierra Leone’s 2016-2018 OGP NAP indicates that these agreements have been made public (OGP NAP: Sierra Leone, 2016-2018, p. 15). While a limited number of contracts have been made available on the Ministry of Agriculture, Forestry and Food Security website, it remains unclear whether they represent 70% of agricultural contracts.

⁸ The Paris Declaration is not a binding set of commitments. Further information can be found here: <https://paris-declaration.ogpsummit.org/>.

national legislation and international agreements” (SDGs, Goal 16). One of the indicators used to measure implementation of this target refers to the “number of countries that adopt and implement constitutional, statutory and/or policy guarantees for public access to information” (SDGs, Goal 16, Indicator 16.10.2).

Taken together, the recommendations and commitments outlined in this section suggest that a strong consensus on the need for transparency and access to information has emerged, both in relation to strengthening governance generally, and specifically with respect to improving the governance and outcomes of land-based investment. While some host states have taken, or are taking, steps to implement these recommendations, the vast majority continue to conclude land contracts behind closed doors, without participation from affected stakeholders, and without making contracts publicly available either before or after their conclusion. Moreover, commitments to transparency continue to be promoted on the basis of “best practice,” with limited understanding of whether and how land contract disclosure may already be required under international law.

III. Relevant Protections under Human Rights Law

While the consensus in best practice recommendations and guidelines discussed above represents an important step forward for improving land-based investment, there has been little discussion to date of arguments for greater transparency articulated on the basis of existing, legally binding obligations that can be argued to require proactive disclosure of land contracts. This section provides an overview of rights enshrined in binding international and regional human rights treaties that provide a strong basis for rights-based arguments for land contract disclosure. The discussion focuses on two sets of rights: (a) rights to participation, which include the right to take part in the conduct of public affairs and rights to effective participation in decision-making concerning lands and natural resources upon which individuals and communities depend; and (b) the right of access to information. While this section discusses these rights and their authoritative interpretations generally, Part IV then draws explicit links between these rights, corresponding host and home state obligations, and land contract disclosure.

(a) Rights to Participation

(i) Right to Take Part in the Conduct of Public Affairs

At the international level, right to take part in the conduct of public affairs is enshrined in the text of most binding human rights treaties. Article 25 of the International Covenant on Civil and Political Rights (ICCPR), for example, provides that “[e]very citizen shall have the right and the opportunity... to take part in the conduct of public affairs, directly or through freely chosen representatives” (ICCPR, art. 25(a)). While similar guarantees can be found in five other “core” international human rights treaties, all of which are binding on states parties,⁹ this sub-section focuses specifically on Article 25 ICCPR owing to *inter alia* its quasi-universal application.¹⁰

The core components of the right to take part in the conduct of public affairs enshrined in Article 25 ICCPR have been clarified by the UN Human Rights Committee, which is the treaty body charged with providing authoritative interpretations of the provisions of the ICCPR and considering complaints by individuals alleging violations of the rights set forth in the Covenant.¹¹

⁹ See, for example: International Covenant on Economic, Social and Cultural Rights (Article 13); Convention on the Elimination of All Forms of Racial Discrimination Against Women (Articles 7 and 8); Convention on the Rights of the Child (Article 15); Convention on the Rights of Persons with Disabilities (Article 29); International Convention on the Protection of All Migrant Workers and Members of Their Families (Articles 41 and 42). At the regional level, the American Convention on Human Rights (ACHR) specifically provides for a “right to participate in government”, which includes a provision that mirrors the language of Article 25 of the ICCPR (ACHR, art. 23). The African Charter on Human and Peoples’ Rights (ACHPR) also provides for the right of every citizen “to participate freely in the government of his country, either directly or through freely chosen representatives” (ACHPR, art. 13), mirroring the language of Article 21 of the Universal Declaration of Human Rights (UDHR). Note that Article 5 of the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD) provides that states parties must guarantee the right of everyone “to take part in the Government *as well as* in the conduct of public affairs at any level,” thereby distinguishing between the narrower right to vote and stand for election, and the broader right of participation in the conduct of public affairs (ICERD, art. 5(c)).

¹⁰ 169 states have ratified the ICCPR. It thus applies to a majority of states. Of non-parties to the ICCPR, 6 states have signed the Covenant, meaning that while they are not bound by the same obligations, they should refrain from undermining the rights enshrined therein. See “OHCHR Status of Ratification Interactive Dashboard” <<http://indicators.ohchr.org/>>.

¹¹ Complaints must fulfill a number of prerequisites in order to be considered by the UN Human Rights Committee. For further information, see: Office of the UN High Commissioner for Human Rights (2013).

The Human Rights Committee has broadly interpreted what constitutes “the conduct of public affairs” found in Article 25(a) ICCPR. In its Views on *Gauthier v. France*, for example, the Committee noted that, when read together with Article 19 ICCPR (regarding freedom of expression, including the right of access to information, discussed further in Part III(b) below), the right to take part in the conduct of public affairs “implies that *citizens... should have wide access to information... about the activities of elected bodies and their members [emphases added]*” (*Gauthier v. France*, 1995, para. 13.4). This broad formulation was further elaborated in General Comment No. 25, which seeks to clarify the content and meaning of Article 25 ICCPR. In that Comment, the Committee defined the conduct of public affairs as follows:

The conduct of public affairs... is a broad concept which relates to the *exercise of political power*, in particular the exercise of legislative, executive and administrative powers. It covers *all aspects of public administration, and the formulation and implementation of policy* at international, national, regional and local levels [emphases added] (UN Human Rights Committee, 1996, para. 5).

More recently, in a review of the scope of Article 25 carried out by the Office of the UN High Commissioner for Human Rights, Article 25 ICCPR was considered to acknowledge “the right of all people to be fully involved in and to effectively influence *public decision-making processes that affect them [emphases added]*” (Office of the UN High Commissioner for Human Rights, 2015, para. 9). The same Office has also noted that the right to public participation under Article 25 ICCPR, and under other international human rights treaties, “may now be read as encompassing rights to be consulted and to be provided with equal and effective opportunities to be involved in decision-making processes on *all matters of public concern [emphases added]*” (Office of the High Commissioner for Human Rights, 2014, para. 89).

Taken together, these broad interpretations of “the conduct of public affairs” allow for a diverse range of activities to fall within the scope of Article 25 ICCPR. Moreover, the Committee’s reference to Article 25 covering “all aspects of public administration” and the formulation and

Individual Complaint Procedures under the United Nations Treaties. Available at: <http://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf>.

implementation of public policy at all levels implies that the activities of subnational bodies, including municipal councils, should be open to participation from the public (Danish Institute for Human Rights, 2013, p. 10).

With respect to modes of participation protected under Article 25(a) ICCPR, the Human Rights Committee has recognized that participation can be both direct and indirect: while the latter refers to the classic right to political participation through elected representatives, the former has been understood to include a range of means of public participation (Danish Institute for Human Rights, 2013, pp. 11-12). For example, the Committee has considered that citizens can “take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize” (Human Rights Committee, 1996, para. 8; *Beydon et al. v. France*, 2005, para. 4.5). Critically, the Human Rights Committee has determined that direct participation in this manner is supported by ensuring freedom of expression under Article 19 ICCPR, which guarantees the right to seek and receive information (Human Rights Committee, 1996, para. 8). This link between participation under Article 25 and access to information under Article 19 highlights that, without access to relevant information, public debate and dialogue is invariably undermined or entirely precluded. The correlation between access to information and the realization of the right to take part in public affairs was further underscored by the Office of the UN High Commissioner for Human Rights in its 2015 review of the scope of Article 25, wherein access to information was referred to as one of the “prerequisites to an enabling environment for participation in the conduct of political and public affairs” (Office of the UN High Commissioner for Human Rights, 2015, para. 13).

Lastly, with respect to the obligations of states under Article 25 ICCPR, the Human Rights Committee has referred to the need for states parties to adopt positive measures to guarantee the rights enshrined therein (UN Human Rights Committee, 1996, para. 12). In its 2015 report, the Office of the UN High Commissioner for Human Rights noted that such measures must conform to certain principles to guarantee “full and effective participation” in public affairs, namely:

- Mechanisms established to guarantee participation in the conduct of public affairs should be established by law;
- States parties must guarantee access to information for all stakeholders in a timely and transparent manner, which requires states to “make every effort to ensure easy, prompt, effective and practical access to information of interest to the public”;
- All mechanisms and processes for participation should be sufficiently resourced, inclusive, non-discriminatory, and designed to enable concerned groups – including the most marginalized groups – to voice their opinions (Office of the UN High Commissioner for Human Rights, 2015, para. 9).

These principles are not in themselves binding, but they provide important guidance to states parties to the ICCPR on how to comply with their binding legal obligations under Article 25 of the Covenant.

The components of Article 25 ICCPR discussed above illustrate the broad and inclusive nature of this provision. A diverse range of activities can fall within the ambit of “the conduct of public affairs,” and Article 25 does not place limitations on the means of participation protected thereunder. Moreover, obligations arising under Article 25 appear to be triggered regardless of whether a rights-holder has a specific interest in the “public affair” at issue: rather, this provision guarantees the right of all citizens to scrutinize activities falling within the ambit of “the exercise of political power”, “the formulation and implementation of policy”, and “the activities of elected bodies and their members.” The nature of Article 25 ICCPR thus reflects the centrality of public participation for good governance in democratic societies. A similar approach is apparent with respect to the right of access to information, as discussed below in Part III (b).

While this section has focused on Article 25 ICCPR, the right to take part in the conduct of public affairs is enshrined in several other core and regional human rights treaties.¹² To the extent that interpretation and application of these provisions mirrors the approach adopted with respect to

¹² See note 10 above.

Article 25 ICCPR, similar arguments could be advanced regarding the nature and scope of state obligations that arise in the context of the realization of this right as protected by other treaties.

(ii) Rights to Effective Participation

In addition to the right to take part in the conduct of public affairs, guaranteed by Article 25(a) ICCPR and several other international and regional human rights treaties, the ICCPR also guarantees the right of minorities “to enjoy their own culture” under Article 27 ICCPR. On the basis of this right, the UN Human Rights Committee has elaborated on state obligations to guarantee the effective participation of minorities in decisions that affect them, including decisions that concern *inter alia* the lands and natural resources upon which they depend.

In its General Comment No. 23, the Committee recognized “that culture manifests itself in many different forms, including a particular way of life associated with the use of land resources” (Human Rights Committee, 1994, para. 7). The Committee also recognized that Article 27’s protection of the right of minorities to enjoy their own cultures may include protection of traditional economic and social activities, and that protection of these rights “may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them” (Human Rights Committee, 1994, para. 7). Notably, the Committee has established that, in order to be effective, participation “requires not mere consultation but free, prior and informed consent” of the members of the affected minority (*Poma Poma v. Peru*, 2009, para. 7.6).¹³

Requirements regarding effective participation in decision-making concerning land and natural resources upon which individuals and communities depend have been further elaborated at the regional level. In a series of cases concerning the restriction of rights pertaining to land and natural resources, the Inter-American Court of Human Rights relied on Article 21 of the American

¹³ Note that the links between land contract disclosure and the requirement to obtain free, prior, and informed consent are not considered in detail in the present version of this paper. The International Labour Organization’s Convention No. 169 was the first legally binding treaty to codify the right; however, the right has also been articulated and applied on the basis of other international and regional binding human rights treaties, in addition to soft law instruments.

Convention on Human Rights (ACHR), which guarantees the right to property, in outlining state obligations concerning effective participation by affected individuals and communities (*Yakye Axa v. Paraguay*, 2005; *Sawhoyamaya v. Paraguay*, 2006; *Saramaka v. Suriname*, 2007; *Xákmok Kásek v. Paraguay*, 2010; *Kichwa v. Ecuador*, 2012; *Garífuna v. Honduras*, 2015; *Kaliña and Lokono v. Suriname*, 2015). The Court has stipulated that:

- States parties have an obligation to actively consult affected individuals and communities in good faith;
- Such consultations must take place during the early stages of plans that may restrict the right to property of individuals and communities;
- States parties must ensure that affected individuals and communities are aware of the possible risks associated with a particular development and investment plan to ensure that the plan, if accepted, is knowingly and voluntarily accepted;
- Where projects are of a large-scale nature, the host state's duty becomes an obligation to obtain the free, prior and informed consent of those affected (*Saramaka v. Suriname*, 2007, paras. 133-134; *Kichwa v. Ecuador*, 2012, paras. 165-167, 171, 177-178).

In two judgments rendered in 2015, the Court reaffirmed its approach to effective participation by means of consultation, and provided further details on the scope and content of state obligations in this regard. In *Garífuna Community of Punta Piedra and its members v. Honduras*, the Court reiterated that states “must ensure the effective participation [of indigenous and tribal peoples] ‘with regard to *any* development, investment, exploration or extraction plan’ [emphasis added],” which the Court has interpreted as “any proposed activity that may affect the integrity of the lands and natural resources [of the community]” (*Kaliña and Lokono v. Suriname*, 2015, para. 206; *Saramaka v. Suriname*, 2007, note 127). The Court clearly stated that the state's obligation to consult “must be complied with *prior to* the execution of activities that may have a significant impact on the interests of the indigenous and tribal peoples [emphasis added]” to ensure that those affected truly have an opportunity to participate and influence the decision-making process (*Kaliña and Lokono v. Suriname*, 2015, para. 207; *Garífuna v. Honduras*, 2015, paras. 217-223)

The African Commission on Human and Peoples' Rights has adopted a similar, though less comprehensive, approach to effective participation. The Commission has relied on Article 22 of the African Charter on Human and Peoples' Rights (ACHPR), which enshrines the right to development, to frame participation as the procedural element of this right. In *Endorois v. Kenya*, for example, the Commission concluded that, in cases where development or investment projects would have a major impact on the lands of indigenous communities, the state must obtain free, prior and informed consent from such communities (*Endorois v. Kenya*, 2009, para. 291). Moreover, the Commission has stressed that the state must seek to impress upon indigenous communities an understanding of the consequences of the project (*Endorois v. Kenya*, 2009, para. 290).

It is worth noting that both the Inter-American Court and African Commission have adopted inclusive approaches to the recognition of rights holders in the context of rights to effective participation. Moreover, neither approach defers to domestic authorities regarding classifications of rights holders. The Inter-American Court has explicitly recognized that land-dependent communities that are not necessarily 'indigenous' to a region, but that nonetheless have a special relationship with the lands and natural resources upon which they depend, come within the ambit of Article 21 ACHR's protection and thus have rights to effective participation in the context of decisions concerning their lands and natural resources (*Moiwana v. Suriname*, 2005, paras. 129-134; *Saramaka v. Suriname*, 2007, paras. 79-86).¹⁴ The Court reaffirmed this approach in a recent case regarding the lands and natural resources of the Garífuna Community of Punta Piedra and its members, where it reiterated that a state's failure to recognize a land-dependent community as 'indigenous' does not preclude or affect that community's rights under *inter alia* Article 21 ACHR (Inter-American Commission on Human Rights, 2015, pp. 92-93).

¹⁴ In terms of what constitutes a special relationship with lands and natural resources, the Inter-American Court has referred to *inter alia*: a "profound and all-encompassing relationship" between the communities and their lands (*Moiwana v. Suriname*, 2005, paras. 132-133; *Saramaka v. Suriname*, 2007, para. 85); a relationship whereby lands are of "vital spiritual, cultural and material importance" (*Moiwana v. Suriname*, 2005, paras. 101, 195); and ties that are characterized by lands and natural resources providing not only the primary means of subsistence for a community, but also a source of the community's identity (*Saramaka v. Suriname*, 2007, para. 82).

While the African Commission has not explicitly applied its jurisprudence regarding effective consultation to ‘non-indigenous’ groups, it has adopted a broad and inclusive interpretation of ‘indigenous’ that allows for protection of many land-dependent individuals and communities in the region.¹⁵ Emphasis in its conception of ‘indigeneity’ is placed on *inter alia*: self-identification as indigenous; and special ties with and use of traditional lands (African Commission Working Group of Experts on Indigenous Populations and Communities, 2005, pp. 87-88; Advisory Opinion on UNDRIP, 2007, paras. 10-13).

Much like the right to take part in the conduct of public affairs protected under Article 25 ICCPR, rights to effective participation guaranteed by Article 27 ICCPR, Article 21 ACHR, and Article 22 ACHPR require access to information for their realization. Without such access, consultations with affected individuals and communities regarding their lands and natural resources are unlikely to be “meaningful,” and any consent to such projects obtained (or purportedly obtained) by the relevant state cannot be “informed.”

(b) Right of Access to Information

(i) Access to Information under the ICCPR

The right of access to information (or, in certain contexts, simply the “right to information”) has been increasingly referred to by human rights scholars and authorities as a standalone right protected under international and regional human rights law (McDonagh, 2013; Danish Institute for Human Rights, 2013, p. 13). While not explicitly enshrined in the text of binding human rights treaties, the content and scope of the right of access to information has been derived in large part

¹⁵ Adoption of this inclusive conception of ‘indigeneity’ followed recognition by the African Commission’s Working Group of Experts on Indigenous Populations and Communities that adoption of a strict definition of ‘indigenous peoples’ was not appropriate in the African context, given, for example, negative connotations associated with the term ‘indigenous’ arising from its use during the colonial era. For further information, see e.g., African Commission Working Group of Experts on Indigenous Populations/ Communities (2005); Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples (2007).

from the interpretation and application of the right to freedom of expression, which is enshrined in several binding human rights treaties.¹⁶

At the international level, Article 19 ICCPR provides that the right to freedom of expression includes the “freedom to seek, receive and impart information and ideas of all kinds” (ICCPR, art. 19(2)). In elaborating on the type of information covered by Article 19(2), the UN Human Rights Committee has stated that the right to seek and receive information includes “the right of individuals to receive *State-held information*, with the exceptions permitted by the restrictions established in the Covenant [emphasis added]” (*Toktakunov v. Kyrgyzstan*, 2006, para. 6.3).¹⁷ Significantly, a majority of the Committee considered that this “information should be provided *without the need to prove direct interest or personal involvement* in order to obtain it, except in cases in which a legitimate restriction is applied [emphasis added]” (*Toktakunov vs. Kyrgyzstan*, 2006, para. 6.3), a qualification that has also been addressed in greater detail by the Inter-American Court of Human Rights, as discussed below.

The Human Rights Committee subsequently elaborated on this approach in its General Comment No. 34, where it underscored that Article 19(2) “embraces a right of access to information *held by public bodies* [emphasis added]” (UN Human Rights Committee, 2011, para. 18). In defining the term “public bodies,” the Committee referred to “all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local,” and noted that state responsibility for the acts of semi-state entities may also arise in certain circumstances (UN Human Rights Committee, 2011, para. 7).

Notably, with respect to the steps that states parties should take to fulfill their obligations under Article 19(2), General Comment No. 34 provides that states should “*proactively* put in the public domain Government information of public interest [emphasis added],” and “should make every

¹⁶ See, e.g.: ICCPR (Article 19); ICERD (Article 5); ACHR (Article 13); ACHPR (Article 9).

¹⁷ Article 19 ICCPR provides that any restrictions on the right to freedom of expression, including the right to seek, receive, and impart information, must “only be such as are provided by law and are necessary” for (a) “the respect of the rights or reputations of others” or (b) “for the protection of national security or of public order (ordre public), or public health or morals” (ICCPR, art. 19(3)).

effort to ensure easy, prompt, effective and practical access” to information of public interest (UN Human Rights Committee, 2011, para. 19). Moreover, the Committee reiterated the state’s obligation to protect individuals “from any acts by private persons or entities that would impair the enjoyment of the freedoms of opinion and expression [including with respect to access to information] to the extent that these Covenant rights are amenable to application between private persons or entities” (UN Human Rights Committee, 2011, para. 7).

The existence of the standalone right of access to information held by public bodies, and of the corresponding positive obligation of states parties to disclose information of public interest, is also supported by frequent and explicit references to this right in several reports of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.¹⁸ In 1998, for example, the UN Special Rapporteur noted that “the right to seek and receive information is not simply a converse of the right to freedom of opinion and expression but *a freedom of its own* [emphasis added],” which imposes “*a positive obligation* on States to ensure access to information, particularly with regard to information held by Government [emphasis added]” (UN Doc. E/CN.4/1998/40, 1998, paras. 11, 14). The same report provides that this positive obligation can require, for example, enactment of legislation to guarantee a legally enforceable right to state-held information at the domestic level (UN Doc. E/CN.4/1998/40, 1998, para 14). In 2000, the UN Special Rapporteur clearly stated that “the right to seek, receive and impart information *is not merely* a corollary of freedom of opinion and expression; it *is a right in and of itself* [emphasis added]” (UN Doc. E/CN.4/2000/63, 2000, para. 42). Shortly thereafter, the Special Rapporteur sought to further clarify the nature of the right; in doing so, the Rapporteur reiterated the statements above, and specifically noted that, to realize the right to information, states should establish “specific legislation, conforming to best international principles and practice” (UN Doc. E/CN.4/2004/62, 2004, para. 60). In 2005, the Special Rapporteur continued to support the articulation of a standalone “right of access to information, especially information held by public bodies,” which the Rapporteur considered was “easily deduced” from Article 19 ICCPR (UN Doc.

¹⁸ Note that the language used by Special Rapporteurs varies within and between reports, referring in some cases to the “right of access to information,” and in others to the “right to information.” For the purposes of this paper, both references are understood in terms of the “right to seek, receive and impart information,” as enshrined in the text of Article 19(2) ICCPR. Analyses of potential differences between a “right of access to information” and a “right to information” are beyond the scope of this paper.

E/CN.4/2005/64, 2005, para. 39). On the basis of this right, the Rapporteur stated that “*all information held by public bodies shall be publicly available* [emphasis added],” unless a legitimate exemption applies (UN Doc. E/CN.4/2005/64, 2005, para. 39).

Drawing from the articulation of the right of access to information by the Human Rights Committee and UN Special Rapporteur on the basis of Article 19 ICCPR, several important points can be noted with respect to the content and scope of this right. First, the information that forms the object of this right includes all state-held information. Any restrictions on public disclosure of such information must satisfy the criteria explicitly defined in Article 19(3) ICCPR, i.e. they must be provided by law and necessary to achieve protection of the rights or reputations of others, or of national security, public order, or public health or morals. Second, state-held information includes information held by all public bodies, which covers all branches of the state and other public or governmental authorities at local, regional, and national levels. Third, information held by such bodies must be disclosed to the public generally. Such disclosure does not require individuals or groups to prove direct interest or personal involvement with respect to the information concerned; rather, if the information is state-held information of public interest, it must be publicly disclosed.

Lastly, and significantly for the purposes of the present paper, states parties must *proactively* disclose state-held information, and should do so in a manner that ensures easy, prompt, effective, and practical access to disclosed information. The Human Rights Committee’s determination that states must disclose this information proactively to comply with their obligations under Article 19 ICCPR is critical, as it clarifies that the right of access to information establishes both proactive and reactive obligations. In other words, realization of the right of access to information requires states parties to go beyond responding to freedom of information requests: compliance with Article 19 ICCPR also requires proactive disclosure of information by states.

(ii) Developments at the Regional Level

At the regional level, articulation of the right of access to information has been advanced on the basis of Article 13 of the American Convention on Human Rights (ACHR) and Article 9 of the African Charter on Human and Peoples’ Rights (ACHPR). Article 13(1) ACHR adopts an almost identical

formulation to Article 19(2) ICCPR. The Inter-American Court has, by means of its jurisprudence, articulated the content of this right in some detail. By contrast, Article 9 ACHPR adopts a different formulation: it explicitly provides for the right of individuals to receive information, in addition to the right of individuals to express and disseminate their opinions within the law. While consideration of the European Court of Human Rights' approach to access to information is beyond the scope of this paper, readers should note that access to information has been protected on the basis of freedom of expression (guaranteed by Article 10 of the European Convention on Human Rights), though the Court has adopted a distinct approach to disclosure of state-held information that diverges from the approaches discussed herein.¹⁹

The approach adopted by the Inter-American Court of Human Rights is particularly relevant to the present paper, as it mirrors the approach adopted at the international level under the ICCPR,²⁰ and provides insight into the application of the state's obligation to proactively disclose state-held information in the specific context of large-scale investments. In *Reyes v. Chile*, the Inter-American Court of Human Rights concluded that Article 13 of the ACHR not only protects the right to receive information, but also establishes "the positive obligation of the State to provide it" (*Reyes v. Chile*, 2006, para. 77). The case concerned various requests for information regarding a large-scale "deforestation project" submitted by an environmental organization to the Chilean Foreign Investment Committee (*Reyes v. Chile*, 2007, para. 3). Among the documents requested were contracts signed between the state and two foreign investors, in addition to a local Chilean company, regarding the project (*Reyes v. Chile*, 2007, para. 57(13)). The Chilean Committee had denied the request without providing a justification for this denial.

¹⁹ The wording of Article 10 ECHR differs from the wording of Article 19 ICCPR and Article 13 ACHR, in that it does not explicitly enshrine a freedom to seek information. The European Court of Human Rights has sought to guarantee access to information in certain circumstances as part of freedom of expression under Article 10 ECHR, but has yet to provide that the right of access to information constitutes a standalone right under that provision. See in particular the Court's judgment in *Magyar Helsinki Bizottság v. Hungary* (2016), which Reventlow and McCully indicate constitutes a step in the right direction regarding acknowledgment of a standalone right of access to information, but stops short of actually acknowledging that right and any corresponding positive obligations of states parties to the ECHR. For further information, see e.g., Reventlow and McCully (2016); McDonagh (2013).

²⁰ For further information on the jurisprudence of the Inter-American Court and Commission on the right of access to information, see, e.g. Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights (2010); Office of the Special Rapporteur for Freedom of Expression, Inter-American Commission on Human Rights (2012).

In clarifying the scope of information considered to be in the “public interest” for the purposes of Article 13 ACHR, the Court specifically provided that the information requested “was of public interest *because it related to the foreign investment contract signed originally between the State* [emphasis added]” and the three companies involved in the project, and because it concerned “a forestry exploitation project that caused considerable public debate owing to its potential environmental impact” (*Reyes v. Chile*, 2006, para. 73). In addition, with respect to the nature of the request for information, the Court noted that the purpose of the request was to verify that a State entity – namely the Foreign Investment Committee – “was acting appropriately and complying with its mandate” (*Reyes v. Chile*, 2006, para. 73).

Thus, in justifying its determination that the requested information (including the investor-state contract) came within the ambit of “public interest,” the Court relied *both* on the implications of large-scale investment projects, *and* on the involvement of a state entity in the conclusion of the contract. The Court then elaborated on the content of the right embodied in Article 13 of the ACHR and in similar provisions found in other human rights treaties, concluding that such provisions “establish a *positive* right to seek and receive information,” a right that can be exercised “without the need to prove direct interest or personal involvement” in the information concerned (*Reyes v. Chile*, 2006, paras. 76-77). In this manner, the Court underscored the social dimension of the right to information, which allows for rights holders to assess whether public functions are being adequately performed by the state:

*Access to State-held information of public interest **can permit participation** in public administration **through the social control** that can be exercised through such access... Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. Hence, **for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds**. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society [emphases added].* (*Reyes v. Chile*, 2006, paras. 86-87).

Given the strong links between effective public participation and access to information, the Court considered that authorities of the state “are governed by the principle of maximum disclosure, which establishes the *presumption* that all information is accessible, subject to a limited system of exceptions” (*Reyes v. Chile*, 2006, para. 92). According to the Court, any restrictions on the right to information must: (a) be established by laws enacted for the purposes of the “general welfare”; (b) be adopted in pursuance of the objectives outlined in Article 13 ACHR; and (c) be necessary in a democratic society or, in other words, “intended to satisfy a compelling public interest” (*Reyes v. Chile*, 2006, paras. 89-91). The burden is on the state to prove that these requirements have been met with respect to any restriction on access to state-held information (*Reyes v. Chile*, 2006, para. 92).

This principle of ‘maximum disclosure’ is also referred to in the Inter-American Juridical Committee’s resolution on the Principles on the Right of Access to Information, which provide that: “[a]ccess to information is a fundamental human right which establishes that everyone can access information from public bodies, subject only to a limited regime of exceptions” (Principles on the Right of Access to Information, 2008, Principle 1), and in the Organization of American States’ Model Law on Access to Information adopted by the OAS General Assembly, which provides for “a broad right of access to information, in possession, custody or control of any public authority” (OAS Model Law on Access to Information, 2010, Article 2). Moreover, these Principles make specific reference to the obligation of states to disclose information proactively, including (but not limited to) their contracts (Principles on the Right of Access to Information 2008, Principle 4).

The fundamental link between access to information and public participation, along with the obligation to proactively disclose state-held information of public interest, has also been highlighted by the African Commission on Human and Peoples’ Rights during the course of its articulation of the content and scope of Article 9 ACHPR (right to receive information and free expression). In 2002, the Commission adopted the Declaration of Principles on Freedom of Expression in Africa to supplement Article 9 ACHPR and provide guidance to states parties to the ACHPR on how best to implement their obligations with respect to the right to freedom of expression. While the Declaration is non-binding, its principles elaborate on the precise meaning

and scope of Article 9 (Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, 2012, para. 13). Key principles regarding access to information include:

- Principle I (The Guarantee of Freedom of Expression): Refers to freedom of expression as “a fundamental and inalienable human right and an indispensable component of democracy,” and includes language that mirrors the language used in Article 19 ICCPR and Article 13 ACHR regarding the right to seek, receive and impart information.
- Principle II (Interference with Freedom of Expression): Establishes explicit criteria that any restrictions on freedom of expression must satisfy.
- Principle IV (Freedom of Information): Includes specific provisions regarding freedom of information. Significantly, these provisions provide that: (a) everyone has a right to access information held by public bodies; and (b) “public bodies shall be required, *even in the absence of a request, actively to publish important information of significant public interest* [emphasis added].”

When called upon to clarify the right of access to information during the course of specific complaints regarding alleged violations of Article 9 ACHPR, the African Commission has echoed the principles outlined above. For example, the Commission has underscored the link between freedom of expression, including access to information, and participation in the public affairs of the state (*Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, 2006, paras. 246-250). With respect to the restrictions on freedom of expression, including access to information, the Commission has stated that any restrictions must comply with Article 19 ACHPR and Principles I(1) and II of the Declaration (*Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, 2006, paras. 248-249). With respect to information held by public bodies, the Commission has confirmed that freedom of expression protects the right to receive information held by the state (*Egyptian Initiative for Personal Rights and INTERIGHTS v. Egypt*, 2006, paras. 251-252). In doing so, it referred to the approach adopted by the Inter-American Court in *Reyes v. Chile*.

In 2010, the Special Rapporteur on Freedom of Expression and Access to Information in Africa was authorized by the African Commission to expand on Principle IV (Freedom of Information) of the

Declaration (African Commission Resolution 167, 2010). On the basis of this mandate, the Rapporteur initiated the process of drafting the Model Law on Access to Information in Africa, with a view to providing more detailed guidance to states parties regarding how best to comply with their obligations under Article 9 ACHPR. The Model Law was finalized in 2012. While it is non-binding, it further clarifies the meaning and scope of Article 9 ACHPR. Notably in the context of the present paper, the Model Law promotes proactive disclosure of state-held information, and includes a specific provision regarding the proactive disclosure of “all contracts, licenses, permits, authorisations and public-private partnerships granted by the public body or relevant private body” (Model Law on Access to Information, 2012, art. 7(1)(g)).

Moreover, the Model Law has helped to promote and shape the adoption of national access to information laws: in 2010, prior to the development of the Model Law, only five African Union member states had adopted access to information laws; as of September 2016, 19 states had adopted such laws (Special Rapporteur on Freedom of Expression and Access to Information in Africa, 2016, para. 61).

Overall, developments at the regional level are reflective of the international trend toward acknowledgment of a standalone right of access to information. Most notably in the context of articulating rights-based arguments for land contract disclosure, both the Inter-American and African regional human rights systems have acknowledged that realization of the right of access to information requires *proactive* disclosure of state-held information of public interest.

IV. Linking Land Contract Disclosure to State Obligations

Based on the rights and protections discussed above, it is possible to link best practice recommendations regarding transparency in land investments and land contracts to existing human rights obligations of home and host states. Part IV clarifies these links to illustrate that the nature and implications of land contracts give rise to three separate arguments for disclosure of these agreements. When taken together, these arguments form a strong rights-based case for the proactive disclosure of land contracts.

(a) Host and Home State Obligations

States parties to international and regional binding human rights treaties must respect, protect, and fulfill the rights enshrined therein: the obligation to respect requires states to refrain from interfering with or undermining the enjoyment of human rights; the obligation to protect requires states to protect rights-holders from human rights abuses; and the obligation to fulfill requires states to take positive action to realize the rights enshrined in treaties to which they are a party (Office of the UN High Commissioner for Human Rights, “International Human Rights Law,” n.d.).

In the context of land investments, both home and host states are subject to human rights obligations. Host states have obligations to respect, protect, and fulfill human rights obligations that arise in the context of inward investment. With respect to home states, scholars and experts have increasingly asserted that human rights treaties have extraterritorial reach in certain circumstances (Cordes and Bulman, 2016, p. 145-146). Thus, home states also arguably have extraterritorial obligations to protect the rights of individuals and groups from the implications of outward investment (Cordes and Bulman, 2016, pp. 144-145). These obligations may, for example, require home states to ensure that their policies regarding outward investment do not encourage or incentivize investment that fails to comply with best practices on responsible investment and is likely to lead to violations of the rights of land-dependent individuals and communities (CCSI Submission on Draft General Comment on “State Obligations under the ICESCR in the Context of Business Activities,” 2017, p. 3).

(b) Arguments for Proactive Disclosure

Three separate arguments for the proactive disclosure of land contracts can be advanced on the basis of state obligations that arise in the context of the realization of rights to participation and the right of access to information. These arguments can be made in relation to obligations that exist at both the international and regional levels. Where obligations exist at the regional level, these overlap with – rather than displace – international obligations, thereby strengthening rights-based

arguments for disclosure of land contracts with respect to host and home states that are party to both international and regional human rights treaties.

First, the obligation to proactively disclose these agreements can be argued to apply to land contracts as **agreements concluded between governments and private companies**. Article 25 ICCPR protects a broad right of citizens to take part in the conduct of public affairs, which includes participating – both directly and indirectly, through a range of means – in the exercise of states’ powers. This protection covers all aspects of public administration at all levels. The scope of affairs covered by the broad terminology employed by Article 25 ICCPR can thus be argued to extend to government contracting over large-scale investments. Investor-state contracts are, by definition, executed by or on behalf of the state or its sub-entities at the national or subnational level. Failure to disclose investor-state contracts impedes public participation in the governance of large-scale investments by, among other things, (a) undermining the effectiveness of public dialogue regarding the exercise of government power in this context, and (b) precluding meaningful participation by relevant stakeholders in decision-making processes regarding large-scale investments. Thus, while investor-state contracts do not necessarily form the object of the right to take part in the conduct of public affairs, disclosure of these agreements is critical for the realization of this right in the context of the governance of large-scale investments.

By contrast, investor-state contracts can be argued to themselves form the object of the right of access to information when this right is considered in the specific context of large-scale investments, including land and other natural resource investments. Realization of the right of access to information articulated on the basis of Article 19 ICCPR (freedom of expression), Article 13 ACHR (freedom of expression), and Article 9 ACHPR (right to receive information and free expression) requires disclosure of state-held information of public interest. Investor-state contracts are by their nature in the public interest: not only are they executed by or on behalf of the state, but they also form a key source of legal rules governing large-scale investments (including land investments), and thus have far-reaching implications for a range of matters of profound public interest, including, for example, fiscal matters, access to water, and protection of the regulatory space of host states. The public interest nature of investor-state contracts and the human rights

implications of these agreements are made clear in the UN Principles for Responsible Contracts, which specifically note that “[c]ontract disclosure is one way States and business investors can pursue their respective human rights obligations and responsibilities” in the context of investment projects (UN Principles for Responsible Contracts, 2015, p. 33).

Moreover, given the ways in which the right of access to information has been interpreted and applied by human rights authorities, investor-state contracts for land and natural resource investments constitute state-held information that must be disclosed to the public generally, i.e. such disclosure does not require rights-holders to prove specific interest in the information concerned. In addition, and most notably in the context of large-scale investments, a specific obligation to *proactively* disclose state-held information of public interest has been articulated on the basis of the right of access to information.

Second, the obligation to proactively disclose investor-state contracts relating to the use of natural resources generally, including the use of land for agriculture and forestry projects, can be advanced on the basis that such agreements **directly affect rights to effective participation in decision-making concerning the use of natural resources** upon which individuals and communities depend. Article 27 ICCPR (right to culture) requires effective participation of minority groups and their members in decisions concerning measures that may restrict their rights as protected by Article 27, including measures that may affect particular ways of life associated with the use of land resources. In order for participation to be effective, states must not only consult members of the affected minority – they must also obtain their free, prior and informed consent with respect to the measures concerned. Without the effective participation of affected minority groups and their members in decisions concerning such measures, the UN Human Rights Committee has determined that adoption of such measures is likely to result in a breach of state obligations under Article 27 ICCPR (*Poma Poma v. Peru*, 2009, para. 7.6).

Obligations to consult and obtain the free, prior and informed consent of affected communities have also been established at the regional level under the ACHR and ACHPR. Among other things, the Inter-American Court has established that obligations arising from Article 21 ACHR (right to

property) include an obligation on states to: actively consult affected individuals and communities at the early stages of any plans or activities that may affect their rights to their lands and natural resources, i.e. prior to the commencement of activities that would have a significant impact on the interests of affected communities; ensure that such individuals and communities are aware of the possible risks associated with development or investment plans; and, where the plan is of a 'large-scale' nature, obtain the free, prior and informed consent of those affected. These obligations apply with respect to affected individuals and communities regardless of whether they are recognized by the relevant host state as 'indigenous' to a region, provided that they have a special relationship with the lands and natural resources upon which they depend.

As described in Part III(a)(ii) above, the African Commission has adopted a similar, though less comprehensive, approach to effective participation, requiring that, in cases where development or investment projects would have a major impact on the lands of indigenous communities, the state must obtain free, prior and informed consent from such communities.

Given the nature and content of rights to effective participation articulated on the basis of Article 27 ICCPR, Article 21 ACHR, and Article 22 ACHPR, disclosure of investor-state contracts is critical for the realization of these rights. Owing to the significant implications of investor-state contracts for the governance and outcomes of natural resource investments, any potential restrictions of the rights of individuals and communities that depend on these resources, or of the risks associated with particular investments, cannot be meaningfully understood and assessed without access to the terms of the contracts that often play a significant role in governing these investments. Thus, without disclosure of land contracts, consultation with affected individuals and communities regarding land investments are unlikely to be "meaningful," and any consent to such projects obtained (or purportedly obtained) by the state cannot be "informed."

While beyond the scope of this paper, similar arguments can be made on the basis of the right to self-determination, which forms one of the treaty norms from which rights of indigenous peoples regarding meaningful consultation and free, prior and informed consent were derived (Office of the UN High Commissioner for Human Rights, 2013, p. 1). Moreover, specific rights regarding

meaningful consultation and free, prior and informed consent are also enshrined in treaties beyond those discussed herein. The International Labour Organization's Convention No. 169, for example, places binding obligations on states parties to engage in "free, prior and informed consultations" with indigenous and tribal peoples in certain circumstances, and requires states parties to obtain consent in the context of relocation.²¹ The UN Declaration on the Rights of Indigenous Peoples also enshrines rights to consultation and consent. While the Declaration itself is a soft law instrument, legal scholars have argued that it enshrines pre-existing rights that had already achieved customary status under international law.²² In the context of the realization of these rights, disclosure of land contracts – and other investor-state contracts for natural resource investments – is but one of a series of steps that states must take to fulfill their obligations.

Lastly, particularly strong arguments for the proactive disclosure of land contracts specifically can be advanced on the basis of the socio-cultural importance of land and the links between access to (and control over) land and the **realization of other human rights**. Land is profoundly connected to the realization of a range of human rights, including rights to food, water, adequate shelter, and even the right to life.²³ Given their nature and content, land contracts can profoundly impact these rights. Without access to these agreements, individuals and communities stand to be deprived of information that is critical for efforts to assert, seek protection of, and realize their rights. This argument can be advanced with respect to investor-state contracts concerning any investments that affect the lands of land-dependent individuals and communities. Extractive industry investments, for example, often impact access to or control over land and related natural resources, and thereby have profound impacts on the lives of affected land-dependent individuals and communities, in addition to other rights-related implications of such investments.

²¹ See ILO 169 arts. 6, 16. Note that art. 16 provides for an alternative procedure in cases where consent cannot be obtained.

²² See e.g., Anaya and Wiessner (2007). Customary law is international law that automatically creates binding obligations for all states, regardless of whether they are party to relevant treaties codifying these obligations.

²³ Regarding the links between land and the right to food, see Cordes and Bulman (2016); Narula (2013). Regarding the links between land and other human rights, see De Schutter (2010). With respect to the links between land and the right to life, the Inter-American Court in particular has taken steps toward articulating these links in some detail with respect to indigenous and other land-dependent communities.

In addition to arguments regarding land contract disclosure specifically, certain rights and corresponding obligations discussed in this paper indicate that states are also under an obligation to provide for transparent and inclusive contracting processes around land investments (and natural resource investments more generally). Compliance with rights to effective participation, for example, arguably requires both disclosure of land contracts and inclusion of affected communities in the processes leading to conclusion of land contracts or to the making of other decisions regarding land investments. Such an argument, while beyond the scope of this paper, would support best practice recommendations that point to the need for transparency throughout the contracting process and investment life cycle.

(c) Practical Implications

When considered together, the arguments outlined above present a strong rights-based case for the proactive disclosure of land contracts, and thereby lend legal weight to best practice recommendations regarding transparency around these agreements. What practical steps can states take to comply with their obligation to proactively disclose land contracts, and how else can these rights-based arguments help to push the transparency agenda forward?

Host states can elect to **disclose land contracts and associated documents on a unilateral basis**, provided that the agreements themselves and/ or applicable laws do not preclude such disclosure. Where host states disclose such agreements, steps should also be taken “to ensure easy, prompt, effective and practical access” to such information by the public (UN Human Rights Committee, 2011, para. 19). If resources are limited, host states can seek technical assistance or other external support to ensure that contracts are disclosed in an effective and accessible manner. For example, host states could decide to make land contracts publicly available by publishing them on OpenLandContracts.org, a repository of investor-state contracts for land, agriculture, and forestry projects.²⁴ The repository allows users to view, search for, and compare land contracts, and provides summaries of each contract’s key social, environmental, fiscal, and operational provisions.

²⁴ OpenLandContracts.org is an initiative of the Columbia Center on Sustainable Investment. The project is supported by UKaid from the Department for International Development. For further information on OpenLandContracts.org, see: <http://openlandcontracts.org/about>.

The OpenLandContracts.org team also offers technical support for host governments to build country-specific repositories of land contracts.

Second, host states can **enact or modify legislation** to *inter alia*: (a) require proactive disclosure of contracts and associated documents regarding land and natural resource investments; and (b) guarantee an enforceable right under domestic law to state-held information of public interest. This option may be particularly useful for host states that already require disclosure of extractive sector contracts and related documents: where such a requirement already exists, host states can explore whether and how the requirement could be amended to also require disclosure of land contracts. The Democratic Republic of the Congo, for example, recently sought to expand an existing requirement to disclose investor-state contracts for extractive sector projects (including forestry projects) to cover agreements concerning agricultural investments. While modification of existing requirements regarding extractive sector contracts may not always be the best solution for requiring disclosure of land contracts, as this option may risk formalizing a disclosure requirement that is not tailored to land investments, this could be an efficient approach for states to adopt (Cordes and Bulman, 2016, p. 159). Moreover, given that disclosure requirements for extractive sector investor-state agreements already exist at the domestic level in a not-insignificant number of states,²⁵ this approach could help to catalyze more rapid reform of domestic requirements in the near future.

Where host states choose to adopt new laws and regulations regarding proactive disclosure and access to information of public interest, states should undertake a review of other relevant obligations to ensure that: (a) new or modified domestic laws and regulations are adopted in compliance with other relevant obligations; and (b) any conflicts between the state's obligation to proactively disclose land contracts and other existing obligations are effectively addressed. As noted in Part I above, land contracts form but one element of the complex legal framework that governs land investments. Other sources of legal obligations relevant to land investments include

²⁵ See NRG's table: <https://goo.gl/dJvNti>.

international investment treaties, which create protections for foreign investors that may require careful consideration where host states seek to enact or modify laws that apply to such investors.²⁶

While adoption or modification of existing laws and regulations concerning land investments may not be required for states to proactively disclose land contracts in practice, codifying the state disclosure obligations – and the corresponding rights of individuals, communities, and the public generally to participation and access to information – in domestic law can be beneficial for several reasons. Establishing the obligation to disclose at the domestic level can, for example, help to cement host state commitments to transparency and illustrate that the state is taking proactive steps to create a transparent legal and regulatory environment for natural resource investments. Enshrining this requirement in domestic law may also help to promote compliance by relevant actors, including investors themselves and government agencies responsible for signing and monitoring compliance with land contracts and other legal rules applicable to land investments. It may also provide governments with a more legitimate means of justifying disclosure of land contracts to investors, rather than undertaking to disclose agreements unilaterally in the absence of domestic legal requirements. Moreover, establishing disclosure requirements and corresponding rights to participation and access to information in domestic law provides clarity to other actors, including affected individuals, communities, and the public more generally, regarding their rights with respect to land contracts. Lastly, codification of disclosure obligations helps to level the playing field for investors and reduce concerns regarding potential implications of disclosure for competitiveness (UN Principles for Responsible Contracts, 2015, Principle 10).

Third, if host states choose to negotiate new land contracts, they can consider **including a specific provision within the contract regarding the public nature of the agreement and any associated documents**, including environmental and social impact assessments. The IISD Guide to Negotiating Investment Contracts for Farmland and Water provides guidance as to the content of such provisions (IISD, 2014, p. 49).²⁷ Moreover, where land contracts include a confidentiality

²⁶ For further information regarding the implications of investment treaties for land investments and options for addressing competing legal obligations applicable in the context of land investments, see Cordes et al. (2016).

²⁷ The IISD Guide proposes the following model provision regarding disclosure:

clause regarding commercially sensitive information, host states should clarify these clauses by providing that they do not apply to the investor-state contract and associated documents. For example, at least three Liberian land contracts include a specific provision providing that the investor-state contract shall in no case be considered confidential under the agreement, and that payments made under the agreement shall also not be considered confidential.²⁸

Home states can also take steps to promote proactive disclosure of land contracts and other information concerning land investments. For example, home states can condition support for outward investment on investor compliance with best practices on responsible investment and human rights-related standards (Cordes and Bulman, 2016, pp. 155-157), including those concerning transparency and disclosure of land contracts. Development finance institutions can, for example, condition their financial support for outward investment on disclosure of project-related land contracts and, more broadly, on compliance with the UN Principles for Responsible Contracts (CCSI Input on OPIC's Draft Revised ESPS, 2016, pp. 1-2). Home states can also establish domestic requirements regarding publicly listed companies. All companies listed on the London Stock Exchange and its Alternative Investment Market (AIM), for example, are required to disclose a short summary of each material contract entered in to during the two years prior to listing or otherwise entered in to during the ordinary course of business (White & Case, 2013).

(a) This Agreement and the documents required to be submitted under sections 6, 8, 9 and 11, by any past and present Parties, are public documents, with the exception of truly sensitive commercial information contained in the Approved Business Plan. They shall be open to free inspection by members of the public at the appropriate State office and at the Company's office in the State during normal office hours, and shall be made available on an Internet web site accessible in the State.

(b) All annual reports submitted by the Company to the State, in accordance with this Agreement, shall be made public and available on an Internet web site accessible in the State (IISD, 2014, p. 49).

²⁸ These contracts are available on OpenLandContracts.org: Maryland Oil Palm Plantation Concession Agreement (2011), art. 25(b) < <http://openlandcontracts.org/contract/ocds-591adf-5085611127/view#/pdf>>; Golden Veroleum (Liberia) Inc. Concession Agreement (2010), art. 23.5(b) < <http://openlandcontracts.org/contract/ocds-591adf-5399370669/view#/pdf>>; Cavalla Rubber Corporation (Liberia) Inc. Concession Agreement (2011), art. 21.5(b) < <http://openlandcontracts.org/contract/ocds-591adf-6994803993/view#/pdf>>.

Home states should also ensure that domestic laws or regulations do not directly or indirectly undermine or obstruct efforts by host states to promote greater transparency and, more generally, to comply with their obligations under human rights law. This also applies to the negotiation of international investment treaties. For example, home states negotiating investment and trade treaties should ensure that such agreements would not, if concluded, impose obligations inconsistent with pre-existing human rights obligations (UN Special Rapporteur on the right to food, 2011, Principle II), including obligations outlined in this paper concerning proactive disclosure of land contracts. Moreover, states negotiating trade and investment agreements should protect the regulatory freedom of states parties to ensure that all parties can adopt or modify domestic laws to, *inter alia*, require disclosure of land contracts.

V. Conclusion

Land contracts can play a critical role in governing the rights, obligations, costs, and benefits associated with land investments. In a majority of cases, these agreements continue to be negotiated behind closed doors and are rarely publicly disclosed once concluded. While transparency alone is not sufficient to promote investment that is responsible and rights-compliant, the current “black box” nature of land investments undermines efforts to improve the governance and outcomes of these projects. It is therefore not surprising that consensus on the need for greater transparency in land-based investment, including disclosure of land contracts, has emerged in guidelines and principles concerning responsible investment and land governance.

This paper has illustrated that calls for land contract disclosure and implementation of transparent and inclusive contracting practices go beyond “best practice” recommendations. The review herein of relevant international and regional human rights law reveals that rights-based arguments for land contract disclosure, grounded in existing and legally binding human rights obligations, can be advanced on the basis of two sets of rights, namely: (a) rights to participation, and (b) the right of access to information. States’ obligations to respect, protect, and fulfill these rights thus lend considerable legal weight to the guidelines and principles regarding responsible investment and land governance that call for states to disclose land contracts. On the basis of rights to participation,

it can be argued that failure by states to disclose land contracts and provide for a transparent contracting process undermines – or entirely impedes – the realization of these rights. With respect to the right of access to information, the nature of land contracts as state-held information of public interest suggests that states are under a positive obligation to disclose these agreements.

Undertaking a review of domestic laws applicable to land investments and access to information could support articulation of state-specific rights-based arguments, and thereby further push the transparency agenda forward with relevant stakeholders, including host and home states. Moreover, additional research is needed to assess and articulate the human rights obligations and or responsibilities of all stakeholders, including investors, with respect to transparency at each stage of the contracting process and the broader investment life cycle. Nonetheless, despite the narrow scope of the present paper, rights-based arguments for land contract disclosure can be articulated on the basis of existing, legally binding human rights obligations. Calls for disclosure of these agreements can thus be promoted not solely on the basis of “best practice,” but also on the basis of being necessary for effective compliance with host and home state obligations under human rights law.

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