



# Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL  
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

## **Governing Natural Resources: Lessons learned from good governance initiatives for extractive industry investments and large land-based agricultural investments**

### **OUTCOME NOTE** of roundtable held at Columbia University on November 11, 2014

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Investments in the extractive industries and large-scale land-based investments in forestry and agriculture present similar opportunities for host governments to accelerate sustainable development, as well as comparable challenges to ensure that such investments do not serve as a source of corruption, rights abuses, or environmental degradation. In response to the challenges associated with ensuring successful and inclusive results from such large-scale investments, an increasing number of initiatives have sought to increase good governance over these types of investments. Yet, despite some perceived commonalities between the sectors, the good governance initiatives in respect of extractive industry investments and land-based (forestry or agriculture) investments are often distinct and sector-specific, with few attempts being made to examine how lessons learned from one sector could be applied to the other.

More opportunities to share knowledge about good governance initiatives across sectors could prove useful. Certain initiatives to improve the governance of large-scale investments may be more advanced in one sector, providing lessons for efforts to develop or improve governance initiatives in the other. Similarly, advancing an understanding of why certain approaches work for one sector, but have failed to gain traction in the other, could provide some guidance for future initiatives. In addition, specific initiatives for one sector could potentially be expanded to cover the other sector, or could serve as a model for similar initiatives.

In an effort to compare governance initiatives across natural resources sectors and to facilitate a conversation about the scope for cross-learning from the experiences of such initiatives in the extractive industries and in relation to land-based forestry and agricultural investments, the Columbia Center on Sustainable Investment (CCSI), together with its supporting partners, organized a roundtable on November 11, 2014. The roundtable was convened at Columbia Law School in New York and brought together a range of stakeholders working on extractive industry investments and/or land-based forestry and agricultural investments, including representatives from civil society, government, academia, and the private sector.

In addition to considering whether, and if so, why, certain good governance efforts may be more advanced in one sector than in the other, the roundtable discussion focused on what could be done to strengthen initiatives in either sector, drawing from experiences with governance initiatives in both.

This outcome document aims to capture the main points of the roundtable discussion and follows the same outline as the roundtable agenda. The morning session commenced with a brief overview of existing good governance initiatives, followed by a discussion of initiatives and other efforts that have been established to promote good governance, accountability, and transparency, including host country and home country legal and policy frameworks, multilateral initiatives such as the Extractive Industries Transparency Initiative (EITI), negotiation support initiatives to improve the quality of the contracts governing large-scale investments, the development and use of model contracts, and the relatively new Open Contracting Initiative. In turn, the afternoon session focused on good governance initiatives that seek to maximize the benefits from large-scale investments for communities, including the use of impact assessments (environmental, social, human rights), the establishment of grievance mechanisms, the use or development of inclusive investment models (community

development agreements, inclusive business models, and other efforts to work and share with local communities), and certification schemes. The final session concluded with an assessment of what lessons could be gleaned and the scope of continued knowledge sharing regarding good governance initiatives in both the land and extractive industries sectors.

## **1. Good governance initiatives and related efforts to promote better investments, improved accountability, and greater transparency**

Governments, donor agencies, investors, and civil society organizations have all undertaken or supported efforts to promote good governance of large-scale investments in order to encourage better deals, improved accountability, and greater transparency. Some of these efforts have focused on improving the legal and policy frameworks governing investments, while other efforts constitute standalone initiatives requiring certain standards to be met or providing specific support to certain stakeholders.

### **1.1. Planning and policy frameworks**

Host governments hold primary responsibility for developing a robust legal and policy framework that guides and informs the planning, preparation, negotiation, implementation, and monitoring of investments that are both sustainable and beneficial to a country's development. An integrated planning framework, which highlights the role of investments for sustainable economic development, is of particular importance for the extractive industries sector, as resources are finite and government revenues are potentially significant. Such planning is similarly vital for land-based investments in forestry and agriculture, given the sensitivities that exist around land tenure, particularly where there is an inadequate system of documenting formal and informal tenure rights. Yet the extent to which host governments have implemented coherent policy frameworks for natural resource investments varies. Establishing coherent frameworks is particularly difficult in countries in which different ministries within the same government fail to consistently compare notes, share learnings, and consider common approaches or solutions to large-scale investments.

There have been some efforts to encourage national and regional policies that address resource investments holistically. The Africa Mining Vision, for example, was adopted by the African Union in October 2008 with the aim to help guide member countries on how to better integrate mining into development policies at the local, national, and regional levels. In the agriculture sector, the Principles for Responsible Investment in Agriculture and Food Systems (adopted by the Committee on World Food Security in October 2014), as well as the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, encourage a more coherent and participatory policy framework for responsible agricultural investments. During the roundtable discussions of the principles, it was suggested that a similar initiative to the Africa Mining Vision could be replicated for the agriculture and forestry sectors. Such an effort could help set regional standards, adapt investment frameworks, and avoid a race to the bottom in terms of incentives offered to investors. It could also serve as a

forum through which African Governments could share experiences and best practices in relation to forestry and agricultural investments.

## **1.2. Host country legal and regulatory frameworks promoting good governance and accountability**

A robust legal framework in a host country encompasses comprehensive laws and regulations that govern the major issues relevant to investment deals, including fiscal, operational, environmental, social, and human rights requirements in line with regional and international standards. Moreover, laws and regulations promoting good governance through greater transparency in the investment process are gaining traction. In particular, some host governments have shown leadership on improving governance by requiring transparency through contract disclosure. These governments have almost exclusively focused on the public disclosure of extractive industry contracts, rather than contracts for other types of large-scale investments. Exceptions include Liberia, which has established transparency requirements that also cover investments in forestry and agriculture, and the Democratic Republic of Congo, which requires the publication of forestry contracts in addition to mining and oil contracts.

There was a lively debate among roundtable participants regarding whether the disclosure of contracts was actually beneficial to host countries. As an example of why contract disclosure might not be beneficial, a participant noted that in at least one country, contract disclosure had led to subsequent investors demanding the same problematic terms as had been previously granted by the government. Another participant countered this argument, however, observing that even without publicly accessible contracts, investors were generally aware of past contractual arrangements. Yet another participant pointed out that transparency plays a key role in highlighting problematic investments, such as large-scale land grabs. In Liberia, for example, local and international non-governmental organizations (NGOs) capitalized on the public availability of contracts to uncover massive land grabs in which more than half of Liberia's forests had been acquired by international investors. In this regard, participants agreed that while contract transparency might not stop the conclusion of illegal resource contracts or controversial large-scale land deals, such transparency can at least help keep civil society and citizens informed.

One participant expressed that too much emphasis has been placed on host country transparency laws in the context of good governance. Instead, good governance should be viewed more broadly and include the actions that host governments have taken to address identified problems. As an example, the participant mentioned countries such as Mozambique, Ethiopia, Lao PDR, and Cambodia, which have not legislated contract transparency for land and agricultural investments, but have officially or unofficially implemented moratoriums to stop leasing land to international investors while reviewing domestic laws and implementing reforms to improve investments in the sector. Similarly, the Democratic Republic of Congo has recently introduced an investment law that specifically focuses on agriculture, while Burkina Faso is currently drafting one.

Although many stakeholders have focused on improving host country investment laws, participants noted that the implementation and enforcement of such laws varies significantly across countries. In addition, in countries that retain state-owned equity

in extractive industry (and other) investment projects, the line between operator and regulator is often blurred and suffers from conflicts of interests without an impartial enforcement mechanism. Furthermore, implementation is highly dependent on the capacity of the public sector to supervise and monitor investments on the ground. This has been a major stumbling block for many governments of low- and middle-income countries, due to public sector capacity constraints and insufficient resources allocated for monitoring and auditing activities.

### **1.3. Home country measures promoting good governance through disclosure**

Governments of home countries have also sought to improve the governance of investments abroad by regulating the conduct of outward investors. This has been achieved primarily through the introduction of disclosure requirements for listed or domiciled companies. For example, Section 1504 of the United States' Dodd-Frank Wall Street Reform and Consumer Protection Act requires U.S.-listed companies to publicly report payments to governments made to access oil, gas, and minerals. Similarly, the European Union has created payment transparency obligations for extractive and forestry operations, while Canada has also designed similar home-country regulations for its extractive industries sector. However, only the E.U. transparency directive has been extended to the forestry sector, and none of these disclosure rules cover any other types of land-based agricultural investments. Participants mentioned that some stakeholders have begun exploring whether home country regulations could be implemented in the United States and the European Union to help monitor or regulate overseas land-based investments, drawing in part from lessons in the extractive industries sector. One challenge in adapting home country transparency laws for land investments will be to determine what should be reported, as tax payments in forestry and agriculture are not as significant as in the extractive industries sector, while much of the debate around land-based investments has centered on land tenure rights.

Apart from payment transparency, Dodd-Frank also creates, in Section 1502, assessment and reporting requirements regarding products that may contain conflict minerals (tantalum, tin, gold, and tungsten) from the Democratic Republic of Congo or neighboring countries. The sourcing report must be made available to the public and requires an independent audit. One participant noted that, just as with non-binding certification schemes such as Fair Trade or the Kimberley Process, the success of such home country reporting measures will rely on the certifier's credibility. Furthermore, the concern was raised that smaller companies will find compliance more difficult, as auditing processes are costly. Other challenges related to certification are discussed in the second section of this document.

### **1.4. Other mechanisms for increasing transparency and accountability**

In addition to the adoption of legal measures mandating transparency through greater disclosure of investment-related information, various initiatives have also developed to promote increased transparency or accountability over large-scale investments. As one participant noted, multi-stakeholder initiatives have been more prominent in relation to the extractive industries sector, where there has generally been a greater emphasis on tripartite interventions. In contrast, good governance initiatives around agricultural investments have tended to be more consumer driven, and less reliant on a multi-stakeholder approach.

An example of one such multi-stakeholder initiative is the Extractive Industries Transparency Initiative (EITI) Standard, developed by a group of governments, companies, and civil society representatives. The EITI Standard requires extractive companies to publish their payments and revenue authorities to publish the receipts from extractive industry projects, with active civil society participation and oversight.

Following G8 discussions in 2013 regarding a global land transparency initiative, the Overseas Development Institute (ODI) published a report to assess different transparency initiatives across sectors to determine whether similar models could be applied to the land sector.<sup>1</sup> The report found that the stakeholders and objects of disclosure related to land-based investments were more complex than in other sectors, and that measuring good governance was more difficult. Given these complications, and a current lack of willingness among governments and companies to move a land transparency initiative forward, civil society has been more active in advocating for good governance of land investments at the national level, rather than through an international multi-stakeholder initiative.

Another initiative seeking to increase transparency is the Open Contracting Partnership, which focuses on improving both disclosure, through the creation of data standards, and participation in public contracting, including during the tendering, performance, and completion stages. The Open Contracting Partnership has begun with a focus on several sectors, including the extractive industries, agriculture, and infrastructure.

#### **Information overload – The limited use of available data**

Although a number of efforts have focused on making more information publicly available through transparency initiatives and disclosure regulations, some participants queried whether greater transparency of information has improved accountability. As one participant noted, it is not yet clear whether past transparency initiatives have improved the governance of large-scale investments. The participant argued that an analysis of the effectiveness of greater transparency should have preceded the push to incorporate disclosure requirements into binding home country regulations.

There was somewhat of a consensus among participants that too much focus has been placed on obtaining and disclosing information rather than on what could be done with such information. For example, one participant working in the extractive industries sector noted that revenue transparency might have limited utility without countries also exchanging tax information, as this lack of coordination rendered it difficult for authorities to verify expenses claimed by investors. In respect of the disclosure of contracts for land-based investments, other participants noted that merely releasing concluded contracts would not help communities whose land rights had been stripped without their consultation, although such transparency could help

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<sup>1</sup> Anna Locke & Giles Henley, “The Possible Shape of a Land Transparency Initiative: Lessons from other transparency initiatives,” *Overseas Development Institute* (September 30, 2013), available at: <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8599.pdf>.

them to monitor compliance with contract terms by the government and the investor.

Participants agreed that more research is required to show how transparency does or could improve accountability on the ground. Such research would also help to answer the question of what data should be made available, and at what stage of the investment. For example, although disclosure of concluded contracts and payment terms was generally viewed as a good way to hold the extractive industries sector to account, for large-scale agricultural investments, it might be preferable for potential contract terms to be disclosed before contracts are concluded. Doing so would enable communities to weigh in regarding whether an investment should proceed. While participants agreed that there were few, if any, incentives for the investor and government to increase transparency in the lead up to a contract negotiation, assessing whether parts of a contract, such as the concession area, could be made accessible before negotiations conclude might be beneficial for some stakeholders.

The information overload resulting from increased disclosure is also exacerbated by the lack of comparability of data delivered by different transparency initiatives. The Open Contracting Partnership aims to address this challenge by developing data standards and encouraging their use.

### **1.5. Model contracts and negotiation support**

There is a clear trend in the extractive industries towards using legislated terms instead of contract-based terms; this removes issues from the negotiating table and helps address potential negotiating asymmetries. Yet many governments still negotiate specific contracts with investors that create a number of responsibilities and rights for each party.

To promote better contract terms, some countries have embraced model contracts, which limit the scope for contract negotiation. Such model contracts are more common in the extractive industries than in the agriculture sector. To assist with negotiating mining contracts, the International Bar Association's Mining Law Committee spearheaded the development of a Model Mining Development Agreement. Recently, the International Institute for Sustainable Development has developed a similar model contract for large-scale agricultural investments. Whether such a template will improve the outcome of contract negotiations in the agriculture sector remains to be seen, and lessons regarding the benefits and limitations of this approach can be gleaned from examining stakeholder experiences with model extractive contracts. Perhaps most importantly, as some participants noted, model contracts should be seen simply as a guide for negotiations, as the specificities of the project, local community, and environment generally need to be addressed on a case-by-case basis.

Within the contracting process, the actual negotiation of contracts can have particularly significant implications. Thus, relevant good governance efforts around investor-State deals have frequently focused on providing negotiation support and capacity-building to host government negotiators. Here, too, more providers have focused on supporting the negotiation of extractive industry deals than on supporting land-based project negotiations. Support that only covers the negotiation stage,

however, may have limited impacts: as one participant noted, the contract is just the starting point of an investment, and it is the monitoring and enforcement of the agreed terms that is problematic in many countries. While not often addressed in the contract negotiation process, governments and support providers could devise plans for how contracts will be implemented, monitored, and enforced. In addition, a portion of the project's revenue could be set aside at the outset of an investment for this purpose.

## **2. Good governance initiatives and related efforts to maximize the benefits of investments for communities**

During the design and implementation of investment projects, and particularly once investment deals have been negotiated, good governance initiatives and related efforts often focus on project-level approaches to mitigating negative environmental, social, or human rights impacts, and to maximizing the benefits of investment projects for local communities. This may include, for example, undertaking *ex ante* or *ex post* impact assessments, or providing grievance mechanisms that address investment-related concerns that arise. Project-level approaches can also entail the design of investment models that incorporate inclusive aspects to share benefits with local communities. In addition, initiatives may link project impacts with broader efforts to improve conditions within an industry, for example, through project-level certification efforts that seek to increase accountability throughout supply chains.

These types of good governance initiatives have been attempted for both extractive industry investments and large-scale land-based agricultural investments, with varying rates of implementation and success. While each category of initiative is accompanied by its own set of challenges and opportunities, the roundtable discussion also highlighted key themes that cut across the different types of initiatives.

The importance of community engagement and participation in implementing project-level initiatives, and the difficulty of ensuring such engagement in practice, was perhaps the most frequently mentioned theme. Community engagement becomes even more difficult, as one participant noted, in respect of engagement with marginalized populations, who are often overlooked.

Another issue that permeated the discussion was the respective roles of governments and companies. This issue arose repeatedly during the discussion of the benefits and drawbacks of certification schemes, but it also surfaced in the context of how companies and local governments viewed their responsibilities, and what that meant for their own interactions. For example, as one private sector participant noted, his company has been trying to move away from traditional corporate social responsibility projects, like building schools and clinics, towards strengthening the roles of local and municipal governments to provide those services.

Participants also asserted that the proliferation of various initiatives, including multi-stakeholder initiatives and certification schemes, raised specific challenges, although also opportunities. For example, one participant argued that a plethora of multi-stakeholder initiatives had caused strain on some communities and governments, due to a lack of integration and coordination. The participant provided one example in which some individuals working on EITI processes were also part of another nationally-mandated stakeholder team, in addition to simultaneously serving on a



local community development group required by a mining contract. The participant noted that, despite the substantive overlap, these groups were not working together. Another participant, who works on certification standards, explained that, in the process of designing a new certification standard, one frequent critique raised was that the new standard would simply add one more auditor on top of the dozens of other auditors already required. The participant suggested that it might be necessary to recalibrate from time to time by determining what would be most effective in specific contexts.

While these themes of community engagement, the roles of government and companies, and the proliferation of initiatives arose throughout the discussion, roundtable participants also discussed the specific challenges and best practices that accompany impact assessments, grievance mechanisms, inclusive business models and benefit sharing, and certification initiatives.

### **2.1. Impact assessments**

To encourage good governance of natural resource investments, governments, civil society, and industry associations often seek to assess the risks related to an investment's social, environmental, or human rights impacts. Such Environmental Impact Assessments (EIAs), Social Impact Assessments (SIAs), or Human Rights Impact Assessments (HRIAs) are ideally undertaken before the conclusion of negotiations for large-scale investments, or as a condition to receiving a license to operate. Assessments can help companies, governments, and communities understand the potential or actual risks of an investment, which in turn can enable companies or governments to modify a project's design to minimize or avoid negative impacts, or, if the assessment is carried out after the negative impacts have occurred, to undertake redress efforts to mitigate or compensate for those impacts. EIAs and SIAs can also be used to develop environmental and social management plans, which can assist companies in managing related risks and ensuring that their operations comply with certain standards.

Governments may require such assessments, or companies or other stakeholders may undertake them voluntarily. For example, companies and civil society groups have begun to carry out HRIAs even without governmental requirements to do so. The use of some form of impact assessment is increasingly common for both extractive industry investments and land-based agricultural investments. Environmental Impact Assessments seem to be the most frequently used type of impact assessment in both sectors; as one participant noted, a recent UNCTAD and World Bank study<sup>2</sup> of 39 large-scale agricultural investments found that 70 percent of investments included an EIA, while 50 percent had an internal environmental management plan. On the other hand, HRIAs are much less common, although their use is steadily increasing in the extractive industries sector. As one participant noted, HRIAs have been used more often in the extractive industries sector than in the land sector (although they are still not common), with HRIAs of agricultural projects – or even agribusiness operations – being exceedingly rare.

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<sup>2</sup> “The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments: Implications for Corporate Performance and Impact on Local Communities,” UNCTAD and World Bank (April 2014), available at: [http://unctad.org/en/PublicationsLibrary/wb\\_unctad\\_2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wb_unctad_2014_en.pdf).

Although impact assessments can serve as important tools for understanding and addressing the negative or positive impacts of an investment, roundtable participants noted significant challenges with how they have been implemented in practice. As one participant noted, at least in the agriculture sector, governments may not enforce their requirements to undertake EIAs, while their regulations sometimes lack sufficient guidance on what the assessments should include. In the experience of another participant, the regulation of impact assessments for extractive industry projects is sometimes accompanied by conflicts of interest, whereby the ministry responsible for approving the project license is also the one with the responsibility for approving the EIA. In addition, the participant noted that, in some places, there is not adequate time allotted for the assessments, and, in others, there are limited check and balance mechanisms, with no independent assessment, peer review, community involvement, or subsequent follow-up to ensure that the company complied with its obligations.

Aside from challenges in enforcing impact assessment requirements, there is also the risk that companies or governments will not use the information in a meaningful way. In the experience of one participant, companies may view impact assessments simply as a box-ticking exercise to obtain a permit or license, neglecting to use the results to inform business operations or management plans.

Impact assessments are ideally undertaken before contracts are signed; such *ex ante* assessments can increase the disclosure of key information to potentially affected communities in advance of actual impacts. Although such a mechanism can facilitate accountability and informed consent, this type of transparency is often lacking in both extractive industry and land-based agricultural investments. Further, impact assessments are sometimes carried out after the project starts. One problem with *ex post* impact assessments is that they are often not suitable for addressing questions of land tenure, which should be addressed in the preparatory phase of a project, even before entering into contract negotiations.

Given the myriad challenges that have arisen with impact assessments, participants highlighted some of the newer approaches, particularly around human rights impact assessments, that have been taken or could be taken to incorporate a wider range of perspectives and fill in some of the remaining gaps. One representative from a civil society group highlighted a tool that facilitates community-led human rights impact assessments, which provides a process for communities to engage the relevant company in a meaningful way.

Another participant described the sector-wide human rights impact assessments (SWIA) that her organization has helped pilot. Under this model, the assessment reviews the overarching legal framework for human rights, the cumulative impacts of multiple companies operating with downstream and upstream activities, and common project-level impacts. This assessment could potentially replace project-level assessments to assess industry operations in the same area. In addition, another participant noted that, for stakeholders who want to undertake human rights impact assessments, another avenue worth exploring was how to integrate human rights into existing environmental and social impact assessment processes.

Finally, a participant explained how her organization has been exploring the potential for carrying out a multi-stakeholder HRIA, which would ideally take place before the investment occurs and involve both companies and communities in assessing the impacts. The participant noted that such an approach could potentially help address distrust between companies and communities regarding assessments initiated by “the other side,” although a number of obstacles existed.

The roundtable discussion on impact assessments highlighted their usefulness for various stakeholders, but also the range of challenges that remain. While some participants described their work to develop or promote new models for assessments, particularly human rights impact assessments, other participants noted the need to provide more guidance for, and greater oversight of, existing assessment frameworks for both extractive industry investments and land-based agricultural investments.

## **2.2. Grievance mechanisms**

Grievance mechanisms, which comprise a key component of the United Nations’ Business and Human Rights framework, provide important opportunities to mitigate negative impacts and to redress concerns related to an investment. Such mechanisms are increasingly seen as a necessary component of responsible investment, regardless of the sector; for instance, they are highlighted in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and will likely be included in the OECD-FAO Guidance on Responsible Business Conduct Along Agricultural Supply Chains, which is still in the drafting stage. However, the establishment and effectiveness of grievance mechanisms for both extractive industry investments and land-based agricultural investments remain inconsistent. As one participant noted, grievance mechanisms are sometimes designed only for employees and not for communities, limiting their applicability and thus usefulness. In other cases, poorly designed grievance mechanisms may simply cause greater problems for communities, rather than serving as an effective avenue to redress them.

In the view of one participant, a grievance mechanism must be sufficiently structured and formal to ensure that community members and workers are comfortable using it. The participant provided the example of a project for which the project manager provided his mobile phone number and told the community they could call him whenever they wanted, 24 hours a day. This informal strategy was not successful, as community members did not feel comfortable calling him in this way. A more appropriate mechanism would have been to create a formal community-based liaison committee with representatives from the investor and the community.

Another participant noted that there are many effectiveness criteria that have been outlined for project-level grievance mechanisms, as well as a plethora of guides and practical examples of project-level mechanisms. The challenge is ensuring that these best practices are implemented, in particular in the agriculture sector, which has relatively less experience with project-level grievance mechanisms than the extractive industries sector.

### 2.3. Benefit sharing and inclusive business models

In terms of benefit sharing, there is a growing movement in the extractive industries towards signing community development agreements (CDA) between affected communities and companies, a step that is increasingly encouraged by governments. Similar efforts are very rare in respect of large-scale land-based forestry and agricultural investments, however, despite the recent proliferation of principles to guide responsible investment in these areas.

Community development agreements in the extractive industries are meant to cover the relationship between a company and the affected community, including by defining specific obligations that a company will undertake with respect to the community. As one participant explained, the objectives of CDAs have evolved over time, shifting from focusing solely on transferring funds from the company to the community to instead developing comprehensive agreements that seek to support long-term development plans. The participant noted that governments, companies, and communities have appreciated this move towards more comprehensive agreements aligned with development plans, noting that this has allowed companies to see that the funds allocated via CDAs were used to advance community investments. Another trend mentioned during the roundtable was the development of model CDAs. This is linked to the increasingly common inclusion of a CDA requirement in mining development agreements signed between the investor and the national government. Although model CDAs hold some promise and can be useful, one participant noted that flexibility is necessary to respond to specific community needs, which vary from one community to the next.

Participants emphasized that several challenges remain in terms of implementing successful CDAs. One challenge is that community engagement around CDAs remains inadequate in many places, which also renders the negotiating environment for CDAs very difficult. One participant stressed that, before CDAs are negotiated, companies and communities need sufficient time to develop relationships, and must set adequate timelines that take into account capacity-building needs. However, lengthy processes are sometimes frustrated by the desire of the company to quickly comply with a mandatory CDA requirement included in the mining development agreement. Improving good governance efforts around CDAs may require the organization of national and regional forums that facilitate the sharing of experiences between communities and/or between local governments.

Community development agreements are only one mechanism for sharing benefits with local community members; “inclusive business models” offer another avenue for achieving this goal. Inclusive business models are commercially viable business models that share value with non-traditional partners, such as local community members or traditional land users. In the agricultural context, inclusive business models that integrate smallholder farmers into supply chains have received considerable attention, with models such as contract farming or outgrower schemes advocated as preferred investment alternatives to large-scale land acquisitions. When developed equitably, such models can provide important support to local livelihood strategies.

Participants briefly discussed whether inclusive business models for agricultural investments that incorporate small-scale farming could provide useful lessons for stakeholders interested in integrating artisanal and small-scale mining (ASM) into inclusive business models for large-scale mining investments. Although the extractive industries and agriculture sectors confront different obstacles in addressing the integration of communities' livelihood strategies into supply chains, the varied experiences with inclusive business models in agriculture could potentially offer guidance for the mining industry, which has grappled with whether and how to responsibly incorporate artisanal and small-scale miners within their supply chains. As a start, participants stressed that the success of outgrower and contract farming models depends on the specific arrangements in place, noting that the model is not always successful and must be designed correctly to realize benefits.

Inclusive business models can be viewed as a unique avenue for facilitating local content, and from that perspective could be compared to other efforts to encourage investment featuring strong linkages with other aspects of the economy. Indeed, ensuring that investments are leveraged to promote inclusive growth is a common policy goal, one in which host governments are increasingly interested, in relation to both extractive industry investments and large-scale land-based investments. To date, local content policies for extractive industry investments have focused more on the general provision of local goods and services, or increasing the number of local employees, and less on the inclusion of ASM through inclusive business models. Agricultural investments not structured as inclusive business models have also incorporated similar types of local content strategies.

#### **2.4. Certification initiatives**

Certification schemes along supply chains offer another type of good governance initiative that seeks to promote increased accountability of investment operations. Roundtable participants had differing opinions on the usefulness of certification initiatives, in part due to their varying success rates and the perception that they are often less desirable than binding regulations. As noted in section 1, a trend that has been seen in the extractive industries is the shift of supply chain monitoring away from voluntary or association-led efforts and towards mandated ones, as evidenced by the U.S. Dodd-Frank assessment and reporting requirements for sourcing certain minerals from the Democratic Republic of Congo and its neighboring countries.

As opposed to many of the other good governance initiatives discussed above, certification initiatives have had a longer and more robust history in the agriculture and forestry sector than in the extractive industries. For example, fair trade, which has traditionally focused primarily on agricultural commodities, has recently been extended to cover gold.<sup>3</sup> In addition, a couple of participants described relatively new certification efforts in the extractive industries that have drawn inspiration from certification initiatives related to forestry and agriculture, including a new environmental and social certification initiative for oil and gas projects,<sup>4</sup> as well as an ongoing effort to develop a certification program for responsible mining.<sup>5</sup>

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<sup>3</sup> Fair Trade International – Gold, available at: <http://www.fairtrade.net/gold.html>.

<sup>4</sup> Equitable Origin website available at: <http://www.equitableorigin.com/home/>.

<sup>5</sup> The Initiative for Responsible Mining Assurance (IRMA) is working to develop an international standard and certification program for responsible mining, “seek[ing] to emulate for industrial-scale

Properly designed certification schemes can be beneficial, providing avenues towards improved good governance. One participant who works for a certification initiative acknowledged initial skepticism regarding whether certification schemes could drive change, but asserted that, based on her experience, certification initiatives that were developed in the right ways and had appropriate governance mechanisms could play an important role. Another participant who has been involved with two different certification initiatives argued that certification could prompt high-bar performance, while delivering rewards for business.

The relationship between certification initiatives and government regulation or oversight, however, is controversial. As one participant noted, his organization is not generally supportive of voluntary systems, although if a scheme helps move standards towards law, it could be useful. The participant asserted that in most cases, however, certification schemes did the opposite, with governments perceiving that the sector is already sufficiently monitored by the voluntary schemes. Yet another participant argued that stakeholders, including certification initiatives themselves, should focus on ensuring that certification and voluntary mechanisms are better aligned with regulations to ensure that they complement regulations rather than replacing them.

The same participant who expressed skepticism regarding the ability of certification schemes to move towards improved legal standards shared that, in his experience with one certification body, companies often failed to comply with the certification requirements, yet were not sanctioned and remained certified, as the certification body lacked the capacity or resources to adequately address complaints or impose penalties. Certification schemes also present problems when used as a proxy for due diligence by investors. This sometimes occurs even when the certification scheme in question is not tailored to the type of investment being made, rendering reliance on the certification scheme even more troublesome.

Of course, problems with compliance are not unique to certification schemes, and one participant queried whether the compliance issue would be any better under a regulatory system, noting that it is frequently difficult to ensure compliance with laws and regulations. In response, another participant noted that, when compliance with regulatory frameworks is not sufficient, it is imperative that greater resources and support are allocated to support host governments in ensuring such compliance.

In light of the potential benefits of certification schemes in some contexts, as well as their acute challenges, participants considered what practices could potentially be implemented to improve the use of certification schemes for either extractive industries projects or agricultural investments.

As one participant working on certification explained, the design of certification initiatives should focus on moving towards a legal framework, determining the appropriate role for government, ensuring that there is a robust enforcement process and grievance mechanism, and enabling civil society to have a voice. Another participant with expertise in certification noted that an appropriately designed

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mine sites what has been done with certification schemes in agriculture, forestry and fisheries.” IRMA press release (July 22, 2014).

certification scheme could support communities that need accountability mechanisms. To this end, a key component is to place community consent and support at the core of the certification criteria. This can be done during the design of new initiatives, or can be incorporated into modifications of existing schemes, as exemplified by one certification initiative, which is working to insert an informed consent standard. The participant acknowledged that initiatives are vulnerable to market pressures and changes in management, however, which also need to be appropriately managed in the initiative design.

For certification of commodities to work, one participant explained that appropriate incentives have to be created. In the participant's view, certification only works if enforced uniformly, creating a level playing field. Another participant suggested that, when seeking to identify successful certification mechanisms, it may be useful for stakeholders from both the extractive industries and the agriculture sector to examine the lessons learned in the electronics and apparel industries. The participant noted that, in both of those industries, active civil society participation appeared to have been crucial for increasing accountability.

In addition to improving the design and use of certification initiatives, a participant also suggested that a mapping of existing initiatives could assist both companies and communities by helping them understand the various initiatives' value and capabilities. Another participant mentioned that the ISEAL Alliance, an association of standard-setting organizations and certification systems that includes both extractive industry and agriculture certifications, could help ensure that common issues are taken up by various initiatives and that information is shared within different convening groups.

### **3. Moving forward**

Whether lessons learned from good governance initiatives for extractive industry investments and land-based agricultural investments can be transferred across sectors was an overarching question of the roundtable, and a key focal point during the concluding session.

The challenges to cross-learning between sectors are manifold. As one participant pointed out, the different nature of investment horizons and resources between extractive industries and agriculture renders it difficult to transfer lessons and assumptions. The economic rents of the extractive industries are also significantly larger than in the agriculture sector, and thus, while extractive industry governance initiatives have focused on revenue transparency as one key mechanism for improved governance and accountability, such a focus is less relevant for agricultural investments. By contrast, good governance efforts around land-based investments have placed more emphasis on land tenure issues, particularly with respect to affected communities who lack formal land titles and confront possible displacement.

Furthermore, another participant noted that, while agricultural plantations for commodities are just as old as mines, there has been a dramatic change in the composition of agribusiness investors, as older plantation companies increasingly withdraw from direct ownership and turn to the global market for commodity purchases, while being supplanted by new firms with much less experience, which

frequently are not subject to the same types of public pressure as more established Western firms. In the mining industry, and even more so in the oil industry, there is a smaller set of highly visible companies, which incentivizes support for and implementation of good governance initiatives.

Perhaps most importantly, it is generally accepted that large-scale investments are necessary in the extractive industries due to the large amount of capital needed to carry out such investments, whereas this consensus has not been reached in the agriculture sector. One participant noted that a number of studies have shown that large-scale land investments were not the best way to invest in agriculture, as smallholder farming may be the optimal model of production in many places. This highlights a stark difference in the narratives around extractive industry investments and agricultural investments, and means that best practices gleaned from good governance initiatives for large-scale mining investments may not be applicable or relevant for initiatives focused on agricultural investments.

Yet, to the extent that large-scale investments are occurring in both sectors, these projects do confront similar challenges on specific issues. For those situations, some lessons drawn from one sector may be useful for the other. (As mentioned above, there may also be useful lessons that could be shared around small-scale farming and inclusive business models, on the one hand, and artisanal and small-scale mining, on the other.) As one participant suggested, it was useful to encourage more dialogue, not only among stakeholders but also among sectors, particularly those with fewer tools or opportunities for experience sharing.

One challenge that is common to extractive industry investments and large-scale land-based forestry and agricultural investments is how to address questions of land tenure. Many participants agreed that both types of investments confront difficulties in respect of land tenure claims tied to the underlying land in a concession, particularly given the weak or transitioning land tenure systems in many places where investments are common. One participant noted that land rights issues, particularly related to agricultural investments, have become even more complicated in the context of the shifting international understanding of who owns and who benefits from the land, as communities are increasingly seen as legitimate owners, even without documented formal title to land. Another participant stated that, at a minimum, investors should understand the current land tenure system prior to making an investment.

In this respect, the experience in certain contexts of mapping and documenting artisanal and small-scale mining claims could potentially be of interest for documentation strategies related to small-scale farmers' land claims. For example, one participant described efforts in the Central African Republic, Liberia, and the Ivory Coast to use drones to map out the boundaries of artisanal claims; those claims were then verified by aerial photography. The participant suggested that a similar mechanism could be used to document the land claims of small-scale farmers in the context of potential large-scale investments in the area.

Greater clarity and transparency around how titles, licenses, or use rights have been awarded to companies is important for both extractive industry investments and land investments. One participant asserted that, increasingly, concerns around mining investments have focused not on transparency of the contract itself, but on



transparency over how the mining titles were awarded. Another participant noted that land rights issues are particularly important for agricultural investments: whereas a government will often revert to claiming eminent domain, based on sub-surface property rights, for mining concessions, it is less likely to do so for large-scale agriculture concessions. Thus, in some places, agribusiness companies are often not able to prove that their concession lease is legal in the face of counter-claims to the same piece of land by local communities. Clarifying land issues is thus a fundamental risk management practice for companies, particularly as communities are increasingly considered the rightful owners to land by international and domestic courts. Disputes over land also create risks for community advocates; one participant highlighted the numerous people who had been killed in the past decade for defending their land, with very few subsequent prosecutions.

Determining the right approach to assisting investors in understanding land rights issues at potential investment sites is complex and fraught with challenges. While some participants suggested that it would be useful to map out for investors land tenure claims, water stress, and other pertinent issues in specific areas, other participants noted that their respective organizations had explored doing something along these lines, but concluded that it would be difficult to map customary land rights, and that a map of tenure claims could create additional risks for communities, given that this information could be used to further exploit land users with weak documentation. One of these participants therefore suggested that the more appropriate approach would be for governments and companies to address land issues by starting from the assumption that people were using the land in question for their livelihoods.

Related to land rights is the question of resettlement and adequate compensation. A participant suggested that one lesson that had been learned in the mining sector related to best practices for calculating the value of land and assets when resettlement is required. Although mining companies previously calculated the net present value of assets and provided lump sum payments, there is now an understanding that some assets are not directly replaceable, and that governments and companies must ensure that displaced people are compensated in a way that ensures the continuing sustainability of their livelihoods. This goes beyond building housing or paying for the loss of farmland.

Another challenge shared by both sectors relates to water use. Both sectors are water intensive, and both face challenges associated with increased water scarcity worldwide. In both sectors, conflicts between investors and local communities around access to, and the quality of, water are on the rise. For example, a participant who works for a mining company estimated that 80% of its community conflicts were linked to water issues and explained that, for this reason, the company was devising water-related solutions to limit its competition for water use with the local community, including through recycling, reusing, and treating water that was not for human use (such as waste water or sea water). Companies investing in extractive industry projects or in agriculture projects might benefit from sharing lessons regarding water efficiency methods across sectors, although such lessons would likely be limited by the distinct operating methods in both sectors. Host governments should also ensure robust regulations regarding water use for investments in either sector, and should carefully assess applications for rights to use groundwater or freshwater,

granting them only after assessing whether a particular investor has explored all opportunities to reduce its water footprint.

Aside from addressing the specific challenges related to land tenure, resettlement, and water use, participants also focused on best practices that could be pursued to strengthen good governance initiatives in both sectors. This includes setting realistic expectations, increasing transparency over reporting and assessments, and supporting capacity building for host government officials.

Realistic expectations on the part of all stakeholders are crucial. In the perspective of one participant, developing shared realistic expectations requires good communication between companies and communities, as well as multi-stakeholder engagement. Another participant explained that, in his experience working on mining projects, the more a company engaged in partnerships, including with local government, civil society, and multilateral organizations, the more successful the project is likely to be, as this process helps manage expectations on all sides. According to a third participant, expectation management should also be extended to good governance tools. For example, certification schemes cannot be expected to replace regulation, or vice versa. Building a better understanding of the strengths and weaknesses of certification mechanisms is thus critical to defining when and where such initiatives can be helpful in supplementing the legal framework.

Participants representing institutional investors highlighted the importance of increasing the transparency of company-led reporting, including by publishing impact assessments and relevant audits. A reporting standard that requires companies to share their impact assessments could promote accountability, as institutional investors would be able to allocate risks to investments more effectively, rewarding projects that have better social, environmental, and human rights mechanisms in place.

Finally, capacity building remains a critical challenge for strengthening good governance efforts. Several participants shared their experiences with capacity building for host government officials around extractive industry investments. For example, to manage capacity related to oil and gas investments, some governments have set up separate secretariats or authorities to retain highly qualified staff. One participant noted the relatively successful experience in one country of partnering external experts with government officials, excepting the high attrition rates whereby government officials would then leave to take jobs in the private sector. Another participant explained that his company had a similar scheme in one country to help develop local talent; it included posting some local employees in the company's offices around the world to gain more expertise. A third participant cautioned that short-term capacity-building programs have limits, given that it is hard to pick up new skills in a short time period, particularly if they are not frequently used skills. In the view of another participant, the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development, along with its Mining Policy Framework, has been a useful resource for governments to share good practices and experience related to environmental, social, and economic issues; the participant suggested that a similar type of forum might be useful for building capacity and sharing resources among governments in relation to agricultural investments.

Key structural differences between the extractive industries and the forestry and agriculture sectors mean that not all lessons learned from good governance initiatives related to extractives investments or land-based agricultural investments are transferrable. However, large-scale extractive industry investments and land-based forestry and agricultural investments share enough challenges regarding certain issues that efforts to better understand the benefits, drawbacks, and best practices around good governance initiatives can be a useful exercise. The roundtable facilitated conversation on these issues, while providing an opportunity for participants to brainstorm further ways to explore shared lessons around governing natural resources, including through targeted research or subsequent convenings. This outcome document aims to support these and similar follow-up efforts.