

Land investment and corruption: Developing an evidence-based understanding of the land investment transparency needs, demands, and uses of host governments

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I. Introduction

Public access to, and meaningful use of, information about land investment projects can help to address many of the governance and justice challenges that the sector currently experiences and contributes to. Increased transparency of land investments can help to tackle investment-related corruption, enable those most affected by investments to influence decision-making, advance accountability, and encourage investments that are more responsible and that result in more inclusive outcomes. This paper interrogates how governments hosting land investments (including in agriculture, forestry and renewable energy) may regard transparency. While often illusive, meaningful transparency has the potential to positively transform decision-making regarding, and the outcomes of, land investments. Yet few approaches to transparency have sought to zero in on the transparency needs and potential uses of key local stakeholders, such as local communities and host governments.¹ We are therefore currently pursuing research to understand what a demand-driven approach to transparency of land investments looks like and how it can be achieved in practice. As a first step, this paper seeks to map and interrogate different government actors' perspectives, and the reasons why they may encourage or resist increased land investment transparency. This analysis is situated in an explanation of the broader research project, to better orient the discussion. The focus of this paper should not be taken to diminish the importance of understanding how increased land investment transparency could enable other actors, such as affected communities and civil society organizations, achieve their objectives and combat corruption. Further outputs from the research will seek to illustrate community and civil

society perspectives around land investment transparency and to explore how companies and other actors may also benefit from increased transparency.

II. Background to the ongoing research project

This paper is part of a larger body of ongoing research that focuses on what types of transparency are most demanded and needed by two key stakeholders: communities affected by land investments and the governments that host investment. Only by focusing on what such stakeholders need, and how they would do things differently if more transparency were achieved, can we truly formulate a theory of change for how transparency can help local stakeholders more effectively achieve their objectives. Drawing from insights from the governance of the extractive, forestry, and potentially other industries, we are testing strategic and more demand-driven approaches to transparency of land investments, focusing on the entire investment lifecycle, including different stages of land transactions. This research will establish an evidence-based understanding of the transparency needs, demands, and uses of affected communities and host governments in an attempt to understand how transparency initiatives can move beyond mere disclosure to effectively improve outcomes and combat corruption.

The research on which this paper is based is in its early stages. This paper therefore draws from existing literature and experience relating to land investment transparency and several introductory stakeholder interviews. This paper will likely be updated prior to presentation at the CLPA conference in November 2019, and a final report based on the research, incorporating two country missions and a range of semi-structured interviews with stakeholders and experts, will be published in mid 2020.

Research objectives and scope

The goals of our ongoing research on land investment transparency are twofold: to increase transparency in the ways that matter, and to support effective use of that transparency and the resulting data. We are applying a demand-driven approach that investigates—both at the international level and in specific country contexts—what is the most important and useful information to disclose and why, in order to inform strategies to strengthen land governance around investment projects. This demand-driven methodology can help to promote approaches to information disclosure and use that:

- a) Bring about meaningful change, including tackling corruption and achieving improved investment-related outcomes for affected communities, host governments, and other stakeholders;
- b) Increase understanding—by host governments and other influencers of public policy—of the links between transparency and responsible land investments, and of the challenges and strategies relevant to increasing transparency; and
- c) Strengthen efforts of domestic and international civil society organizations (CSOs) seeking to effect change at project, national, and/or international levels.

Main research questions

The ongoing research will seek to understand the perspectives of two types of actors. First, those who wish to access and use data (“data users”). Second, those actors who hold and/or produce relevant data, focusing again on host governments, as well as investor companies, financiers, and other relevant actors (“data producers”). As part of the research, we will explore the following questions.

1. Data use: From the perspective of data users:

- What information is really needed or desired, when would it be most effective to have, and in what form?
- What additional opportunities, such as processes, institutions, or initiatives, need to be created or strengthened to ensure that disclosed information can be used to effectively achieve those users' respective objectives?
- How have host governments, communities (with or without CSOs) respectively used information made available through transparency laws or practices to date, and has this helped them to achieve their objectives? What are the barriers to the most effective use of such information?

2. Disclosure / data production:

- What information would data producers be willing to disclose?
- What are the incentives and disincentives for data producers to disclose that information? What would incentivize them to disclose relevant information?
- Apart from using disclosed information, how do different stakeholders (including host governments, "responsible" investors, affected communities, civil society actors at different levels, and international financial institutions) otherwise benefit from increased transparency? How can these benefits feed into a demand-driven conception of transparency and be used to encourage or incentivize greater buy-in for improved transparency?

3. Risks: What risks might increased transparency create for legitimate tenure rights holders?

Methodology

The ongoing research will combine international-level analysis with a focus on two country contexts to identify the key transparency needs and demands of different actors, and to understand *why* they regard specific types of information as important and what use would be made of such information. The research will look at all stages of a land investment (including before and during land transactions and during the operation of the investment) to determine key "moments" for transparency.

- At the international level we will: (i) stock-take, and survey the perspectives of, relevant actors, focusing on those in a position to disclose information or to influence disclosure, those who would use disclosed information to improve outcomes, and those who may benefit from increased transparency more generally; and (ii) draw from lessons learned from transparency practices and initiatives in other industries, such as the extractive industries (while being alert to, and highlighting key differences between land investments and other industry contexts).
- At the country level, we will conduct two in-country research missions to interview different stakeholders both in the nation's capital and in or near one or more sites currently or previously the subject of large-scale land transactions. This country-level work will help identify needs, demands, and opportunities that are significantly shaped by local contexts. It will also be critical to developing appropriate approaches in those contexts for advancing transparency and enabling effective use of disclosed information. While researching different contexts could reveal different transparency needs and demands, this country-

level work will also help feed more nuanced analysis into efforts to promote transparency at the international level.

Once data has been collected, we will synthesize our findings to make observations about the effectiveness of various transparency proposals and approaches, and to seed ideas for new approaches to disclosure and new opportunities for data use, potentially at both the country level for each focus country and the international level.

III. Defining transparency

Taken literally, transparency evokes notions of openness and visibility, implying a focus on information disclosure. Yet in practice the concept of transparency involves a much more transformative set of concepts. In addition to public disclosure of relevant information, transparency entails effective access and use of that information. As such, we define transparency to encompass the human rights of all peoples to information, public participation and the rights of indigenous, tribal and other peoples to give or withhold their free, prior and informed consent. This conception of transparency also illustrates why we focus on a demand-driven approach to land investment transparency: understanding the transparency demands and needs of rights holders, such as affected communities, helps not only to bolster human rights but also to ensure that relevant information is effectively used by rights holders and the bearers of human rights obligations (which include host governments) to achieve their objectives. Such an approach can also help to avoid the pitfalls of top-down approaches to transparency, which may allocate scarce resources to serving international agendas without actually empowering rights holders or host governments to better achieve their objectives and improve practices on the ground.

IV. Corruption and transparency: Infinite tensions

Corruption and transparency exist in continual tension: transparency can act as a vital strategy to uncover and tackle corruption, yet at the same time corruption often closes up the entry points for transparency (or other interventions) to begin to be able to improve outcomes. Our 2018 study on the legal support gaps experienced by governments² noted corruption as one key barrier to governments seeking and/or implementing advice on achieving more responsible investments. Support providers to governments and to investor companies shared accounts of illicit payments or other benefits provided by companies to government decision-makers in the context of negotiations. Unsurprisingly, corruption interfered with efforts to more responsibly regulate investment. Decision-makers receiving illicit benefits were regarded as less likely to follow legal advice, less willing to push back against investors' demands regarding key contractual terms (including regarding changes to the country's model contract), and less interested in properly incorporating the results of financial modeling or other research and analysis into the design of the contract.

The study also observed that corruption can cause self-interested government officials to deliberately block the government from receiving legal support during negotiations. In one example, a government representative's attempts to obtain low-cost external legal support were well received by middle-level government officials but eventually vetoed by more senior government representatives. That representative believed that the senior officials blocked the assistance because they stood to benefit personally from dealings with relevant investors, and did not "want lawyers coming in and identifying

that people at the top are receiving [illicit] benefits.” Corruption in the context of legislative drafting or contract negotiations can result in governments prioritizing the interests of some over the interests of the country and its citizens more generally. When it comes to contracts, corruption may also decrease the likelihood that parties will include clauses encouraging more responsible practices, or that any such clauses will be implemented subsequently.

Transparency can theoretically play a vital role in minimizing corruption. Exposing governance procedures to public scrutiny and empowering actors to negotiate those procedures armed with the information and support they need makes it harder for impervious actors to use their position for personal illicit gain. Yet governance cultures defined by generations of corruption may be incredibly resistant to efforts to advance transparency. Different strategies for advancing transparency, then, may be called for in different contexts. One host government representative interviewed for this research described a culture of embedded corruption in their country, where companies commence conversations with the host government about proposed investment projects by deciding on the amount of money the government contact will be personally paid, in exchange for recommending the project to their colleagues. While that government did still have information needs and policy focuses, these tended to be overlooked in favor of the pursuit of illicit payments, resulting in sub-optimal decision-making regarding, and regulation of, land investments. In such a context, the government representative contended that partnerships with international organizations, such as the Bretton Woods institutions, were needed to achieve greater transparency. Specifically, when such organizations are willing to partner with host governments and provide funding for programs to improve ministry performance, the government is more likely to follow calls for reforms that strengthen governance, including making decision-making processes more transparent.³ This example illuminates the importance of understanding the local context, including the objectives and motivations of host government actors and other stakeholders, as a vital precursor to designing a strategy for advancing transparency. In the following section, we map the roles and motivations of different actors in order to further understand the complex arrangement of agendas and interests that exist within host governments.

V. Mapping host government actors and their incentives

In order to interrogate the transparency needs and demands of host governments, it is important to understand the diverse range of government entities, and the differing agendas and pressure points of actors within them. Governments stand to benefit from transparency, which can enable them to “understand the trade-offs of land and natural resource use options available to them, to make the best choice in terms of policy and allocation of resources, and to negotiate better deals on behalf of their people and natural wealth.”⁴ Yet in practice, different government actors will be driven by different agendas, creating a complex scenario that must be understood before we can begin to identify opportunities and threats to advancing demand-driven transparency. This section attempts to set out a rudimentary mapping of a select group of government entities, explaining their agendas and why they may be motivated to encourage or oppose calls for increased transparency. In practice, the motivations and constraints of government actors each country will vary depending on the local context and other factors; this mapping is done in an attempt to highlight the complexity of government

perspectives on land investment transparency and to inform theories of change for advancing transparency.

Ministries of agriculture and forestry

While roles will vary, ministries of agriculture and forestry usually help to: set sectoral policies and legal frameworks; commission and assess feasibility studies and other assessments; scrutinize, and negotiate with, potential investors; allocate land or facilitate land transactions for land investment; and monitor land investment projects that proceed.

Ministries of agriculture and forestry can benefit from greater transparency around land investments in several ways. As information users, these ministries need information to help with initial decision-making, including verifying the alignment of projects with the country's development goals,⁵ assessing feasibility, screening potential investors, and understanding the strengths and weaknesses of the government's bargaining position in order to negotiate effectively.⁶ While ministries can require companies to provide them with key information, relevant information may be held by a range of actors, which makes accessing relevant information for each proposed investment complicated and resource-intensive. Given such challenges, a culture of proactive (and public-facing) transparency, rather than one of responsive information disclosure to specific government entities, can help ministries of agriculture and forestry to more efficiently access and use relevant information. Transparency can help these ministries with the monitoring of land investments,⁷ which also requires access to relevant information to assess investor compliance with the terms of the investment. Such ministries may also benefit from proactive transparency practices, which can minimize the need to assist other government actors, such as ministries of environment or finance, that may also need to access information to monitor aspects of land investments relevant to their mandates.⁸

Despite the above benefits, ministries of agriculture and forestry may be motivated to oppose increased transparency in some cases. Such ministries—or influential actors within them—may wish to avoid increasing public accountability, which can lead to greater scrutiny of ministry decisions and behavior that may have been undermined by errors, institutional failures or imprudent choices. Increased public accountability can also help to uncover corrupt activities that public officials may be participating in,^{9, 10} and thus may provoke their strong resistance. Another potential cause for ministry avoidance of transparency lies in the fear that disclosure and participation will delay the facilitation of deals. A growing field of research underlines that companies will actually be exposed to *increased* financial risks where they do not properly address land tenure issues and engage with local communities.¹¹ Such risks imperil the feasibility of land investments, which runs counter to the interests of ministries of agriculture and forestry who generally wish to see the investments they approve succeed. Despite this, many officials may regrettably still consider land tenure regulation and the meaningful participation of communities in decision-making around investment projects as running against ministry objectives of portraying their country as “open for business.” Such officials may therefore wish to avoid delays to deals by any means necessary, including by restricting the amount of information disclosed, and opportunity for community participation and input, before a specific deal has been concluded.^{12, 13}

Ministries of environment

Ministries of environment are usually empowered to protect and preserve a country's natural resources and wildlife. They therefore have an important role to play in regulating land investments, which can potentially generate significant negative environmental impacts, and holding companies to their environmental obligations.¹⁴

Ministries of environment may lack influence within the government and even be sidelined during land investment negotiations. They could therefore benefit from increased transparency, which could allow them to ensure adequate environmental conditions are imposed on any projects that proceed, and to effectively identify and enforce company obligations with regard to environmental protection. As mentioned above, ministries of environment also stand to benefit from increased transparency, which can enable them to efficiently access and use relevant information when monitoring investor compliance with environmental laws and obligations.

Investment promotion agencies

Investment promotion agencies (IPA) are public entities responsible for attracting investment in a country, including in agriculture and other land investments. Because they are often the investor's first point of contact within a country, IPAs are increasingly being charged with additional roles, including helping investors navigate administrative processes for obtaining authorization to conduct investment.^{15,16}

IPAs may be interested in transparency as a means of obtaining information needed to successfully attract the right sort of investor, and to connect each investor with the right local context for their project. IPAs also need to have access to national, regional and local development goals and policies, as well as the country's priorities and desired types of investment, all of which can valuably inform IPA strategies.¹⁷ Finally, because IPAs often rely on information from other government entities, rather than producing information themselves, transparency can help IPAs to quickly obtain the most up-to-date and relevant information when needed, and to avoid the misuse of information that may be out of date or inaccurate.

Local governments

Local governments, including municipal and district governments, often pursue more local development plans and can act as intermediaries between central government actors and the communities that may be positively or negatively affected by land investments. In some contexts local governments may also act, whether legitimately or otherwise, as representatives of communities; care should be taken to distinguish between the role of local governments' primary role as duty bearers and regulators from the potential function of acting as formal community representatives.

Despite comprising part of the host government, which is a key information producer, local governments are often not fully informed about national-level decisions made about investments taking place locally. Given the wide range of technical considerations that such investments produce, local governments may also often lack skills and resources to effectively understand and use information that is at their disposal. Local governments therefore stand as a key potential beneficiary of increased transparency. Local governments often must facilitate the resolution of conflict—whether between a company and community or between community members themselves. Increased transparency can help local governments with this function by effectively managing

expectations and potentially minimizing the risk of community grievances linked to the failure to adequately acknowledge and incorporate community perspectives into investment-related decision-making.

On the other hand, local officials may still be motivated to oppose greater transparency. In strongly centralized and repressive contexts, local governments may face significant pressure from their central or national level counterparts to follow the government line, even when it is a fundamentally un-transparent one. Local government officials also possess valuable knowledge about local stakeholders and powerbrokers, which they can use as leverage to obtain illicit personal payments and favors from incoming companies. For such actors within local government, transparency may be seen as a threat to this source of revenue and influence.¹⁸ Local officials benefitting illicitly are likely to strongly oppose efforts at advancing transparency, effectively rendering them more responsive and accountable to company interests than to their local constituencies.¹⁹

Parliamentarians

Parliaments often contain a wide range of representatives, some of whom can effectively raise concerns and increase pressure on government administrators to act responsibly with regard to land investment. Transparency is an obvious benefit to parliamentarians, who otherwise may not be able to understand how land investments are proceeding within the country and their potential positive and negative impacts.

In some countries, land investment deals cannot legally proceed without the approval of parliament. Transparency in such cases helps parliamentarians triangulate information and develop a deep understanding of proposed investments, thereby strengthening their role in holding the executive to account.²⁰ It can also enhance parliamentarians' leverage over ministries pursuing investment, which can be used to demand more responsible parameters for the project. Parliament, as the legislative arm of government, can also play a strong role in advancing transparency by enacting laws on freedom of information, transparency, and reforms to other laws and regulations that detail consultation and approval processes and reporting requirements.²¹

Other host government actors

Many other government entities' agendas and dispositions to the prospect of increased transparency are relevant, and are only not discussed in detail here because of want of space. These relevant actors include: the Ministry of Land (which oversees land administration, title registration and sometimes help with the resolution of land-related disputes); the Ministry of Finance (which may monitor the investment for tax compliance); investor screening agencies (which conduct due diligence on prospective land investors); as well as public-private partnership agencies; offices of the President or Prime Minister; national human rights institutions; and special economic zone authorities, where relevant.

VI. Conclusion

This paper only scratches the surface of the complex relationship that host governments have with transparency in the context of land investment. Host governments stand as both information users and information producers. They are human rights duty bearers, yet also act as self-styled drivers of development and consider private investment as one of their key strategies for doing so. Host governments are also heterogeneous; they

comprise many actors with a diverse range of agendas and interests. The contradictions of, or conflicts between, these agendas and interests are resolved through quiet contestation and the machinations of political hierarchies—whether such machinations are constitutionally proscribed or dictated by those most able to wield real world influence. While the demands of this diverse array of actors relating to transparency will vary greatly, certain actors within them will indeed have genuine transparency needs, and understanding what those are and how they can be achieved will be key to realizing transparency’s potential to transform how host governments approach investment. Such an understanding can thus help advance the improvement of processes and outcomes of responsible land investments.

Endnotes

- ¹ One notable exception is Centre pour l’Environnement et le Développement (2013). La transparence dans le secteur foncier au Cameroun: <https://rightsandresources.org/fr/publication/ced-rapport-sur-la-transparence-dans-le-secteur-foncier-au-cameroun/#.XTnJGpNKi9Y>
- ² Columbia Center on Sustainable Investment (2018). Governing Land Investments: Do Governments Have Legal Support Gaps?: <http://ccsi.columbia.edu/work/projects/legal-support-for-governments/>.
- ³ Interview with government representative, June, 2019.
- ⁴ Global Witness, International Land Coalition, and the Oakland Institute (2012). Dealing with Disclosure: Improving Transparency in Decision-Making over Large-Scale Land Acquisitions, Allocations and Investments: https://www.oaklandinstitute.org/sites/oaklandinstitute.org/files/Dealing_with_disclosure.pdf.
- ⁵ Mirza, Hafiz, et. al. The World Bank (2014). The Practice of Responsible Investment Principles in Larger-Scale Agricultural Investments: <http://documents.worldbank.org/curated/en/135321468158370655/pdf/861750RAI0P1253560Box385174B00PUBLIC0.pdf>.
- ⁶ Columbia Center on Sustainable Investment (2018).
- ⁷ Mirza, Hafiz, et. al. (2014).
- ⁸ Global Witness, International Land Coalition, and the Oakland Institute (2012).
- ⁹ The World Bank Group Public-Private Partnerships, CGP, COST and PPIAF (2015). A Framework for Disclosure in Public-Private Partnerships: <http://pubdocs.worldbank.org/en/773541448296707678/Disclosure-in-PPPs-Framework.pdf>.
- ¹⁰ The Food and Agriculture Organization of the United Nations and Transparency International (2011). Corruption in the Land Sector: <http://www.fao.org/3/am943e/am943e00.pdf>.
- ¹¹ See, e.g., Locke, Anna et al, Assessing the Costs of Tenure Risks to Agribusiness (Feb. 2019), pp. 6, 7, 14 <https://bit.ly/2H35Rlh>; Davis, Rachel and Franks, Daniel (2014). Costs of Company-Community Conflict in the Extractive Sector <https://www.shiftproject.org/resources/publications/costs-company-community-conflict-extractive-sector/>
- ¹² Global Witness, International Land Coalition, and the Oakland Institute (2012).
- ¹³ Columbia Center on Sustainable Investment (2018).
- ¹⁴ Mirza, Hafiz, et. al. (2014).
- ¹⁵ Cotula, Lorenzo, et. al. International Institute for Environment and Development, the Food and Agriculture Organization of the United Nations and the International Fund for Agricultural Development (2009): Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa: <http://www.fao.org/3/a-ak241e.pdf>.
- ¹⁶ Hilton, Andrew, et. al. The Food and Agriculture Organization of the United Nations (2015): Safeguarding land tenure rights in the context of agricultural investment: <http://www.fao.org/tenure/resources/results/card/en/c/10673a35-48ad-4a55-9a1c-5542deb27721>.
- ¹⁷ The World Bank and UNCTAD (2018). Responsible Agricultural Investment (RAI): Knowledge into Action Notes series. Note 6: Screening Prospective Investors: <https://openknowledge.worldbank.org/handle/10986/29479>.
- ¹⁸ The Food and Agriculture Organization of the United Nations and Transparency International (2011).
- ¹⁹ Global Witness (2010). Making the forest sector transparent: annual transparency report 2009: <https://www.globalwitness.org/en/archive/making-forest-sector-transparent-annual-transparency-report-2009/>
- ²⁰ Cotula, Lorenzo. International Institute for Environment and Development and the Food and Agriculture Organization of the United Nations (year not specified): Land tenure issues in agricultural investment: http://www.fao.org/fileadmin/templates/solaw/files/thematic_reports/TR_05B_web.pdf.
- ²¹ Transparency Accountability Initiative and Global Witness (2011). Opening Government: Land Transparency: <https://www.transparency-initiative.org/wp-content/uploads/2017/03/12-land-transparency1.pdf>