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Transparency in Land-Based Investment: Key Questions and Next Steps

March 2016

Large-scale investments in agriculture and forestry (“land deals”) are often shrouded in secrecy. In many cases, they are negotiated without the involvement of affected communities, approved through opaque decision-making procedures, and governed by legal agreements that are difficult both to access and to understand. This systemic lack of transparency impedes accountability and exacerbates ongoing disagreements about the real costs and benefits for investors, host countries, and their citizens.

This briefing note examines why contract disclosure and a contracting process that is open, accessible, and inclusive are important;¹ what such transparency entails; and how various stakeholders can work towards achieving it.² Transparency in the contracting process is of particular significance in the context of land deals, given the centrality of land for the livelihoods, culture, and identity of many land users.

Why is land contract transparency important?

Increased transparency throughout the contracting process³ can promote more responsible investment and benefit a range of stakeholders, including host-country governments, local residents and land users (“affected communities”), investors, civil society organizations (“CSOs”), and citizens of the host state. While transparency should be understood as a means to an end, and not an end in itself,⁴ it provides a strong foundation for broader reform and improvement of land-based investment.

Accountability and Good Governance

Host-country governments (including all relevant agencies and departments) can use disclosed land contracts⁵ to monitor investor compliance with relevant obligations. **Affected communities, citizens, and CSOs** can use disclosed information to scrutinize land-based investments, shape their own demands for improved governance, and seek to hold investors and government officials to their obligations.

Negotiation of Improved Land Deals

By having access to the land contracts of other host states, **host-country governments** can gain a better understanding of the terms and commitments used in comparable contexts. This access can provide useful information and lessons for new contract negotiations. When coupled with a more participatory contracting process, increased transparency during negotiations can allow **government agencies and departments** to weigh in on issues where their expertise can encourage more balanced, socially

inclusive, and sustainable investments. To the extent that affected communities and CSOs are also invited to take part in negotiations, disclosed information can support their more informed participation.

There is a legitimate fear that contract publication will result in pressure on officials to match concessionary deals or to compete in a “race to the bottom.” However, current asymmetric access to information provides companies with a strategic advantage over governments. Contract transparency helps to erode this asymmetry, and can thus provide for a more balanced negotiation.

Protection and
Fulfillment
of Rights

Where **affected communities** wish to challenge decisions taken by investors and government entities, they can use disclosed information to support claims submitted to available grievance mechanisms (including mechanisms operated at the project-level, by multi-stakeholder initiatives, or by development finance institutions). They can also use the information to assert their rights in domestic courts, regional human rights tribunals, and/or UN complaints procedures.⁶

Reduced Risk
of Instability
and Conflict

Land is very closely connected to socio-political and cultural identity for many **individuals and communities** that depend on land targeted for investment. Disclosure and engagement around land contracts can thus be vital for managing the risk of instability and conflict, which in the case of agricultural investments may be exacerbated by their fragile nature, and by the extensive initial outlay these investments can require. In addition, recent studies have shown that secrecy surrounding the terms of a land-based investment, coupled with a lack of community engagement, results in increased challenges to the legitimacy of such deals.⁷ This can have negative financial implications for **investors** and render such investments socially and economically unsustainable.⁸ One study analyzing 262 cases of disputes between local communities and investors in agriculture, energy, and mining projects concluded that conflicts with local communities “had a materially significant impact on investors in 67% of these cases.”⁹

Land contract transparency, including greater scope for community participation during the contracting process, can help investors mitigate these risks. More stable investor-community relations can also reduce the likelihood that the government will experience public pressure to renegotiate the contract.¹⁰

Accurate
Assessment
of Implications

The lack of available and reliable information about land-based investment has created uncertainty around the extent, scale, and implications of such investment. With increased transparency of deals and the contracts governing them, **all relevant stakeholders** will be able to develop more reliable assessments of the true implications, both positive and negative, of investment in the agriculture and forestry sectors.

What does transparency of the contracting process require?

A transparent contracting process should encompass the following key elements:

Disclosure

A range of information concerning land-based investments (at all stages of the project cycle) should be made publicly available.¹¹ Disclosure should begin at the planning and inception of the contracting process, and continue throughout the project cycle of land-based investments.¹² Open data schemas to organize and share detailed contracting information, such as the Open Contracting Data Standard, can help manage the process of disclosure.

Access

Disclosed information needs to be accessible, shareable, and useable.¹³ Mechanisms that take into account possible barriers to accessibility and comprehension can help.¹⁴ For example, the agreements published on www.OpenLandContracts.org are accompanied by plain-language summaries of important contractual provisions, helping readers to better understand their implications.

Participation

Opportunities for relevant stakeholders to participate effectively and meaningfully in the contracting process should be provided. This kind of participation is increasingly being linked to obtaining the free, prior and informed consent of communities for investments.¹⁵

What type of information should be made publicly available?

Emerging best practice indicates that, at a minimum, land contracts between investors and host states should be publicly disclosed. This includes any annexes, amendments, or side letters that modify or supplement the main contract. Details regarding any exceptions to disclosure of all contractual terms, such as to protect commercially sensitive information, should also be disclosed.¹⁶

In addition to land contracts, disclosure of certain associated documents can provide a clearer picture of the underlying deal and its potential implications. This includes, for example, community development agreements (“CDAs”) or social agreements undertaken with nearby communities, environmental and social impact assessments (“ESIAs”), or forest management plans.¹⁷

Details around the award process should also be disclosed, as should the identity of the companies involved, as well as their controlling interests and/or beneficial owners.¹⁸ Other important details include those concerning revenue collection, in-depth geographic information regarding areas of land identified and approved for investment, and details of relevant voluntary standards or certification programs¹⁹ that investors or governments have agreed to be bound by.

Who has a role to play in promoting contracting transparency?

While contracting parties are the best placed to disclose land contracts and associated information, other stakeholders also have important roles in promoting transparency throughout the contracting process.

- ➔ **Host-country governments** can provide for mandatory, standardized disclosure requirements in domestic law. They can also make voluntary disclosure commitments.²⁰ Among other benefits, requiring disclosure across the board may address investors' concerns regarding any competitive disadvantage of being a first mover on contract disclosure.
- ➔ Where domestic law or government policy does not require disclosure, **investors** can voluntarily disclose relevant contracts.²¹ Similarly, investors can voluntarily disclose associated documents, such as CDAs or ESIA's. Proactive disclosure of contractual information would help investors align with the best practices described in various principles and guidance documents.
- ➔ **Home states**²² can also require or encourage their investors to disclose certain contracts, associated documents, and other information concerning foreign investments through the enactment of domestic legislation or policies.²³
- ➔ **Donor governments** can provide the support needed for host states to develop effective disclosure mechanisms that facilitate increased participation in the contracting process and the conclusion of more equitable land deals.
- ➔ **Development finance institutions** can advance increased transparency by establishing transparent contracting as a condition for receipt of assistance,²⁴ or by encouraging clients to disclose proactively.
- ➔ **CSOs** can work with host-country governments and investors to determine how to disclose information in a way that is accessible to affected communities and other stakeholders. Following disclosure, CSOs can help to build the capacity of relevant stakeholders to understand and use the information.
- ➔ **Affected communities** can disclose information available to them, for example, maps of community claims that are relevant to the contracting process, agreements that have been negotiated with investors, and information regarding investor and government practice concerning community engagement around investment projects.
- ➔ **Companies further down the supply chain** can establish supplier policies that require transparency throughout the contracting process, while **consumers** also can request greater transparency throughout supply chains.

Next Steps

As part of an overall process of early stakeholder engagement, open and transparent contracting can help mitigate risks while yielding important benefits for a range of stakeholders. Yet guidelines promoting transparency around land-based investment are relatively recent,²⁵ and few host-country governments have committed to increased public disclosure of land contracts.²⁶ Thus, a common understanding of stakeholder roles and how disclosed information can be effectively used has yet to coalesce. Although a broad set of norms and practices are emerging, better learning and sharing is needed from efforts and experiences so far.²⁷ This work should be coupled with capacity-building and open data efforts to ensure that disclosed information can be understood and used to promote more balanced, socially inclusive, and sustainable land-based investment.

Additional Resources

Websites and Tools

[OpenLandContracts.org](#) - an online repository of publicly available contracts for large-scale land, agriculture, and forestry projects.

[Open Contracting Partnership](#) - the Open Contracting Partnership opens up public contracting through disclosure, data and engagement so that the huge sums of money involved are spent honestly, fairly, and effectively.

[LandMark Platform](#) - an online, interactive global platform on indigenous and community lands.

[The Land Matrix](#) - a global and independent land monitoring initiative that promotes transparency and accountability in decisions over land and investment.

[TMP Systems IAN: Risk Beta 1.0](#) – a database which uses high-resolution geospatial data to show where tenure risk is more likely to cause problems.

[TMP Systems IAN: Diligence Beta 1.0](#) - provides practical, implementation-ready processes to counter tenure risk at each stage of the project lifecycle.

Guidelines

African Union Commission, African Development Bank, and the United Nations Economic Commission for Africa, *Guiding Principles on Large Scale Land Based Investments in Africa* (2014), available at

http://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf

Committee on World Food Security, *Principles for Responsible Investment in Agriculture and Food Systems* (2014), available at <http://www.fao.org/3/a-au866e.pdf>

Food and Agriculture Organization of the United Nations and the Committee on World Food Security, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012), available at

<http://www.fao.org/docrep/016/i2801e/i2801e.pdf>

French Agency for Development, *Guide to Due Diligence of Agribusiness Projects that Affect Land and Property Rights* (2014), available at

<http://www.landcoalition.org/sites/default/files/documents/resources/Guide-to-due-diligence.pdf>

New Alliance for Food Security and Nutrition, *Analytical Framework for Land-Based Investments in African Agriculture: Due Diligence and Risk Management for Land-Based Investments in Agriculture* (2015), available at

<https://new-alliance.org/resource/analytical-framework-responsible-land-based-agricultural-investments>

Organisation for Economic Co-operation and Development and the Food and Agriculture Organization of the United Nations, *OECD-FAO Guidance for Responsible Agricultural Supply Chains* (2016), available at <http://mneguidelines.oecd.org/OECD-FAO-Guidance.pdf>

United States Agency for International Development, *Operational Guidelines for Responsible Land-Based Investment* (2015), available at <http://www.usaidlandtenure.net/documents/operational-guidelines-responsible-land-based-investment>

United Nations, *Principles for Responsible Contracts* (2011), available at <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>

United Nations, *Large-Scale Land Acquisitions and Leases: A Set of Minimum Principles and Measures to Address the Human Rights Challenge* (2009), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-33-Add2.pdf>

Publications

Anna Locke and Giles Henley, *The Possible Shape of a Land Transparency Initiative: Lessons from Other Transparency Initiatives* (Overseas Development Institute 2013), available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8599.pdf>.

Global Witness, International Land Coalition, and the Oakland Institute, *Dealing with Disclosure: Improving Transparency in Decision-Making over Large-Scale Land Acquisitions, Allocations and Investments* (2012), available at <https://www.globalwitness.org/en/archive/dealing-disclosure/>.

Interlaken Group and Rights and Resources Initiative (RRI), *Respecting Land and Forest Rights: A Guide for Companies* (2015), available at <http://www.rightsandresources.org/en/publication/view/respecting-land-and-forest-rights-a-guide-for-companies/>.

Lorenzo Cotula, *Land Rights and Investment Treaties: Exploring the Interface* (International Institute for Environment and Development 2015), available at <http://pubs.iied.org/pdfs/12578IIED.pdf>.

Lorenzo Cotula, *Land Deals in Africa: What is in the Contracts?* (International Institute for Environment and Development 2011), available at <http://pubs.iied.org/pdfs/12568IIED.pdf>.

Lorenzo Cotula, *Investment Contracts and Sustainable Development* (International Institute for Environment and Development 2010), available at <http://pubs.iied.org/17507IIED.html>.

Endnotes

¹ This briefing note builds on discussions concerning transparency in large-scale land-based investment at a recent *Roundtable on Land Contract Transparency*, co-organized by the Columbia Center on Sustainable Investment (CCSI) and the Open Contracting Partnership (OCP), held at Columbia Law School in October 2015.

² This note focuses on land contract transparency (i.e. the disclosure of contracts and other related information) and on the importance of establishing a transparent contracting process. Readers should also be aware of the significance of transparency for the broader investment process and lifecycle of investments projects.

³ The term “contracting process” is used to refer to the planning, preparation for, negotiation, monitoring, and implementation of land contracts.

⁴ See Anna Locke and Giles Henley, *The Possible Shape of a Land Transparency Initiative: Lessons from Other Transparency Initiatives* (Overseas Development Institute 2013), available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8599.pdf>. See also Lorenzo Cotula, “Opening up land contracts” (October 20, 2015), available at <http://www.iied.org/opening-land-contracts> and Emma Wilson, “Transparency: can it work for sustainable development?” (May 23, 2013), available at <http://www.iied.org/transparency-can-it-work-for-sustainable-development>.

⁵ This note uses the term “land contracts” to refer to: (1) written agreements, including concession agreements, land lease contracts, land transfer/sale contracts, Conventions of Establishment, or other relevant legal documents; (2) between host-country governments (and/or their sub-entities) and investors (local or foreign); (3) to transfer rights to use, control, or own land; (4) for the purpose of large-scale commercial agriculture (including biofuels and renewable energy production) or timber extraction. Unless otherwise noted, references to land contracts in this briefing note should be read as encompassing documents associated with contracts, including environmental and social impact assessments.

⁶ Relevant tribunals and United Nations (UN) treaty bodies include: the Inter-American Commission on Human Rights; the Inter-American Court of Human Rights; the African Commission on Human and Peoples’ Rights; the African Court on Human and Peoples’ Rights; the UN Human Rights Committee; the UN Committee on Economic, Social and Cultural Rights; the UN Committee on the Elimination of Discrimination against Women.

⁷ The Munden Project, *The Financial Risks of Insecure Land Tenure: An Investment View* (2012), available at http://www.rightsandresources.org/documents/files/doc_5715.pdf; The Munden Project, *Communities as Counterparties: Preliminary Review of Concessions and Conflict in Emerging and Frontier Market Concessions* (2014), available at http://www.rightsandresources.org/wp-content/uploads/Communities-as-Counterparties-FINAL_Oct-21.pdf. See also *infra*, note 9.

⁸ *Id.*

⁹ TMP Systems, “Introducing the IAN Tenure Risk Toolkits” (September 30, 2015), available at <http://www.tmpsystems.net/media/2015/9/30/vimb6damt5csboh4ob07p4swq525j>.

¹⁰ See Natural Resource Governance Institute (NRGI), *Contract Transparency: Creating Conditions to Improve Contract Quality* (2015), available at http://www.resourcegovernance.org/sites/default/files/nrgi_Contract-Transparency.pdf.

¹¹ See Principle 1 of the *Open Contracting Global Principles*, which states: “Governments shall recognize the right of the public to access information related to the *formation, award, execution, performance, and completion of public contracts*” (emphasis added). The Principles are available at http://www.open-contracting.org/global_principles.

¹² The importance of disclosure beginning at the inception of the contracting process has been highlighted by relevant guidelines, and also by CSOs in analyzing the lessons to be learnt from existing transparency initiatives focused on the extractive industries. See e.g., Principle 7 of the UN *Principles for Responsible Contracts* (2011), available at <http://www.ohchr.org/Documents/Issues/Business/A.HRC.17.31.Add.3.pdf>. See also Locke and Henley, *supra* note 4, at p. 44; G8 Lough Erne Communiqué (2013), para. 44, available at <https://www.gov.uk/government/publications/2013-lough-erne-g8-leaders-communicue>.

¹³ See Committee on World Food Security (CFS), *Principles for Responsible Investment in Agriculture and Food Systems*, (2014), Principle 9.ii, available at <http://www.fao.org/3/a-au866e.pdf>.

¹⁴ UN *Principles for Responsible Contracts* (2011), *supra* note 12, Principle 7.

¹⁵ In certain circumstances, obtaining the free, prior and informed consent (FPIC) of indigenous and tribal peoples is required before investment projects can be carried out on their lands. See International Labour Organization Convention No. 169 (“ILO 169”), arts. 6 (sets the standard for consultations with indigenous and tribal peoples) and 16 (requires consent only in the exceptional context of relocation). The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) also contains several provisions requiring FPIC, including arts. 10 (relocation); 11 (taking of cultural, intellectual, religious and spiritual property); 19 (adoption of legislative or administrative measures); 29 (disposal of hazardous materials); 32 (development projects). FPIC is also increasingly seen as best practice for community engagement. For example, FPIC is listed as a key principle in the Roundtable on Sustainable Palm Oil’s (RSPO) *Principles and Criteria for the Production of Sustainable Palm Oil*, and is a requirement of the Forest Stewardship Council. See also: The Food and Agriculture Organization of the United Nations (FAO)-CFS, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2012), Principles 9.9 and 12; International Finance Corporation (IFC) *Performance Standard 7*; Oxfam, *Guide to Free Prior and Informed Consent* (2014), available at <https://www.oxfam.org.au/what-we-do/mining/free-prior-and-informed-consent/>.

¹⁶ This includes the subject-matter of the excepted clauses, the reasons for non-disclosure, and any expected release dates. Note that exceptions should only be made where compelling reasons exist to justify non-disclosure. See UN *Principles for Responsible Contracts*, *supra* note 12, Principle 10.

¹⁷ Re disclosure of impact assessments, see Land Policy Initiative (AUC-AfDB-UNECA), *Guiding Principles on Large Scale Land Based Investments in Africa* (2014), Principle 4, available at http://www.uneca.org/sites/default/files/PublicationFiles/guiding_principles_eng_rev_era_size.pdf. Re disclosure of due diligence findings and impact assessments, see United States Agency for International Development (USAID), *Operational Guidelines for Responsible Land-Based Investment* (2015), section 1.0, at p. 22, available at

<http://www.usaidlandtenure.net/documents/operational-guidelines-responsible-land-based-investment>.

¹⁸ The term “beneficial owner” refers to “the natural person(s) who ultimately owns or controls a customer and/ or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement”. See *Financial Action Task Force Glossary*, available at <http://www.fatf-gafi.org/glossary/>.

¹⁹ For investors: see e.g., the RSPO *Principles and Criteria for the Production of Sustainable Palm Oil*, *supra* note 15; the International Cocoa Initiative; and Forest Stewardship Council certification. For governments: see the list of “Guidelines” at the end of this briefing note.

²⁰ If the land contracts do not contain confidentiality clauses, a country can choose to simply disclose proactively (barring any national law/policy *preventing* disclosure, of which the authors are unaware in respect of land contracts). If the contracts do contain confidentiality clauses, then the country would have to either gain permission from the investor(s), such as through the negotiation of an additional agreement, or potentially pass transparency legislation. (See, e.g., NRG1, *supra* note 10, which notes that these options can generally supersede confidentiality clauses.)

²¹ Subject to the caveat that, if the contract contains a confidentiality clause prohibiting such disclosure, the investor would have to seek permission from the government and any other contracting parties, potentially through the negotiation of an additional agreement. The extractive industries sector has been at the forefront of increasing transparency around investment, with several companies voluntarily disclosing contracts and other information concerning their investments, e.g. Rio Tinto and Newmont Mining. An example cited at the *Roundtable* held by CCSI and OCP (*supra* note 1) was Newmont’s effort to seek parliamentary disclosure, debate and approval for a major mining contract in Ghana (in addition to Presidential approval) so that the contract was viewed as legitimate.

²² The term “home state” generally refers to the state of which an investor is a national, or in which an investor is organized, constituted, or incorporated.

²³ While no home state currently requires such contract disclosure, home states are increasingly requiring increased information from outward investors regarding large-scale investments with potential development or human rights implications. See e.g. US Dodd Frank Wall Street Reform and Consumer Protection Act, sections 1502-1504.

²⁴ E.g. IFC Extractive Industry clients commit to being transparent about the terms and conditions agreed with host-country governments under which an extractive resource is being developed.

²⁵ For a list of relevant guidelines, see “Additional Resources” at the end of this briefing note.

²⁶ To date, only one country, Liberia, has made their commercial agriculture and forestry contracts publicly available. Two others, the DRC and Ethiopia, have disclosed some of their land contracts. Sierra Leone has recently committed to disclosing 70 percent of its agricultural lease agreements.

²⁷ Lindsey Marchessault and Michael Jarvis, “The Trend toward Open Contracting: Applicability and Implications for International Investment Agreements” in Andrea K. Bjorklund (ed.) *Yearbook on International Investment Law and Policy* 2013-2014, 568.