



2.5 Using access-to-information legislation to improve transparency

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Introduction

Ecuador is a country with significant areas of globally important tropical forest, but where forest governance has often lacked equitable and open access to information. Frequently, decisions on forest planning and management do not include all key stakeholders, especially those who directly depend on forests for their livelihood.

To increase transparency across the public sector, the government of Ecuador approved the *Organic Law of Transparency and Access to Public Information (Ley Orgánica de Transparencia y Acceso a la Información Pública, or LOTAIP)* in 2004. Since 2005 Grupo FARO¹ has monitored compliance of the Article 7 of the law, which requires the publication of information regarding contracts, finances and plans, among other things.



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In 2010, as part of “Making the Forest Sector Transparent,” an international initiative operating in seven countries and coordinated by Global Witness,² Grupo FARO, based on its experience on transparency issues, started monitoring the compliance of LOTAIP.

What’s wrong with forest governance in Ecuador?

Nearly 36% of Ecuador’s surface (more than 9 million ha) is tropical forests. It is difficult to determine ownership of forests, because there are no complete or up-to-date official records. The main structural reason for this is that legal and institutional arrangements related to land tenure have always been an issue in Ecuador, with the creation and dissolution of government agencies with the mandate to adjudicate on land title. The most recent incarnation of this phenomenon is a new National Land Secretary. A new law is currently being drafted to regulate land tenure and redistribution; it is expected to clarify the roles of the various stakeholders.

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Around 75% of the nation's forests outside protected areas are the property of indigenous peoples and smallholders, only half of whom have legal title. The other 50% claim to have customary rights; however, the land has not been legally allocated to them. These unclear tenure arrangements are a major underlying cause of poor forest governance. This in turn often leads to perverse outcomes such as disenfranchisement of indigenous and other rights-holders; demoralized sense of ownership, pride and therefore investment in sustainable rural livelihoods among forest-dependent peoples; and inequitable centralization of power in economic elites. These factors exacerbate other important drivers:

- deforestation for large-scale agricultural and infrastructure investments, which is often the consequence of broad economic policies that socialize the environmental and social costs of industrial development while privatizing the profits;
- small-scale but extensive “illegal” logging — most forest exploitation is by small operators, and from their perspective the distinction between informal and illegal logging activities barely exists in a context where land- and forest-tenure are weak;
- lack of access to information — since forest land outside protected areas is private property, the state does not allocate concessions or permits for use rights, but logging companies are required by law to obtain licences from the Ministry for the Environment (*Ministerio del Ambiente*, or MAE) after the submission and approval of a management plan. Licences and plans are not made publicly available, so it is not possible to independently judge their quality. Nonetheless, the ministry's own figure for the deforestation rate indicates that insufficient accuracy and rigour are applied to forest management planning to ensure sustainability.³ Other than occasional studies, there is also a lack of updated and verifiable information on deforestation rates, species status, drivers of land conversion, illegality, etc. In addition, the information that is available is scattered among different entities; and
- lack of access to decision-making — in general, decisions about forests do not include the participation of all key stakeholders, especially those who directly depend on forests for their livelihood. This makes it impossible for citizens to independently satisfy themselves that the state is following the rules, and is implementing policies and practices to ensure the provision of the public benefits of forests (including mitigation against climate change).

Solutions to the problem of poor forest governance are not straightforward. The list of social, economic and environmental issues affecting forests in Ecuador — and elsewhere — is long and complex, and measures to address them all, by state or non-state actors, are beyond the scope of this paper. This article focuses on one element: access to information.

Fixing forest governance weaknesses in Ecuador: the role of transparency

The “Making the Forest Sector Transparent” programme focuses on increased transparency as an entry point, since it has broad support — few people would state they are against it. It is important, however, to make clear the link to a shared sense of good governance: “Transparency is inextricably linked to governance: although there is no coherent body of governance theory, descriptions of good governance processes tend to be broadly similar, describing a situation whereby the state and its institutions are not seen as the only

relevant actors in the allocation of development priorities, and increasing relevance is given to the role of networks in the pursuit of common goals. The state therefore becomes just one actor in the process of governance, alongside civil society and the private sector; and for this to function, a degree of transparency — both in terms of information disclosure and access to decision-making — is required in order for the participants to be able to interact constructively.”⁴ Transparency supports the role of diverse actors in several ways:

- to hold others, especially government and/or key decision-makers, to account;
- to improve public policy and efficiency through complementary roles (“checks and balances”) and openness; and
- to combat corruption through a wider knowledge of the rule of law.

For transparency to be useful and for it to lead to accountability and improved governance, some form of social contract is required. The roles and responsibilities of the state, on one hand, and citizens, on the other, must be agreed to — at least implicitly — by each party. In this context, the government of Ecuador, based on a bill presented by a coalition of civil society organizations, approved LOTAIP⁵ in 2004. This law states that “Access to public information is a right, and is guaranteed by the state.” Article 7 of LOTAIP requires the publication of information regarding contracts, finances, plans, among others, by all public agencies or agencies that receive public funds.⁶

The Ombudsman (*Defensoría del Pueblo*) has the mandate to enforce compliance with LOTAIP, but the only consequence for non-compliance is inclusion in a list of institutions with unfulfilled compliance. Independent assessment shows that the law needs improvement: in an international rating by the Centre for Law and Democracy LOTAIP obtained a score of only 75 out of 150.⁷ It received its low grade mainly for vague provisions for appeals and sanctions.

Additionally, the 2008 Constitution provides for support to LOTAIP by establishing a fifth branch⁸ of the state: the Transparency and Social Accountability Branch. It was created in response to innumerable cases of corruption, but also in the context particular to Ecuador, such as ethnic diversity and well-organized indigenous peoples’ groups. This required the creation of opportunities for dialogue and greater participation in state functions.

The new branch has the mandate to use social accountability⁹ and public participation to foster transparency and prevent corruption within public or private agencies that provide public services. Although the current government has made some efforts to generate information and make it available, there is still a long way to go, both in terms of making information available and in ensuring that this and other mechanisms — such as clearly defined roles and coordination among the public institutions in charge of forest management — deliver good forest governance.

Despite the fact that LOTAIP is one of the main instruments to assess and promote transparency in Ecuadorian public institutions, it does not provide any criteria to measure quality and completeness of information. The law, the ombudsman and the transparency and social accountability branch are necessary, but are not sufficient to guarantee

compliance with the law. Some standards were necessary in order to measure the level of transparency in public agencies.

Assessing proactive publication of information

In an effort to fill this gap, in 2005 Grupo FARO developed a methodology with measurable and comparable criteria to assess public institutions with regards to compliance of the law. Grupo FARO's assessment focused on Article 7 of the law, which specifies information dissemination, and covers 20 areas of obligation (Table 1). In order to validate the methodology Grupo FARO organized six focus groups, with representatives of civil society organizations, community leaders and public officials, to rank the areas according to the relevance of the information needed by citizens.

This assigned a weight according to relevance for public management: items that are a high priority to enable the organization to perform its role were assigned a weight of 70%; items that are complementary for this were weighted 20%; and items that help describe the organization were weighted 10%. The assessment looks only at the information published by the institutions through their web sites. Each item is composed of multiple sub-items, each of which is assigned a value of 0 or 1 on the basis of availability of certain documents, the level of disaggregation of the information, and the timeliness, for example. All these components contribute to the construction of an index that rates the overall fulfilment of the access to information law.

Table 1. LOTAIP Article 7 areas, categorized by importance

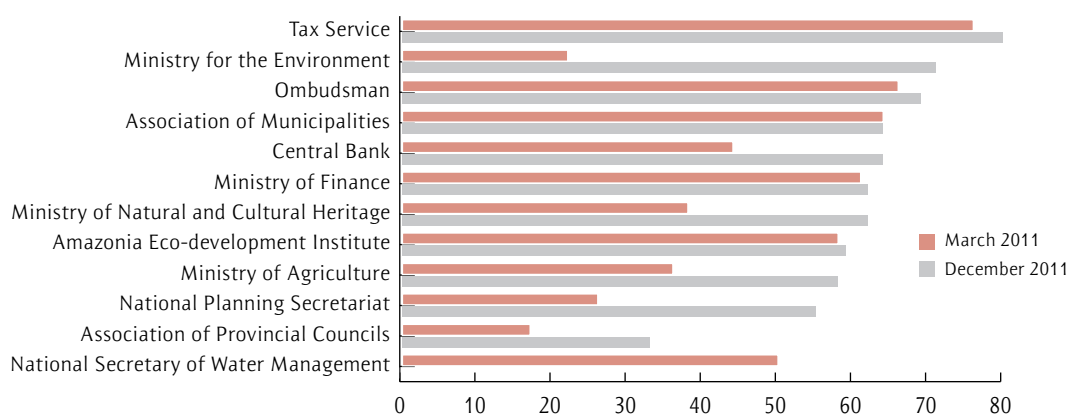
Priority (weighted 70%)	Complementary (weighted 20%)	Descriptive (weighted 10%)
F) Forms availability	C) Salaries	A) Legal structure, regulations and procedures
G) Annual budget	D) Services offered	B) Contact information
H) Internal and government audits	J) Breach of contract	E) Collective agreements
K) Plans and programs	L) External or internal credit contracts	I) Contractual processes
M) Accountability mechanisms	N) Allowances	O) Who is responsible for information
P)* Applied sentences	S)* Resolutions	
Q)* Applied resolutions		
R)* Applied only for the Central Bank		
T)* Information specific for some tribunals		

Reference letters refer to the sequence of clauses in Article 7 of LOTAIP; *Information specific to some agencies

In order to apply the methodology, Grupo FARO designed an online survey with 59 questions. The monitor completes the form according to the information found on the monitored web page. The information gathered is transferred to a data management program, which assigns values to the items and the sub-items and calculates the general index.

Since its development in 2005, the methodology has been applied to several ministries and local governments. In 2010, as part of “Making the Forest Sector Transparent,” Grupo FARO started monitoring compliance of LOTAIP in 12 public institutions related directly or indirectly to forest management in Ecuador (Figure 1). One of these, the MAE, is responsible for the forest sector (outside protected areas) through its Natural Heritage Secretariat.

Figure 1. LOTAIP compliance (%): 12 institutions with responsibilities in the forest sector



The results from the March 2011 assessment show that the institution responsible for tax (SRI; 87%), the ombudsman (69%), and the central bank (73%) are the most transparent as far as proactive publication of information, as prescribed by LOTAIP, is concerned.¹⁰ By December 2011 the SRI (81%), and the Ombudsman (69%) had remained in the top three, joined by the environment ministry (MAE; 72%).¹¹ MAE’s dramatic change — from 25% in March to 72% in December — is significant; the launch of the Grupo FARO’s National Transparency Report for the Forest Sector increased attention on transparency issues within this ministry more than in other public institutions.

This kind of monitoring helps citizens to know how public institutions are doing in terms of compliance with their transparency obligations, and about the speed with which they are improving access to information. Grupo FARO and Global Witness complemented these results with other publications, including a global annual report on forest sector transparency¹² and an analysis of public investment in the forest sector.¹³

Impacts

As mentioned, the existence of a law on access to information does not guarantee transparency, either in making information available or in decision making. Civil society is an

important part of promoting and encouraging compliance with the law by putting the topic on the public agenda and by organizing citizen action on a range of issues related to access to information.

It is too early to identify any impacts from LOTAIP assessments on more sustainable and equitable forest management. In other sectors, however, Grupo FARO has used various approaches to achieve the goal of improving governance through increasing transparency. Grupo FARO worked directly with the public sector, increasing its capacity to provide information and respond to information demands, and with civil society to disseminate information about the law and of the right to information, to encourage public participation in decision making and to understand what people need to know. There are some examples of the impact of Grupo FARO's activities in other sectors:

- The Ministry of Finance increased compliance with LOTAIP from 30–90% between 2005 and 2007 and established a clear mechanism for responding to information demands.
- Quito city council increased compliance with the law from 37–75% in six months. This was done through training for webmasters on the use of LOTAIP and how to make information available to the public. After initial facilitation from Grupo FARO, the initiative established a “transparency certificate” for municipal agencies that perform well, which is now implemented by the city council.
- Access to information had an increasing profile on the public agenda. In 2010 the ombudsman published standard parameters for compliance with Article 7 of LOTAIP. These include provisions included in Grupo FARO's methodology, such as availability, timeliness and disaggregation.
- The Transparency and Social Accountability Branch, as the fifth branch of the state, is starting to be effective, working with other organizations (Grupo FARO among them) to develop a joint methodology to monitor compliance with LOTAIP and to improve responses to information requests.



In the forest sector, it can be expected that the continued use of a monitoring tool such as this one will continue to increase compliance with LOTAIP, and that the information made available can start to have a positive impact on governance. For example, an accessible list of operators who have committed infractions and are suspended from holding a licence would improve law enforcement. Likewise, publication of the licences themselves would provide clarity (not least to competing companies) that the rules regarding their issuance were being uniformly applied. In addition, publishing forest management plans would help people living near areas of forest operations to reach their own conclusions about the contribution these operations make to local and national environmental, social and developmental objectives.

Lessons learned

The existence of a framework such as a right-to-information law — especially one as structured as LOTAIP — greatly facilitates the monitoring and assessment of public access to information. In countries where no such law exists, or is new and/or weak and therefore not yet embedded in the culture of public institutions, such assessments are more difficult and less influential. In the forest sector, other norms, such as those generated by FLEGT or REDD+, incidentally provide a framework for assessing transparency. “Making the Forest Sector Transparent” is working to publish a gap analysis of the commitments to information disclosure annexed to some FLEGT VPAs, and to pilot a participation assessment tool for REDD+.

LOTAIP does not establish any criteria about the importance or the prioritization of the published information. An institution could potentially score very high by publishing a large quantity of low-value information. The Grupo FARO assessments rely on focus groups and other subjective approaches to develop a methodology to score information priorities. Until these are enshrined in the work of a state institution, such as the Transparency and Social Accountability Branch, those priorities will always be open to challenge.

LOTAIP has also not provided sufficient specificity about some information. For example, while LOTAIP requires all public agencies publish the contracts they manage, they are not explicitly required to make logging licences or forest management plans available, as they are not regarded as managing public resources. This is one area where compliance with the law has not been tested. Although LOTAIP does not prevent institutions from publishing any kind of information (unless it is classified as reserved), neither does it require specific details that may be important for good forest governance.

The existence of a right-to-information law is a step to increased transparency. But in order for a law to be effective, it should incorporate a component that clearly describes how the information has to be published by the institutions. Transparency is not only about uploading information on a web page; there ought to be an extra component in the law related to presenting the information in a way that is useful and easy to understand. The law needs also to have clear mechanisms to respond to information demands, and clear mechanisms to penalize — not just report — institutions when they don't comply with the law.

In general, the right to participate in policy and practice is strong in Ecuador. However, the forest law does not stipulate any formal requirements for participation in decision-making. As in many countries assessed by the programme, national dialogues with civil society have taken place on major issues, but they have been sporadic and not legally binding. Similarly, local forums have been promoted by civil society organizations with peers and with the government, but they are not institutionalized. The participation checklist currently being developed by Grupo FARO and others is intended to use a current global initiative (REDD+) as an entry point to address this.

Finally, it is important to mention that LOTAIP applies only to the public sector. The obligation of the state to be transparent stems in part from the concept of “public service” — that the state exists to serve the people. Private companies have no (or minimal) obligation to be more transparent. Private companies have social responsibilities; therefore, they should also be required to be transparent.

As the value of forests starts to shift away from timber as a commodity — something tangible and easy to see — to that of carbon and environmental services, neither of which are easily measured or monetized, it is increasingly important that public authorities in Ecuador and elsewhere be open about the public information they have and the decisions they make in the public interest.

Endnotes

1. Grupo FARO (*Fundación para el Avance de las Reformas y las Oportunidades*, or Foundation for Advance of Reforms and Opportunities), is an independent, impartial and secular civil society organization (CSO) that provides support and promotes the active participation of civil society, the business sector and state entities, based on research and analysis, for the proposal, implementation and monitoring of public, local and national policies.
2. Making the Forest Sector Transparent operates in Cameroon, the Democratic Republic of Congo, Ecuador, Ghana, Guatemala, Liberia and Peru. See www.foresttransparency.info for further details and Annual Transparency Reports for the forest sector in each of these countries.
3. According to a study published by the Ministry for the Environment, the rate of deforestation in the country is 0.63%, which means 61,800 hectares are lost each year. Data retrieved on December 22, 2011 from www.ambiente.gob.ec/sites/default/files/users/mponce/TasasDeforestacionEcuador.Ver_03.05.11.pdf
4. See Global Witness. 2010. Making the Forest Sector Transparent. Annual Transparency Report 2009, page 8; <http://www.foresttransparency.info/cms/file/231>.
5. *Ley Orgánica de Transparencia y Acceso a la Información Pública* (2004), Law No.24, published in official journal (*Registro Oficial Suplemento*) No. 337. There is no official website for LOTAIP, but a copy of the law can be found on the websites of many state institutions, for example www.ambiente.gob.ec/sites/default/files/users/lianeth/LEY%20organica%20DE%20transparencia%20Y%20ACCESO%20A.pdf.
6. A rating of the Legal Framework for Right to Information in 89 Countries (www.rti-rating.org/countrydata.html) provides a spreadsheet score for the quality of LOTAIP (in the law, not in implementation) compared to other countries. LOTAIP scores 75 points, which is the average score among the 89 countries.
7. See the Centre for Law and Democracy, Global Right to Information Rating: www.rti-rating.org/methodology.html.
8. The Ecuadorian government is divided into five branches, each with separate and independent powers and areas of responsibility: executive, legislature, judiciary, electoral and transparency and social accountability.
9. Social accountability is an approach towards building accountability that relies on civic engagement, i.e., in which it is ordinary citizens and/or civil society organizations who participate directly or indirectly in exacting accountability. Retrieved from: <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTPCENG/0,,contentMDK:20509424~menuPK:1278120~pagePK:148956~piPK:216618~theSitePK:410306,00.html>.
10. For full Grupo FARO report see *Transparencia y acceso a la información del sector forestal ecuatoriano 2010*, published in May 2011: www.grupofaro.org/publicaciones.php?id=95.
11. The second assessment was due to be published March 29, 2012, accompanied by an award-giving ceremony for the most progressive public institutions.

12. See www.foresttransparency.info and the downloadable reports at www.foresttransparency.info/report-card/downloads.
13. Grupo FARO. 2011. *Lupa Fiscal — Inversión fiscal en la gestión del patrimonio natural ecuatoriano 2008–2009*; www.grupofaro.org/publicaciones.php?id=96.