Tenure and Investment in Africa

Synthesis Report

This document provides a synthesis of our findings from an investigation of tenure risk in East, West, and Southern Africa. The analysis shows that a majority of tenure disputes are caused by the displacement of local peoples, indicating that companies and investors are not doing enough to understand competing claims to the land they acquire or lease. This failure in diligence is particular noteworthy given that a majority of the disputes analyzed had materially significant impacts: indeed, a higher proportion of projects in Africa are financially impacted by tenure dispute than any other region in the world.

Companies, investors, and governments are increasingly aware of and responsive to the risks posed by unclear and insecure tenure. Leading actors are now more willing and able to identify and manage these risks through engagement with local people. However, transferring project-level improvements across corporate activities and ensuring that these lessons reach smaller companies remains an enormous challenge. Companies and investors with low reputational exposure, including many companies headquartered in emerging markets, still show little inclination to address tenure risk. They are even further away from having the capacity to do so through effective local engagement.

Guidance on tenure needs to be adapted to the specific requirements of African operating environments and low-capacity domestic companies to have widespread impact. More work is also needed to address the paucity of effective local service providers capable of implementing this guidance. These issues are solvable and, encouragingly, there is broad agreement among key stakeholders about what needs to be done.

Introduction

In the wake of the financial crisis, Africa saw a rush of capital into land and commodities. Growing concern with the climate crisis has led to a similar rush of capital to renewable energy projects in some countries. This wave of investment was promising for countries and regions in desperate need of economic development and additional sources of energy. However, many of these projects failed to engage local people effectively and became embroiled in costly disputes. This paper shows that a majority of these disputes were driven by forced displacement of local peoples (63%) and that a similar proportion faced materially significant interruptions (69%).

The nature and source of tenure disputes differs by region, with West Africa dominated by palm oil; Southern Africa by sugar and mining; and Eastern Africa by energy and public infrastructure. Local responses and redress mechanisms also differed regionally: media and advocacy campaigns were most common in West Africa; violent opposition in Southern Africa; and legal challenges in Eastern Africa.

This is not to say that there have been no violent disputes in Eastern Africa over sugar or that there are no lawsuits in Southern Africa against infrastructure projects. Rather, we can see identifiable patterns in each region suggesting that commodities driving land use change and the expansion of plantations are creating tenure disputes in each region. Local people will use the tools available to them to protect their rights and interests. Engaging with local communities is therefore key to managing this risk. Tenure risk is no longer a highly localized issue; it is becoming an important factor to consider across investment strategies.

In their rush to seize opportunity, investors and governments have often sought to make deals directly with one another. This approach may make sense on paper – from a formal, legal perspective, governments still own most of the land in Africa.[1] However, this approach fails to account for the fact that many people without formal rights have customary rights to the land, which in some cases they have owned for generations, and the fact that many countries are undergoing land reform processes to recognize community land rights. Failure to consult with local communities – the unrecognized counterparty in these deals – means that many of the investment projects agreed to in the wake of the financial crisis are now mired in conflict and making considerable losses.

The financial problems created by tenure disputes have become cautionary tales for companies and investors who see opportunity, but don't necessarily have the capacity to engage local

[1] Rights and Resources Initiative. 2015. Who Owns the World's Land? Available at: http://www.rightsandresources.org/wp-content/uploads/GlobalBaseline_web.pdf

people. This synthesis report examines the ways that increased understanding of operational risks and growing public scrutiny have created greater awareness of tenure issues among private sector actors. Companies and investors are becoming more discerning about these issues. They are paying more attention to tenure policy and the ability of governments to facilitate effective dialogue with local peoples, as well as to their compliance with high international standards. They are also increasing their ability to manage tenure risk so they can deal with the complexities of African operating environments.

However, many companies and investors with low reputational exposure and accountability have yet to recognize the value of effective local engagement. Domestic companies in emerging markets, for example, are often complicit in tenure abuses that are damaging for local areas and, ultimately, for their bottom lines. These actors need more relevant guidance from international brands, CSOs and donors to recognize that there is a business case for high standards on tenure. They will then need further support to implement these changes to their business model.

Tenure Risk in Africa: Key Findings

This paper provides the top-line results of a comparative analysis of tenure issues and summarizes discrete investigations into the impact these issues have on investment in East, West, and Southern Africa.[2] Despite distinct differences between regions, common trends are emerging as collective understanding and management of tenure issues improves.

We emphasize that more must be done to embed high standards across land investment, particularly in the case of less exposed, domestic actors. In particular, we highlight the deficit in service providers capable of forging productive dialogues between private actors and local peoples.

Financial Impacts of Dispute

Tenure disputes in Africa are prevalent and our research shows that they are more likely to be financially significant than in other parts of the world. 53% of disputes in the Americas, Asia, and Oceania faced materially significant stoppages. However, 69% of the recent African cases

[2] The analysis is based upon original research into 32 recent cases of tenure dispute spread equally across the three sub-regions. Cases were coded for a number of factors according to a methodology developed for the IAN Case Study Database, which we use for comparisons with the rest of the world. This quantitative analysis was supported by qualitative desk-based research into the nature, causes, and effects of the disputes; field work to speak to disputants in key cases; and interviews with leading land tenure experts from industry, academia, and independent researchers. The results were provided in three papers on East, West, and Southern Africa as well as an additional paper on General Trends. This work is synthesized in this document.

IAN is a risk and due diligence platform developed by TMP Systems. Its current beta release covers “tenure risk” and has two complementary tools: IAN Risk, a database which uses high-resolution geospatial data to generate a profile of a site, area, or supply chain; and IAN Diligence, which provides practical, implementation-ready processes that help companies and investors to counter tenure risk at each stage of the project lifecycle based on a business-oriented analysis of hundreds of problematic case studies in emerging and frontier markets (the IAN Case Study Database).

we looked at experienced moderate or lengthy work stoppages caused by either direct or legal action by local peoples.

In East and Southern Africa, the proportion is as high as 75%. Tenure risk is therefore a materially significant factor that should be integrated into mainstream risk assessment processes for land-based investments in Africa.

Drivers of Dispute

The most significant driver of dispute across Africa was displacement, which was the primary cause of dispute in 63% of cases. This underlines the problem of local peoples' rights being ignored in land deals. Companies and investors must recognize that local communities are likely to fight to protect their lands, and that this will interfere with the stability of their projects and ultimately their cash flows.

Our research also suggests that disagreements over compensation, or lack thereof, is a significant driver of dispute in Africa. Compensation issues are a primary driver of dispute in 19% of cases, compared to a global average of 8%. Differences over compensation causes more disputes in Eastern and Western Africa than anywhere else in the world. Even in these regions, however, compensation was the cause of a minority of conflicts, playing a much less significant role than many in the business world might predict.

Most disputes are driven by factors like displacement, environmental damage, and cultural abuse. Companies should therefore adopt an operational rather than a financial approach to managing tenure risk. Direct local engagement --which allows a company to understand local interests, concerns, and points of disagreement -- is a necessary condition of this approach.

Regional Comparison: East, West and Southern Africa

Case study analysis underlined distinct trends in each of the key sub-regions. Most noticeably, different commodities dominate in different regions. In West Africa, most of the recent disputes involve palm oil; in Southern Africa, sugar is the key agricultural commodity but mining remains a significant driver of tenure dispute; in East Africa, a larger number of tenure disputes are related to energy and public infrastructure projects.

Disputes also seem to follow slightly different pathways: in West Africa, media campaigns appear to be a key tool; in East Africa, lawsuits are much more prevalent; while in Southern Africa, disputes are more likely to involve direct action and violence. Each region contains disputes of every type, but the prevalent trends are clear.

Features of Operating Environments with High Tenure Risk

We found that population pressure around disputes sites was considerably higher in Africa—particularly West Africa—than in the rest of the world. The average population count for the areas surrounding the dispute sites in Africa was more than twice that of the global average

(816,547 people within a 50 kilometer radius compared to 319,426). For West Africa, the average was over 1 million people.

This contradicts a common assumption voiced by companies and investors, which is that there is more land for expansion of oil palm plantations in West Africa than in more saturated Southeast Asian markets. It also indicates that companies are not using free and publicly available information on population in their diligence processes.

Our analysis of conflict sites in Africa also found a high level of water risk. Water risk is a key factor for many investors in Africa, particularly for thirsty activities like sugar production and mining. But the connection of these issues to tenure rights needs more investigation and emphasis. It seems that in many instances, low access to clean drinking water, or to be specific reasonable and safe water distribution infrastructure, is a key driver of water risk even in areas where the natural supply of water is high. In other words risk may derive more from economic than physical water scarcity.

Our assessment of data on social welfare and land use reinforces the hypothesis that tenure disputes are much more common in remote areas with relatively low levels of economic development that are underserved by public infrastructure. For example, over 50 percent of the population in the areas where disputes occurred were deprived in terms of access to electricity and improved sanitation. In Southern Africa, nearly twice as many people near dispute sites were deprived of access to basic infrastructure compared to the rest of the sub-region.

In addition, we found that the average distance of our cases from national borders was just 61 kilometers. This proximity in large countries suggests that border regions are conducive to conflict over tenure, perhaps because they typically exhibit low levels of governance and accountability.

Regional Summaries

Intra-regional differences aside, the sub-regions and sectors we looked at provide a broad story of financial and reputational problems driving improving practice and growing recognition of the value of local engagement, at least among international actors. For further detail on these issues, please see the discrete regional reports, which can be found at the following link: rightsandresources.org/risk-conflict-to-peace-prosperity/.

In the palm oil sector in West Africa, a trend of operational and reputational problems for groups like Bolloré became an issue for the sector as a whole. Leading companies like Olam have improved their practices on tenure and local engagement, and there are signs that these lessons are percolating through to other sectors these companies work in, like rubber. However, more work will be needed to encourage high performance in less exposed actors, including domestic players. Many local palm oil companies in West Africa, for example, continue to be complicit in tenure abuse.

In the sugar sector in Southern Africa, a number of major buyers and producers who dominate supply chains are keen to meet commitments over land tenure, as well as associated issues like deforestation. This has driven improvements in the social and environmental performance of plantations. It has also led to increased traceability in previously opaque supplier models, as upstream brands look to do more to verify their performance on tenure at the producer level. Support from the public sector and CSOs will be required to ensure traceability, which would remove incentives for international companies to entrench the plantation model and for domestic actors to engage in tenure rights abuse.

In East Africa, the power sector has become much more sensitive to tenure issues. This is evident in the high standards set for geothermal projects in Kenya, as well as improvements in the wind sector following considerable problems. Tenure-related issues are also becoming more influential in public infrastructure development. These dynamics are combining to create significant pressure on governments for macro-level improvements in tenure policy and practice.

However, there are signs that some high-level decisions over key pieces of regional infrastructure are being made on questionable premises. For example, the preference for Tanzania over Kenya for recent rail and pipeline projects may be based on the conception that land is easier to clear in Tanzania because the government owns it. However, the cases profiled in our research suggest that this emphasis on government ownership enabling rapid development is misplaced. Indeed, these cases suggest that a careful and consultative approach can be key to efficient projects.

Across East, West, and Southern Africa, awareness of tenure risk is growing among companies, investors, and governments. As tenure becomes more significant in risk assessment and due diligence, the private sector is becoming more discerning about tenure policy and its enforcement as a way to assess the reliability of host governments as a counterparty. Host governments will benefit from recognizing and responding to this trend, particularly by providing more accurate information and by improving that capacity to facilitate open dialogue between stakeholders.

Guidance and Implementation

Growing awareness of tenure risk is encouraging, but there still appears to be a widespread lack of understanding about how to address it. Leading companies are increasingly drawing upon available guidance material, such as the Interlaken Group’s Land and Forest Rights Guide, the New Alliance Due Diligence Framework, and the IAN toolkits. These tools have been developed to operationalize the Food and Agriculture Organization of the United Nations’ (FAO) Voluntary Guidelines on Responsible Governance of Land Tenure (VGGTs) and assist with tenure due diligence.

Many of these companies have also developed robust corporate codes for tenure issues, particularly where they are involved in large investments like mines or plantations. In addition, some companies refer to commodity-specific standards and guidelines, such as the Roundtable on Sustainable Palm Oil or the Bonsucro Production Standard. For investors, the touchstone is still the International Finance Corporation's (IFC) Performance Standards, though there is interest among leading investors and companies, as well as donors, in creating or highlighting alignment between these codes.

Although we found broad support for available guidance and for the development of tools like the Interlaken Group's Guide and IAN, there are evidently two key issues that must be addressed in further work. First, documented examples of successful implementation of tools is necessary for their uptake by the mainstream. The lack of such evidence may even prevent corporate-wide application of some of the guidance for large but less reputationally exposed companies.

Second, and as a related issue, the guidance is typically perceived by the private sector as too high level. It needs to be adapted to the country-level so it can be linked to specific market and user requirements. According to our consultation process as well as our observation of cases, this contextualization will be vital if we expect domestic actors to achieve high standards on tenure. This becomes doubly problematic if international actors feel they are at a competitive disadvantage because of their adherence to tenure guidelines.

Taking high-level guidance to the country level is feasible, but will require extensive multi-stakeholder engagement. In the meantime, efforts to improve policy environments are vital. Similarly, concerted efforts will be required to address the deficit in quality service providers for tenure issues that was raised by a large number of experts interviewed.

At the domestic, and to a lesser extent international level, capacity building efforts are required to develop providers for key services related to tenure, including consultation, title mapping, grievance resolution, and benefit sharing. But work will also be needed to connect companies and investors to reliable service providers who can help them improve their performance on tenure at a reasonable cost.

Direct Lines of Communication

In all regions, particularly in Southern Africa, it is hard to overemphasize the problems related to expectations management. This operates on a number of levels through deal making and project development:

1) **Government – Company/Investor:** Governments regularly make promises they can't deliver, or provide misinformation. The most common example of this is the claim to have thousands or millions of hectares of land available and unencumbered. Similarly, governments often suggest that they can facilitate effective dialogue or resettlement processes when they lack the capacity and in many cases the inclination to do so. This is intended to encourage investment, but any such clear-cut claims should be treated with

suspicion. As awareness of tenure issues grows, this failure in accuracy is increasingly likely to deter investment.

2) **Company/Government – Communities:** Some companies and governments have shown a willingness to win consent, or at least soften opposition, by providing misinformation or failing to correct misconceptions. The clearest example of this is job creation, since many major investments in land are now highly mechanized and therefore create relatively little employment. These actions will often exacerbate the reaction when the truth becomes clear. Just as importantly, they can permanently damage the trust local peoples have for the company. Projects are much more likely to run smoothly if local perceptions are aligned with actual impacts, both positive and negative.

3) **Company – Investor:** Companies will often try to avoid providing investors with the full story. They may even suppress tenure risk completely and claim to have social license before they have an agreement with local people. As investors apply increasing diligence on land rights issues, this practice becomes more risky for the companies involved. There is now greater pressure to adhere to reporting frameworks like the Global Reporting Initiative (GRI) and to improve key diligence materials like impact assessments.

The problems facing host governments are often described primarily as capacity problems. But one of the most revealing findings of this research was that high capacity governments like Australia and Canada also struggle to facilitate the kind of direct engagement required to provide accurate and up-to-date information for social and tenure diligence.

We are not suggesting that capacity is insignificant, particularly in Africa where many governments need help with basic functions like cadastral management as well as more intricate problems like effective benefit sharing. Governments in Africa clearly need assistance with policy design and enforcement as well as economic planning. But misconceptions of basic facts around tenure --such as the availability of land, the value of good agreements, and the significance of effective engagement processes -- may be just as important.

Many of the issues discussed through this paper can only be addressed by providing direct lines of communication between key stakeholder groups, and particularly between the companies and investors backing a project and the people affected by it. Government, companies, investors, and CSOs that are effective in facilitating these direct lines of communication are likely to experience greater stability in their operations as well as improved reputations if they achieve a robust social license to operate.