Land Tenure Risk: Why it Matters for Companies, Investors, and Communities

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Two important new reports focus on land tenure conflicts between companies and communities.

In September, the Rights and Resources Initiative released a report entitled, "Global Capital, Local Concessions: A Data-Driven Examination of Land Tenure Risk and Industrial Concessions in Emerging Market Economies." The report, drafted by the Munden Project, attempts to quantify the percentage of company land concessions that overlap community (particularly indigenous) claims, referring to this overlap as "land tenure risk."

Using quantitative analysis of GIS data, the authors found that 31% of all commercial land in fifteen emerging economies overlapped documented community land claims, or three of every ten concessions. Given that many community land claims are not even documented, these numbers probably under-account for the extent of the problem. In short, the potential for land disputes abounds.

Given that national constitutions and courts may protect such traditional land rights — even if governments do not when awarding concessions — such lands are the source of legal and operational risks. The report highlights the economic losses companies have suffered when communities have engaged in direct action to halt projects that they believed were on their traditional land. The authors emphasize the need for companies, investors, and insurance companies to factor the cost of land-related conflict into their valuation models.

The report specifically explores steps that investors could take to better quantify the risk related to land tenure when investing in large-scale projects. Specifically, the report suggests that investors in a given concession examine:

- The extent to which the concession and local land claims overlap;
- The national context, including:
  - the degree of corruption in land grants;
  - the extent to which the legal system protects land rights of traditional users;
  - the frequency of legal land disputes;
  - the frequency of violent disputes over land; and
  - the frequency of overlapping claims at the national level.

The report also suggests that investors examine company operational policies on community engagement, noting that such policies should not simply rely on government assurances or the transfer of formal legal title, but rather provide a means to resolve the land claims of traditional land users.

In early October, Oxfam America released a report entitled “Sugar Rush” focused on conflicts over land tenure. This report focuses on the land acquisition of the agricultural sector, particularly sugar producers. Oxfam alleges that sugar producers sometimes displace traditional owners from their land with no or inadequate compensation, thus negatively affecting an array of human rights.

Oxfam calls on consumer-facing companies that use sugar — such as Coca-Cola, PepsiCo, and Associated British Foods — to require their suppliers to acquire land by obtaining the free, prior, informed consent of the land’s traditional users. Oxfam indicates that such consumer-facing companies should identify the sources of their sugar, including the location in which it was grown. Oxfam also argues that companies should adopt policies of no tolerance for land grabs, and should urge governments to prevent land grabs.

Taken together, these two reports reflect the fact that questions as to the propriety of land acquisition are more important than ever. If trends hold steady, the percentage of arable land compared to the world’s population will continue to decline, increasing land tenure risk. Investors, in addition to civil society, will place increasing pressure on companies to demonstrate that they or their suppliers acquired their land through the free, prior, informed consent of the traditional users of the land.

In this context, companies and investors should consider the following:

- Land tenure risk is significant in emerging economies;
- Conflicts over land can delay projects for years and may result in project cancellation; and
- Companies need to better account for and effectively manage the risk of such conflicts.

In particular, companies should not simply rely on government assurances that they have clean title. Even if such title stands up in court (and it may not), companies potentially face years of tension or open conflict with neighboring communities. They also could be considered to be complicit in human rights abuses related to population displacement. Ultimately, companies should seek to engage directly with potentially affected traditional land users to negotiate for access to land, and should consider adopting a policy on free, prior, and informed consent.