Friends of the Earth

The Importance of Land Rights for Investors in Agribusiness

Within the field of sustainable development, there is no concern more fundamental than the governance and management of land and natural resources. Yet institutional investors with significant holdings in emerging markets securities often fail to account for the material risks and benefits of properly incorporating land tenure and customary land rights into due diligence practices.

The United Nations' Food and Agriculture Organization defines land tenure as "the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land."[1] This can be understood as the systems of governance, management, ownership and access that individuals and communities employ over land that is the source of their livelihood and culture.

While investors in the Global North are more familiar with statutory property rights that are generally based on direct purchase of land by individuals or corporate entities, in much of the world – including the areas of rapid agro-commodity expansion in the Global South – land tenure systems are often defined by customs predating Western law and are often collective rather than individual.[2] Importantly, as stated by the Munden Project, "the absence of formalized legal entitlement does not mean that land is 'empty' or unclaimed. In almost all parts of the developing world one finds traditional systems of land management, often called 'customary tenure'. Customary users of land – such as Indigenous Peoples – commonly understand their property rights without reference to a legal structure."[3]

When communities' land rights are disregarded and companies or investors have not received communities' free, prior and informed consent (FPIC) to operate on their customary lands, intense land conflicts may result that can delay, derail or halt projects, which in turn carries financial risks.

Land Tenure Risks and a Social License to Operate

The significance of secure community land rights can be seen through both a positive and negative lens. While governments provide businesses with the legal licenses to operate, this process does not necessarily take into account the existing customary rights and legitimate claims of communities who use and inhabit the land being granted. As one study states, "a concession agreement in and of itself will not guarantee the ability to operate. Even if concessions provide the right from a legal point of view, these are frequently challenged where there is tension between a company and the local population."[4]

When communities have secure rights over their traditional lands and natural resources and these rights are respected, they are able to genuinely consent to projects on their lands, providing a social license for company operations. Additionally, free, prior, informed consent allows communities to become willing partners in economic development initiatives fostered by foreign investors. Without this social license, however, investors run the increased risk of land conflicts, which bring significant material risks.

One study found that "unresolved conflicts over land tenure significantly augment the financial risks for companies in infrastructure, mining, agriculture and forestry. By themselves, delays caused by land tenure problems can inflate a project's expenditures by an order of magnitude – and in some cases these losses have even been great enough to endanger the future of the corporate parent itself."[5]

The Materiality of Land Tenure Risks

A growing body of literature indicates that social and land-related conflict can pose significant material risks to investors as well as to local government and communities. A 2014 study that surveyed timber, palm oil, mining, oil, gas and agriculture concessions in eight countries found that 93 to 99 percent of concessions across sectors and countries were inhabited by communities who claimed some rights to the land and the resources found there.[6]

Land conflicts between companies and local communities can cause operational delays and violations of human rights, and can lead to "stranded assets risk" when the land in question cannot be developed as hoped, thereby reducing growth and impacting investment value.[7] A 2017 study into the monetary costs of social conflict on five palm oil plantations in Indonesia found 174 instances of conflict, with the tangible cost of conflict reaching as high as $2.5 million. The largest direct costs were due to disrupted plantation operations and diversion of staff time. Furthermore, the study found indirect costs between $60,000 and $9 million related to social conflict from "conflict recurrence or escalation; reputational loss; and risk of violence to property and people."[8]

Another study found that "two-thirds of all disputes between investors and communities in Africa occur when communities are displaced from land. Acquiring disputed land can be expensive, time-consuming, and damaging to a company's reputation."[9] Additionally, a separate study found that "companies ignoring pre-existing or customary local land rights in their acquisition process experienced financial damage ranging from operating costs increased by as much as 29 times to outright abandonment of operations."[10]

While some investors may conduct human rights due diligence and Environmental, Social and Governance (ESG) risk management as part of their regular business activities, these practices are rare among mainstream investment firms. Some of the primary approaches to preventing social conflict are not generally understood or incorporated by investors despite increasing recognition of their primacy. One core example is the recognition of communities' rights to free, prior informed consent, as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples[11] and affirmed through the FAO Voluntary Guidelines on the Responsible Governance of Tenure. Incorporating tools that examine existing land tenure systems, respect communities' customary land rights and require companies to seek communities' free, prior and informed consent during land acquisition processes are concrete ways to mitigate land tenure risk.

The Case of Golden Veroleum Liberia

In August 2010, Golden Veroleum Liberia signed an agricultural concession agreement with the government of Liberia covering 350,000 hectares, or approximately 2.3 percent of the country's land mass. The land indicated in the concession agreement is densely forested, rich in biodiversity and customarily owned and used by rural communities.[12]

Since GVL commenced operations, the company and its primary investor Golden Agri-Resources

Golden Veroleum Liberia, Jacksonville, Sinoe County, Liberia. Credit: Gaurav Madan have faced consistent allegations of human rights violations, environmental degradation and disregard for communities' land rights. This includes destruction of sacred sites, pollution of drinking water sources and continued development on disputed lands. In 2015, a riot erupted on the plantation, which resulted in severe repression and generated long-lasting tension. In 2018, GVL was found to be engaged in ongoing destruction of high conservation value forests, including fragile chimpanzee habitat[13] – a failure of governance that might have been avoided if local communities had been involved in decision-making.

After years of civil society complaints filed with the Roundtable on Sustainable Palm Oil, the sustainability certification body for the industry, the RSPO found GVL in violation of a number of its principles and issued multiple stop-work orders. Subsequently, in July 2018, GVL left the RSPO – an event which will likely have financial repercussions for commercial clients of GVL's parent company GAR, many of whom have commitments to sustainable palm oil sourcing.

Within Liberia, the GVL case has become an object lesson on the need to formally secure Liberians' land rights. Advocates for the country's Land Rights Act (which was recently approved by the country's legislature) believe its passage will help provide communities with equal footing with companies and investors, ensure sustainable investment and provide land tenure security for economic growth.

Community Land Rights and Climate Change Mitigation

The recognition of communities' land and natural resource rights is an essential strategy to reducing carbon emissions and mitigating the effects of climate change.[14] In a 2016 study, the World Resources Institute found that in territories where Indigenous Peoples held titles to their land, deforestation rates were two to three times lower than in areas with similar forests.[15] WRI estimated that the total climate change benefits of providing secure property rights to Indigenous Peoples' territories in these three countries were somewhere between $25 billion and $34 billion – the equivalent of taking as many as 12 million cars off the roads for a year.

In the Bolivian Amazon, the rates of deforestation in community-owned and managed forests are six times lower than in areas not managed by communities, including officially designated protected areas. In the Brazilian Amazon they are 11 times lower. In the Guatemalan Petén they are 20 times lower. And in the Mexican Yucatan – 350 times lower.[16] In sum, securing Indigenous Peoples' and

Forests cleared by Golden Veroleum Libeia for palm oil plantation in Sinoe County, Liberia. Credit: Gaurav Madan.

communities' land rights is a low-cost approach to slowing deforestation, reducing emissions and ensuring sustainable investment.

The Role of Due Diligence in Mitigating Investment Risks

The U.N. Guiding Principles on Business and Human Rights argues that, while governments have a duty to protect human rights, businesses (including financial firms) have a clear duty to respect human rights, including land rights. Similarly, the Organization for Economic Cooperation and Development asserts that financial sector actors have a duty to minimize and mitigate human rights impacts[17] through continuous and ongoing due diligence.[18] Thus, investors should incorporate due diligence and risk management processes that explicitly require investee companies to respect communities' land rights and secure communities' free, prior and informed consent before financing operations. A failure by investors to incorporate land rights into risk management strategies can contribute to social conflict, deforestation and biodiversity loss and undermine commitments to climate change mitigation consistent with the Paris Agreement and the Sustainable Development Goals.

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