Executive Summary

Communities as Counterparties:

Preliminary Review of Concessions and Conflict in Emerging and Frontier Market Concessions

Prepared for the Rights and Resources Initiative

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From a business perspective, the risk posed by conflicts between concession operators and local populations in emerging or frontier markets concerns more than just companies with ground-level operations. It also interests investors. Grounded in an ongoing examination of case studies, this analysis describes the overarching patterns of conflict between companies and local communities in emerging and frontier market concessions. Identifying those patterns is the first step to establishing best practices for managing the risk.

INTRODUCTION

In emerging or frontier markets (EFMs), a significant portion of land is designated for commercial use via concession agreements. These agreements are the legal framework for economic activity in EFMs across many sectors: oil and gas, mining, agriculture, and the like.

As we have noted previously,[1] property rights in many EFMs are dysfunctional to the point that ownership of land can be granted to an operator without the tens of thousands of people who live or depend on that land knowing about it. Generally tied to their land for many generations, these people have little interest in moving to urban areas and are practically impossible to relocate.

Nor is the presence of people on land designated for concessions unusual: in a parallel analysis we conducted, we found that there were people present in 93-99% of concession territories,[2] and that their presence was more or less uniform across sectors and countries. Table 1 below illustrates the statistical improbability of "clean" (i.e. uninhabited) concession areas.

Table 1: Presence of populations in concession areas in eight countries

Country	Concession	Area (km^2)	Total number of concessions minus offshore (polygon)	% of concessions with people in it (Landscan)	% of concessions with people in it (SEDAC)
Brazil	forest	59,130.02	13	100%	100%
	oil and gas	239,832.62	115	96%	100%
Cambodia	palm oil, rubber, cassava, sugar	21,700.00	225	99%	100%
	mining	3,944.64	15	93%	100%
Colombia	mining	53,181.67	9,464	97%	99%
	oil	155,903.06	229	100%	98%
Indonesia	palm oil	155,245.18	1,845	99%	98%
	logging	302,505.81	557	96%	98%
	wood fiber	128,829.03	570	98%	100%
Liberia	agriculture	6,911.93	15	100%	100%
	logging	32,758.16	222	100%	100%
Mozambique	agriculture (biofuel)	30,585.04	374	100%	100%
Peru	forest	79,351.73	105	98%	100%
	mining	269,894.01	59,159	92%	100%
	oil and gas	203,258.17	70	97%	97%
Philippines	timber	5,052.82	22	100%	100%
	mining	14,867.64	35	100%	100%

[1] The Financial Risks of Insecure Land Tenure: An Investment View. Available at: http://www.rightsandresources.org/documents/files/doc_5715.pdf [Accessed 2nd October 2014].

[2] The different figures derive from different population datasets (93% in the Landscan dataset, and 99% using SEDAC data). More details on the data and our methodology for this analysis can be found in Appendix A.

In some countries, the proportion of land allocated for commercial use through concession agreements is extensive. Over 40% of land in Peru was allocated for forest, mining, and oil and gas concessions. In Liberia, the use of around 35% of land was conceded for agriculture and timber production. And in Indonesia, 30% of the entire country's land is currently part of some sort of concession.[3]

The granting of concessions without the knowledge or approval of people directly affected by them is obviously a human rights issue of grave concern. But it may also have a real financial impact, and this impact concerns more than just those companies with ground-level operations.

For example, an increasing number of private equity funds invest directly in concessionaires in EFMs. In parallel, asset managers in equities have an indirect interest via shareholdings in companies who depend on supply from these concessions to make their products (i.e. those making consumer goods, food/beverage products, etc.).

Corporate social responsibility may be effective in capturing the interest of companies, particularly when their brands have value. By contrast, investors tend to be more interested in "the availability of relevant and reliable data which reflects actual issues and potential risks."[4] This is not to say they are hard-hearted, simply that they tend to rely more on numbers to make decisions.

Given the extreme rarity of uninhabited concessions, investors should assume some degree of interaction between a concessionaire and whoever lives within (or in many cases, close to) the concession territory. The financial costs of getting this interaction wrong can be significant – a recent major study of business costs resulting from conflict found, for example, that "company-community conflict in one country cost one project US$100 million per year in stoppages."[5] On some occasions, for example where local communities have legally recognized rights to land, infringements of those rights can lead to complete shutdowns of operations.[6]

As we have examined this problem, we have come to think of local populations as a kind of "unrecognized counterparty" to concession agreements. We found that communities often used legal mechanisms to resolve their grievances with concessionaires. This suggests that local

[3] See Appendix A for the complete breakdown.

[4] Release from the Norges Bank Investment Management (NBIM). Available at: http://www.nbim.no/globalassets/documents/submissions/2013/20131217_rainforestfoundationnorway-2.pdf [Accessed 2nd October 2014].

[5] Franks, D.M., Davis, R., Bebbington, A.J., Ali, S.H., Kemp, D. and Scurrah, M., 2014, "Conflict translates environmental and social risk into business costs", *Proceedings of the National Academy of Sciences of the United States of America*, Vol. 111 No 21. Available at: http://www.pnas.org/content/111/21/7576 [Accessed 10th October 2014].

[6] This occurred in Jesus, Pedro Galvez and Cachachi in Peru: http://basedatos.conflictosmineros.net/ocmal_db/?page=conflicto&id=184 [Accessed 2nd October 2014].

communities' rights over an area have appreciable legal weight, even if government bodies and concessionaires haven't attributed them much import in the terms of their agreements.

Our analysis suggests that 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. We examined 60 examples of conflict in mining and timber concessions (two of the most heavily regulated sectors we looked at) to assess the legality of the concessions themselves, and only found four instances where there was clear evidence of irregularities in the concession or licensing process.

The abundance of conflicts between communities and companies in instances where a concession has been granted suggests that what is written on paper does not necessarily represent the full reality of operating a concession.

Just like other important counterparties – a government agency or an engineering firm hired to construct a mine – the community's consent and cooperation must be properly secured before a concession can operate effectively. Recognizing communities as counterparties is one way of thinking through what is required to properly secure consent.

This view begs two questions: first, is it worth the money, time, and risk involved in dealing with these local counterparties? And second, what best practices can we define to reduce the expense and risk of the process?

We are beginning a multi-year effort to answer these questions.[7] As a first step, this paper shares some emerging evidence from a review of 100 cases in ten different EFMs to establish overarching patterns of conflict around concessions.[8] Our findings are admittedly subjective, but they suggest some interesting conclusions for investors, namely:

1. More resources should be devoted to managing risks at the inception stage of operating a new concession, or very early in the expansion of a concession.

[7] The sectors to be covered are mining, agriculture, infrastructure, energy, and forestry. We will begin by assessing the specific land-tenure related challenges of each sector in detail. Based on these, we will devise due diligence and risk management frameworks tailored to each sector, suggesting best practices that should be adopted by companies seeking to minimize the risk and the damage caused by conflicts between themselves and local communities over land and resource rights.

[8] The number of cases for each country was the following: Brazil (33), Peru (19), Mozambique (10), Colombia (8), the Philippines (10), South Africa (6), Indonesia (4), Liberia (4), India (3), and Cambodia (3). Cases were selected starting where more information was publicly available. For further details on our methodology in selecting case studies, please refer to Appendix B. The full list of cases can be found in Appendix C.

We should point out that this is a first step in plugging a significant information gap. We suspect the gap exists because this has been viewed as a human rights (and not an investment) issue, which means it has only been examined by researchers who think primarily in social, legal, or political terms. Worse still, their jobs have been made very difficult by uncertain – and frankly, insufficient – public funding.

2. Risks resulting from conflict with local populations can be managed by maintaining strong environmental standards.
3. More time and resources should be given to the identification and development of relationships with reliable local counterparties.

We welcome feedback from those interested in this topic, which can be directed to us via email at landtenurerisk@mundenproject.com.