



Latin American countries have found some interesting strategies for creating agreements between individuals, communities and private companies about accessing land for extractive industries.

# FROM EXPROPRIATION TO SOCIAL LICENCE: ACCESSING LAND FOR EXTRACTIVE INDUSTRIES



## SUMMARY

Gaining access to land with mineral and hydrocarbon resources can present a significant challenge. Experiences from Latin America show that direct land expropriation has been abandoned in favour of social licence, meaning securing community or individual agreement about the use of land for extractive activities. This Brief describes the key factors that have enabled this transformation, and provides examples to illustrate the main social licence strategies in use in Latin America. Finally, the Brief identifies key lessons from policy and practice that will be useful for other regions facing similar challenges.

## KEY CHALLENGE: DEVELOPING SUSTAINABLE POLICIES FOR ACCESSING LAND USED IN EXTRACTIVE PROJECTS

Obtaining permission to extract minerals or hydrocarbons from privately-held land is a necessary first step for developing new extractive industry projects. Mining concessions give companies the right to extract resources, but since these resources are sub-surface, companies first need access to the surface land, or superficial land, that lies on top of the resources they hope to extract.

In Latin America, mineral-rich lands are often in the hands of rural farmers and indigenous communities that depend on the territory for their livelihoods. Since extractive projects almost always significantly alter or even degrade the landscape, thereby limiting the possibilities for future land-use by the local communities, obtaining permission to use the land for new extractive projects, and working with communities to decide how land should be used, is no easy task.



## KEY DEFINITIONS

**Expropriation:** The action of the state taking possession of a citizen’s private property, or revoking a citizen’s property rights without the owner’s consent. The property is taken for government use, or delegated to a third party to use for public or civic purposes, or in some cases, for economic development.

**Social Licence:** Social licence exists from the moment a project has the ongoing approval from the local community and other stakeholders who are directly impacted. A social licence is granted on a site-specific basis. The bigger the social, economic and environmental effects of a project, the more difficult it becomes to obtain social licence.

“You don’t get your social licence by going to a government ministry and making an application or simply paying a fee... It requires far more than money to truly become part of the communities in which you operate.” - Pierre Lassonde, President of Newmont Mining Corporation.

**Social Damage:** The anticipated and unanticipated negative social consequences of planned interventions, including policies, programmes, plans and projects.

Land expropriation to develop extractive industry projects has been a problem not only in Latin America, but in Africa and Asia as well. In countries like Ghana and Mozambique, prevailing land acquisition mechanisms confer upon the state an absolute power to appropriate land for any public purpose.<sup>1</sup> As a result, conflicts related to land expropriation and displacement of local people are common.

## LATIN AMERICA’S POLICY SHIFT: FROM EXPROPRIATION TO SOCIAL LICENCE

Latin America has undergone a clear policy shift, moving away from expropriation and towards obtaining social licence to gain access to land. Examining the experience of various countries in Latin America shows how states, private firms and civil society groups have used five main strategies to improve policies and practices for gaining permission to access land for extractive projects. These are:

1. Establish clear property rights
2. Consultation mechanisms
3. Land purchase or other financial compensation
4. Compensation for social or environmental impacts
5. Returning the land to communities upon termination of the project

### 1. Property Rights

Because many extractive projects are located in remote areas where property rights are not well defined, states are developing processes to establish collective or individual land rights in rural areas. The goal is to avoid competing claims of legal land ownership. Since land expropriation is increasingly viewed as an unacceptable policy option, establishing defined land rights is crucial for developing new extractive projects.

Establishing land rights for rural citizens takes place in several ways. One common method is for state agencies to

### EL CERREJÓN: A POLICY OF THE PAST

El Cerrejón mine, located in La Guajira, Colombia, is the largest open pit coal mine in the world, covering an area of some 69,000 hectares. From the beginning of the project, mining operations were linked to expropriation of land and forced displacement of local populations, which radically disrupted the culture and livelihoods of different groups in the area. In September 1981, Media Luna, the ancestral territory of the Wayúu community, was expropriated to build the Cerrejón mine port. In 1991, 350 Wayúu people were resettled back on 1000 hectares of Media Luna. But the discontent persisted among Wayúu people and other local communities because they considered that some of the land appropriated by the company was not actually put to productive use. The project has met with public resistance since the beginning, undermining new mining initiatives in the region.

Source : Idárraga, F., Muñoz, D., Vélez, H. 2010. *Conflictos Socioambientales por la Extracción Minera en Colombia: Casos de Inversión Británica* (Socio-environmental Conflicts due to Mining Extraction in Colombia: Cases of British Investment). CENSAT Agua Viva, Bogotá.

<sup>1</sup> Van Criekinge, J. 2008. *Africa Conflicts and Mining-Induced Displacement*. *The Broken Rifle*, 77.





give property titles to local populations. This serves to formalise land rights and provides a mechanism for resolving disputes. These titles can be granted to individuals or to collectives, as may be more appropriate in the case of farming or indigenous

communities. With these titles, local communities acquire the necessary legal protection to start negotiating with extractive industries for land access to sub-surface resources (see text box).

### PERU: GRANTING LAND TITLES TO FACILITATE LAND TRANSACTIONS

In 1992, the *Proyecto Especial de Titulación de Tierras y Catastro Rural* (Special Project on Land Titling and Rural Cadastre - PETT) was created in Peru with the goal of completing and updating a legal rural cadastre. Through this project, the state granted land titles to individuals, peasant farmers and native communities in rural areas. The largest mining projects, such as [Antamina](#), have supported the PETT project in their areas of operation in order to facilitate the land transaction process.

Sources: *Reglamento de Organización y Funciones del Proyecto Especial de Titulación de Tierras y Catastro Rural* (Regulation of Organisation and Functions of the Special Project on Land Titling and Rural Cadastre), DS n° 064-2000-AG. Perú. Damonte, G. 2011. *Construyendo Territorios. Narrativas Territoriales Aymaras Contemporáneas* (Building Territories. Contemporary Aymara Land Narratives). CLACSO, GRADE, and Fundación Tierra, Lima.

Another way in which land ownership is established in rural areas is through state conferral of special territorial rights to indigenous communities. This provides these communities with a powerful tool to negotiate territorial access to resources, and even enables them to reject, or at least delay, some controversial projects (see text box).

In both cases it is the state which grants and supports individual or community land rights, which private companies working in the country must respect.

### BOLIVIA: INDIGENOUS LAND RIGHTS TO NEGOTIATE LAND ACCESS

Bolivia's 1994 Constitution recognised collective indigenous ownership forms, called *Tierras Comunitarias de Origen* (TOCs - Native Community Land), and the 2009 Constitution recognises indigenous territorial rights.<sup>2</sup> In September 1996, the indigenous Guarani people, requested that the state grant TOC titles to their communities in the regions of Chuquisaca, Santa Cruz and Tarija. In July 1997, the request was granted, thus, twelve areas, including the Itika Guasu territory, made up of some 216,002 hectares, were recognised as TOCs. This status resulted not only in the titling of 38.4 % of Guarani territory, but also resulted in some US\$13.5 million in compensation paid by Repsol Bolivia after they expanded production in Guarani lands without prior consultation or negotiation.

Sources: Fundación Tierra. 2010. Informe 2010. *Territorios Indígena Originario Campesinos en Bolivia. Entre la Loma Santa y la Pachamama*; Guzmán G. (ed). 2006. *Las Piezas del Conflicto* (Parts of the Conflict). Fundación UNIR, La Paz; Quispe, A. 17 January 2012. [Bolivia: Petrolera Repsol Compensó a Pueblo Guarani con US\\$ 13.5M](#). *La Razón, La Paz*.

## 2. Consultation Mechanisms

States, private companies and civil society groups have developed consultation mechanisms that include the disclosure of planned corporate land transactions. The governments of some countries, such as Bolivia, Ecuador and Peru, have established participatory mechanisms for each stage of the project, namely exploration, exploitation and closure. Additionally, the governments of Colombia, Bolivia and Peru, among others, have enacted special consultation laws for indigenous peoples. In the private sector, some more socially responsible companies have followed these consultation procedures, sometimes even improving on them by following their own corporate social responsibility rules, which incorporate non-mandatory consultation procedures. The Bolivian example below (see text box) demonstrates the potential results of these consultation strategies.


### SAN CRISTÓBAL: A STEP FORWARD IN CONSULTATION

The San Cristobal mine is located in the province of Nor Lipez, in the Bolivian department of Potosí. In early 1994, MINTEC, a leading Bolivian mining consultancy company, acquired a mining concession, as well as the community's permission to access the land.

The company gained legitimacy within the community by providing employment opportunities and facilitating a transparent exchange of information. The community was involved in making decisions

<sup>2</sup>In 2009, the TOC were renamed *Territorios Indígena Originario Campesinos* (TIOCs - Native Indigenous Peasant Territories).





about site selection, housing design, infrastructure for the resettlement process, eligibility and benefits packages. These positive steps were noticed in the neighbouring community of Culpina K, which later consented to allow MINTEC to access their land as well.

In November 1998, the community of San Cristobal was relocated to the new town site which had been constructed by the mining company. In 2006, after a period of poor communication between the community and the new mine owner during the construction phase, the mine management recognised the risks created by the deterioration of its relationship with the community. In response, the company decided to re-establish connections with the community through the formation of a participatory process for designing and managing development programmes.

Source: Aranibar, A. M., Chaparro, E., Salgado, R. 2011. [La Industria Extractiva en América Latina y El Caribe y su Relación con las Minorías Étnicas](#) (*Extractive Industry in Latin America and the Caribbean and its Relationship with Ethnic Minorities*). Serie Recursos Naturales e Infraestructura 156. ECLAC, Santiago de Chile.

### 3. Financial Compensation

Once land rights have been established, companies look for the best way to gain permission to access land. The most common ways are either to purchase the land outright or to establish a compensation arrangement in exchange for access to the land.

In Latin America a key challenge in purchasing or leasing land for extractive projects is determining how land values are calculated. When real estate markets are present and functioning properly, market prices can be accepted as correctly reflecting land values. But when local real estate markets are non-existent or poorly developed, it becomes more difficult to determine the actual land value. In such cases, either the state can regulate the transactions, following specific procedures for land valuation, or local communities and private companies can work together to arrive at a mutual agreement. Whatever the strategy, land price is a sensitive and disputable issue.

Companies and private firms in Latin America have compensated communities for access to their land in several ways:

#### **Purchasing**

In Peru, the Antamina mining company decided to buy all the land for its proposed extractive site from individual or collective owners at a price negotiated with the community. For this transaction the parties agreed on a fixed price per hectare. This proved to be a good arrangement; unlike other projects where companies had not reached similar agreements, few people have complained about the purchasing process. For example, when the Yanacocha Company in Peru decided to negotiate purchase prices on an individual basis, the first individuals to sell their land received much less money per hectare than later sellers, who were in a stronger position to negotiate. As a result, those who sold their land first felt that they had been defrauded by the company.

While purchasing is by far the most common method of financial compensation for land access, two other strategies have also been used:

#### **Local Employment for Land**

In 2006, Petrobras and the Government of the province of Santa Cruz, Argentina, signed an agreement to jointly exploit the Glencross and Estancia Chiripá oil deposits. Petrobras promised to hire 80% of its workforce in Santa Cruz.<sup>3</sup>

#### **Company Shares for Land**

In 2003, Xstrata, along with public officials and civil society members from the province of Espinar, Peru, signed the *Convenio Marco por el Desarrollo de Espinar y Tintaya* (Framework Agreement for the Development of Espinar and Tintaya). The agreement established a 3% payment of company profits before tax, or a minimum amount equivalent to US\$ 1.5 million annually in compensation. This agreement took place two years before the national mining royalty system was created.<sup>4</sup>

### 4. Compensating For Negative Impacts

When unforeseen social and environmental impacts occur, states and responsible companies have sometimes

<sup>3</sup> 11 August 2006. [Santa Cruz y Petrobras Explorarán Yacimientos](#). Diario *El Argentino*, Buenos Aires.

<sup>4</sup> OXFAM America. 2003. [Case 3A – Tintaya](#); Pascó-Font, A. et al. 2001. [Peru: Learning By Doing](#). Mc Mahon, G., Felix, R. (eds). *Larges Mines and the Community. Socioeconomic and Environmental Effects in Latin America, Canada, and Spain*. IDRC, World Bank, Washington, DC



established compensatory mechanisms for those who have been impacted. The most successful compensation efforts have been achieved by incorporating all local stakeholders into the consultation process – in particular former landowners – who were directly impacted by the extractive operations. Community development strategies

and compensatory mechanisms are then designed with input from all stakeholders, often resulting in initiatives like education and health support programmes and local capacity development. The goal of these policies is to promote the health and well-being of host communities, while at the same time securing long-term access to mineral resources (see text box).

### CORPORATE SOCIAL RESPONSIBILITY TO FACILITATE LAND TRANSACTIONS

Escondida Mining, located in the Atacama Desert in Chile, operates the largest copper mine in the world. In 1997, the Escondida Mining Foundation (EMF) was created as an autonomous, non-profit organisation. EMF manages a variety of educational projects, including teacher training, school management improvement, scholarship programmes and English classes. It also conducts training and technical assistance for small businesses and has supported the creation of a manufacturing business that produces textiles using traditional techniques and materials employed by indigenous peoples from the area.

While these initiatives are well received by the community, others argue that the company's investment in the EMF is insignificant compared with the large profits it receives, or with the value of the fresh water rights it has acquired.

Sources: [Website of the Escondida Mining Foundation](#); Budds, J. 2009. The 1981 Water Code. [The Impacts of Private Tradable Water Rights on Peasant and Indigenous Communities](#). In: Alexander, W. (ed). *Lost in the Long Transition. Struggles for Social justice in Neoliberal Chile*. Lexington Books, Maryland.

## 5. Land Return at Project Closure

Finally, an interesting practice followed by some companies is committing to return land back to communities upon the closure of the extraction project. An important issue here is making sure that the land being returned can serve some productive purpose for future owners, and is not rendered useless by pollution and other damage.

An example of this practice is the case of Barrick's *El Indio*

mine in Chile. Since 2002, the company has been carrying out mine closure activities in response to a voluntary agreement with the community. The most outstanding activity of this process is the rehabilitation of the Elqui Valley and the Malo River. However, there are media reports that, despite the rehabilitation process, the Malo River is still contaminated with thousands of tons of cyanide and arsenic, threatening the health of local communities and agricultural practices in the area.<sup>5</sup>

<sup>5</sup> [Barrick webpage](#); 20 April 2011. [Barrick Mentira Irresponsable – El compromiso con la destrucción](#). *Defensaterritorios.org*, Barcelona.

# CONTEXTUAL FACTORS

# ENABLING LATIN AMERICA'S POLICY SHIFT



Three important processes have been taking place in Latin America that have proved critical for developing policy and practice improvements with respect to land access for extractive industries.

First, Latin America's democratisation process that has taken place over the last several decades has facilitated the emergence of NGOs, civil society groups and a more open media. Together, these independent organisations have been responsible for bringing the concerns of local peoples, with respect to extractive industry projects, to light nationally and internationally. This, in turn, made possible the creation of dialogue mechanisms designed to deal with land access issues. Conflicts over land access have become more visible and the decision-making processes are no longer closed, since debates are more transparent and participatory, making lasting resolutions more likely.

Second, institutional improvements in the state have facilitated more proactive involvement in extractive affairs. First, states have bolstered their public sectors by creating offices responsible for

environmental and social affairs to better deal with land access conflicts. The creation of ombudsman offices in many Latin American countries is a good example of this process. Second, states have also given more rights to land owners, in particular to indigenous peoples, who now have more tools and skills at their disposal to deal with extractive initiatives. Overall, clear rules, participatory procedures and state safeguards for vulnerable and indigenous people are at the heart of public policy improvements.

Third, many firms have gradually improved their social and environmental standards, particularly those companies that are interested in improving their record in these areas. Despite the fact that Corporate Social Responsibility (CSR) rules have not become mainstream in the industry, there are still a number of large extractive firms who have incorporated positive CSR measures into their Latin American operations. Companies are learning that the more socially and environmentally responsible their practices are, the more likely they are to have their projects approved.

## LESSONS LEARNED

- 1 Because land expropriation is no longer seen as a viable option, government-driven processes to establish collective or individual land rights in rural areas are a crucial first step for developing new extractive projects.
- 2 Consultation and participatory mechanisms that include the disclosure of planned corporate land transactions seem to be working, but need further development by governments, companies and civil society. States should better define the roles and responsibilities of public and corporate actors with regard to the participatory processes, as well as assume a more proactive role in relation to supervision and monitoring.
- 3 In the absence of developed real estate markets, it is important that the state regulate land transactions. In the absence of state involvement, civil society can support local communities when negotiating with private firms over land values.
- 4 When states and responsible corporations develop compensatory mechanisms to address land degradation and social and environmental impacts, reliable, long-term access to resources is more likely.
- 5 While land remediation is often enforced in extractive industry regulations, giving
- 6 back land freely to its former owners or local communities is a socially responsible corporate practice that can help to improve the image of a company, and the extractive industry sector in general. There is no single recipe for acquiring a social licence. While the practices listed above have served to reduce conflict and bring long-term stability to extractives projects, they still need further development to become standard state and corporate practices and to better address the many challenges they face.

### CONTACT [GRADE](#)

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