

# Legal empowerment for local resource control



Lorenzo Cotula

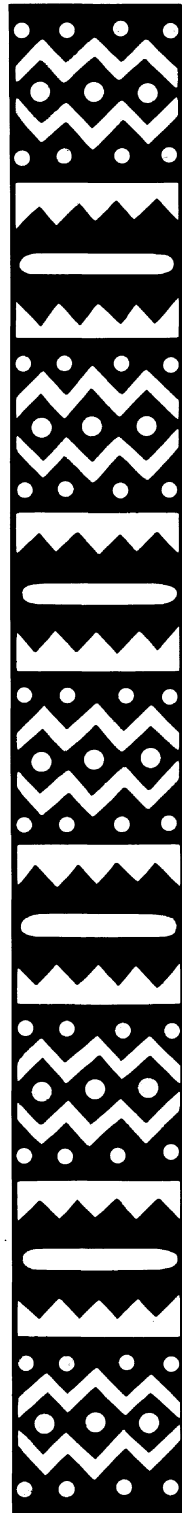
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# **Legal empowerment for local resource control**

**Securing local resource rights within  
foreign investment projects in Africa**

Lorenzo Cotula



# LEGAL EMPOWERMENT FOR LOCAL RESOURCE CONTROL

Lorenzo Cotula  
2007

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*Cover photos: Top left: Boys of Bongo, Bolgatanga, Ghana cultivating soya beans. © Sean Sprague / stillpictures; Top right: A non-literate woman from a pastoral zone participating in a training session in Pulaar, a local language spoken in Senegal. © Amadou Diol / ARED; Bottom: Logging truck in virgin forest, Congo. © BIOS Gunther Michel / stillpictures.*

We would like to pay our respects to Amadou Diol of ARED, Senegal who sadly passed away in June 2007. Amadou took the photos of the ARED training sessions. He was an exceptional trainer known well for his sense of humour and communication skills. He was highly regarded by his colleagues and by participants on ARED training courses and will be greatly missed.

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## ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
ACHR	American Convention on Human Rights
APIX	<i>Agence Nationale Chargée de la Promotion de l'Investissement et des Grands Travaux</i> , Senegal
ARED	Associates in Research and Education for Development, Senegal
BIT	Bilateral Investment Treaty
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEPIL	Centre for Public Interest Law, Ghana
COTCO	Cameroon Oil Transportation Company, Cameroon
CTV	<i>Centro Terra Viva</i> , Mozambique
ECHR	European Convention on Human Rights
EIA	Environmental Impact Assessment
FAO	Food and Agriculture Organization of the UN
FDI	Foreign Direct Investment
FIELD	Foundation for International Environmental Law and Development
GERSDA	<i>Groupe d'Etude et de Recherche en Sociologie et Droit Appliqués</i> , Mali
IBRD	International Bank for Reconstruction and Development
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

ICSID	International Centre for the Settlement of Investment Disputes
IDA	International Development Association
IED Afrique	<i>Innovations, Environnement et Développement en Afrique, Senegal</i>
IFC	International Finance Corporation
IIED	International Institute for Environment and Development
ILO	International Labour Organisation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organisation
PRA	Participatory Rural Appraisal
SIA	Social Impact Assessment
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme

“Laws were made that the stronger might not in all things have his own way”.  
(Ovid, 43 BC – 17 AD)

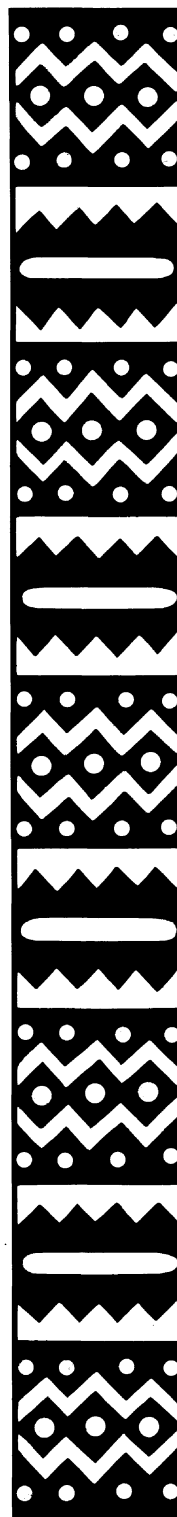
“Laws, like the spider's webs, catch the flies and let the hawk go free”.  
(Proverb, based on a statement first attributed to Solon, VII-VI c. BC)





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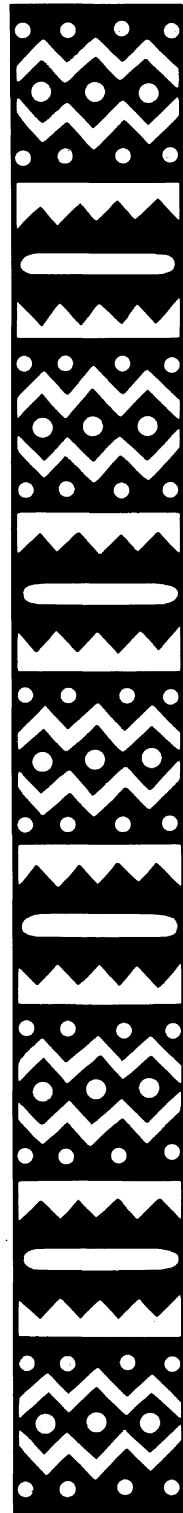
## EXECUTIVE SUMMARY

Across rural Africa, most people depend on natural resources such as land, water and forests. Natural resources are also an important sector for foreign investment, for instance in the agribusiness, forestry, tourism, mining and petroleum industries. In recent years, many African states have made policy efforts to attract foreign investment, and several countries have experienced substantial increases in investment flows.

Overlaps between the resource claims of foreign investors and of local groups raise the challenge of maximising the benefits of foreign investment to local resource users, and of minimising costs. Secure local resource rights are key to doing this.

Where local resource rights are weak, investment projects may undermine the ability of local groups to access the resources on which they depend. This may take the form of expropriation or otherwise loss of resource access without adequate compensation; or of environmental degradation such as the pollution of water and other resources essential to the local population. Weakness of local resource rights may also undermine the position of local resource users in their negotiations with incoming investors; and therefore limit their ability to benefit from investment projects through negotiated benefit-sharing arrangements.

Weakness of local resource rights may be compounded by the significant power asymmetries characterising relations between foreign investors, the host state and local resource users affected by investment projects. In addition, in much of Africa the law – whether national or international – tends to provide greater protection to the legal entitlements of foreign investors than to those of local resource users. This reinforces powers asymmetries and increases the vulnerability of local resource rights.



***Legal empowerment can increase local resource control...***

Appropriate legal arrangements and adequate capacity to use them can help local resource users in Africa have greater control over the natural resources on which they depend. This is at the heart of the concept of “legal empowerment”, which has been defined as the use of legal processes to improve disadvantaged populations’ control over their lives.

Legal empowerment to increase local resource control requires action at different levels, including:

- Law reform to establish or sharpen arrangements (“legal tools”) that strengthen the protection of local resource rights, or that provide greater say in decision-making processes affecting these rights;
- Strategies, approaches and support materials to help local groups make the most of the opportunities offered by the law (“para-legal tools”), including legal literacy training, legal assistance, individual and public interest litigation, and representation and advocacy.

***... through tailored legal tools that secure local resource rights...***

In recent years, new legal tools to secure local resource rights have been developed in several African countries – including tools for vesting greater resource rights with local users; for building local consultation and benefit sharing into project design and implementation; and for minimising and compensating negative impacts on local resource rights.

Tools to devolve greater resource rights to “communities” (legally constructed as private entities or as local government bodies) give local users greater control over resources. However, such devolution has in many cases fallen short of transferring land ownership (with devolved rights mostly relating to use and management), is typically qualified (with the central state often retaining the power to withdraw or curtail devolved rights), and has been even more limited in the case of valuable resources located on or below the land.

Reform to strengthen the content of local resource rights (from precarious to unconditioned, long-term use rights through to ownership), to link strengthening of land rights to greater control over valuable resources (from timber to minerals), to establish accessible processes for documenting local resource rights, and to legally protect resource rights irrespective of documentation can increase the effectiveness of these tools.

In the area of local consultation and benefit sharing, innovative legislation in some countries requires investors to consult local resource users, and provides a

framework for such users to negotiate benefit-sharing agreements with incoming investors. Yet, conceptual limitations (e.g. with consultation being viewed as a one-off exercise, while investment projects may last several decades), legal ambiguities (e.g. as to the legal value of benefit-sharing agreements) and practical constraints (e.g. as to major disparities in negotiating power, and as to risks of elite capture within local “communities”) all affect the materialisation of the benefits that this legislation can bring.

Reform to tighten legal requirements on who is to be consulted, on the object, scope, quality and timing of the consultation, and on the extent to which the views expressed by the consulted must be taken on board; to make benefit-sharing arrangements a condition for the allocation of resource rights to investors; and to strengthen the legal value of benefit-sharing agreements and of related monitoring and sanctioning mechanisms can increase the effectiveness of these tools.

Tools to minimise and compensate the negative impacts of investment projects on local resource rights (from takings to pollution) have also been developed, including social impact assessment, safeguards concerning takings of property, and remedies for damage to property (injunctions, restoration and compensation). However, experience with social impact assessment remains limited (both in law and in practice); full compensation for loss or compression of land rights is not yet a legal requirement in several countries; and legal and extra-legal factors affect the ability of local resource users to obtain redress for damage to property.

Tightening legal requirements for social impact assessments; establishing robust and justiciable public purpose requirements for takings; requiring compensation not only for loss of ownership but also for impairment of other types of resource rights (such as use rights based on “customary” norms); establishing clear and fair standards of valuation and compensation, and fair and transparent procedures, including grievance mechanisms; and removing legal constraints to damage-to-property remedies (e.g. standing, burden of proof, limited availability of injunctions) would increase the effectiveness of these tools.

*... and appropriate para-legal tools that build local capacity to make use of the law*

The fact that legal tools for securing local resource rights are enshrined in the legal system does not necessarily mean that local resource users are in a position to use them and benefit from them. Given the widespread lack of legal awareness, the significant economic, geographic, linguistic and cultural barriers constraining access to courts and the other important constraints on legal access in much of rural Africa, legislative measures must be accompanied by sustained investment in building local capacity to engage with the legal system. This requires developing

and implementing para-legal tools to help local resource users engage more effectively with the opportunities offered by the law.

On the ground, recent years have witnessed substantial innovation in delivering legal services to local groups. This ranges from new approaches for providing legal literacy training, and for raising legal awareness through rural radios; to participatory methodologies for registering collective land rights and for supporting local resource users in their negotiations with government officials and foreign investors; and to strategies combining use of legal processes with advocacy through media engagement and social mobilisation.

There is a need to support on-the-ground efforts to develop innovative ways to use the law as a tool for empowerment; and to promote exchange of experience among innovators as well as wider dissemination, so as to facilitate mutual learning and wider replication.

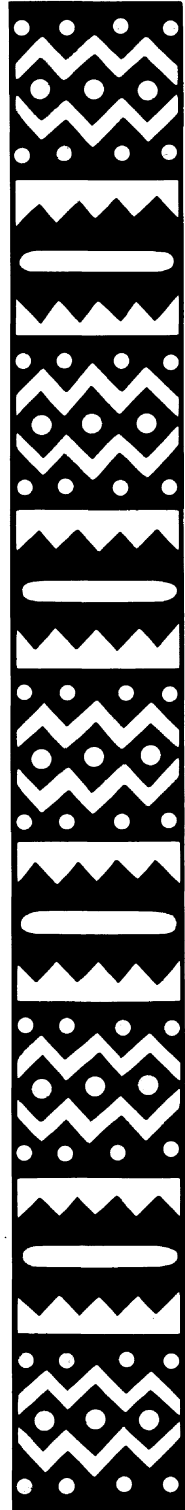
### *Conclusion*

In the implementation of many foreign investment projects in Africa, asymmetries in power relations and in legal entitlements between local groups, foreign investors and the host state make local resource rights vulnerable to negative impacts such as uncompensated expropriation or environmental degradation. But where appropriate conditions exist, tailored legal tools accompanied by adequate capacity-building efforts can secure local resource rights, address power asymmetries and help local groups affected by investment projects gain greater control over their lives (“legal empowerment”).

Empowerment may occur through opening to negotiation decisions previously closed to it, or through providing local groups with assets they can use in their negotiations with outside actors. Different legal (and para-legal) tools are mutually reinforcing, as their cumulative empowerment potential is likely to be greater than the sum of that ascribable to each individual tool. For instance, requirements to negotiate benefit-sharing arrangements are likely to be more effective where complemented by tools vesting clear and secure rights with local resource users, and by tools ensuring fair compensation standards and processes for takings should benefit-sharing negotiations fail.

Promoting legal empowerment to increase local resource control requires efforts to identify, sharpen and replicate effective legal tools; to build the capacity of local groups better to use those tools; and to facilitate lesson sharing and exchange of experience on how best to undertake these activities.

# I. INTRODUCTION





## **1.1. OVERVIEW**

### **1.1.1. The issue**

Across rural Africa, most people depend on natural resources such as land, water and forests. Natural resources are also an important sector for foreign investment, for instance in the agribusiness, forestry, tourism, mining and petroleum industries. In recent years, several African countries have experienced increasing investment flows, particularly in the natural resource sector. For countries with an abundance of natural resources, but lacking in the capital and technology to exploit them, investors with the necessary capital and technology may be an attractive option.

Overlaps between the resource claims of foreign investors and of local groups raise the challenge of maximising the benefits of foreign investment projects to local resource users, and of minimising costs. Secure local resource rights are key to doing this.

Where local resource rights are weak, natural resource-based investment projects may undermine the ability of local groups to access the resources on which they depend. This may take the form of expropriation or otherwise loss of resource access without adequate compensation; or of environmental degradation such as the pollution of water and other resources essential to the local population.

Loss of rights and resource degradation have major negative impacts on the livelihoods of local resource users, impacts that are differentiated along wealth, status, gender, age and other lines. Weakness of local resource rights may also undermine the negotiating power of local resource users in their negotiations with incoming investors; and therefore limit their ability to benefit from investment projects through negotiated benefit-sharing arrangements.

These problems are often compounded by the weak legal protection of local resource rights, and by limited opportunities for local resource users to influence decision-making affecting their rights. They are also reinforced by strong power asymmetries between foreign investors, the host state and local resource users.

Appropriate legal arrangements and adequate capacity to use them can help local resource users in Africa have greater control over the natural resources on which they depend. This includes more effective legal protection of local resource rights, and greater say in decision-making processes affecting these rights.

Over the past decade, a wave of law reforms in several African countries has, on paper, given resource users greater control over natural resources – for instance, through legal recognition of “customary” resource rights, community land registration, compulsory consultation processes, and opportunities for participation built into environmental impact assessment and other processes.

Yet these reform efforts remain incomplete, and in a number of countries much remains to be done to bring the national legal framework in line with international standards. Even where appropriate legislation is in place, major shortcomings often affect its implementation – for instance, most people living in rural areas are not aware of the rights created by legislation, and do not have the skills and the resources to enforce them.

### **1.1.2. The study**

This study draws lessons from experience with using legal processes to secure local resource rights within the context of foreign investment projects in Africa. The study is not about the extent to which foreign investment contributes to sustainable development, nor about whether African countries should or should not adopt measures to attract foreign investment; rather, it takes foreign investment flows as a given, and explores ways in which benefits for the local population can be maximised and costs minimised.<sup>1</sup> In so doing, the study tackles two interlinked issues.

First, it develops a conceptual framework for addressing these issues, through defining key concepts such as legal empowerment, analysing power relations in foreign investment projects, and comparing the protection of natural resource rights for foreign investors and for local resource users (Part II). This analysis reveals asymmetries in power relations as well as in the protection of resource rights at international, national and

---

**1. Although it is recognised that the terms and conditions applicable to investment projects may affect investment flows.**

local levels. Overall, the law tends to accord greater protection to some interests (foreign investment) than to others (local resource users). These asymmetries in the law broadly reflect power asymmetries between foreign investors, local resource users, the host state and other actors involved in or affected by the investment project.

Secondly, the study analyses the legal tools that have been used in several African countries to secure the resource rights of local groups affected by foreign investment projects, and to address power asymmetries between local resource users and foreign investors (Part III). This includes vesting greater resource rights with local groups (e.g. through community land registration or decentralisation); tightening requirements for minimising and compensating negative impacts on local resource rights (e.g. through more demanding rules on compensation for taking or damage to property); and strengthening local consultation and benefit-sharing requirements.

The conclusion (Part IV) analyses the way and extent to which these legal tools can tackle the asymmetries both in power and in the law identified above; and outlines ways for taking forward the key findings of this study.

The study was prepared for the “Legal tools for community empowerment” project – a collaborative project to empower local resource users affected by investment projects in Africa (see Box 1). During the scoping phase of that project, research was undertaken to identify innovative approaches for securing local resource rights, and to assess the extent to which procedural rights (e.g. access to information, public participation in decision-making) can enable local resource users to have greater say in decision-making. The research aimed to develop a coherent conceptual framework for project activities, and to take stock of experience with using legal processes as a means for empowerment. It was to pave the way to the in-country work of the “Legal tools” project, and to generate knowledge for wider dissemination. This publication summarises key findings of the research on securing local resource rights (the findings of the research on procedural rights are summarised in a separate report).

The study is likely to be of interest to development lawyers, development practitioners working at a macro-planning level, and researchers. As for development practitioners, the study sets out the case for taking law seriously as a tool for empowerment and positive change. As for

### **BOX 1. THE “LEGAL TOOLS” PROJECT**

“Legal tools for community empowerment” is a collaborative project coordinated by the International Institute for Environment and Development (IIED), and implemented in partnership with the Foundation for International Environmental Law and Development (FIELD); with the *Groupe d’Etude et de Recherche en Sociologie et Droit Appliqué* (GERSDA), in Mali; with the Centre for Public Interest Law (CEPIL) and the Faculty of Law of the University Ghana, in Ghana; with *Centro Terra Viva* (CTV), in Mozambique; and with *Innovations Environnement et Développement en Afrique* (IED Afrique), in Senegal.

The project develops innovative tools that local communities in Africa can use in order to have greater control over the natural resources on which they depend – particularly within the context of large-scale investment projects. Through combinations of action research, training and policy engagement, and of legal expertise and participatory approaches, the project:

- identifies, improves and promotes innovative legal approaches to secure local resource rights (e.g. community land registration, mandatory community consultation) and to increase access to decision-making (e.g. access to information legislation, mechanisms for public participation);
- designs, tests and implements in selected sites a range of cost-effective and replicable materials and approaches to build local capacity to use the opportunities offered by the legal system.

More information on this project is available at <http://www.iied.org/NR/drylands/themes/legalempowerment.html>.

development lawyers, it argues that designing and implementing legal tools that deliver that positive change depends not only on sound legal thinking, but also on tackling power relations and other social, cultural, political and economic factors that affect the way the law operates. As for researchers, the study contributes to ongoing debates on the relationship between law and power, through developing a conceptual framework and through linking this to the analysis of law and power issues within foreign investment projects in Africa. The findings of this study are also likely to be of interest to law-makers in Africa – although it is expected that this audience will be better reached through a forthcoming briefing note based on this study.

## 1.2. DEFINITIONS, SCOPE AND RATIONALE

**Legal empowerment** is defined here as “the use of legal services and other development activities to increase disadvantaged populations’ control over their lives” (Golub, 2005:304). The concept has recently gained currency partly as a result of the establishment of the UN-hosted Commission on the Legal Empowerment of the Poor. Different people have used this concept in different ways, however. The meaning of legal empowerment as used in this study is further discussed below (section 2.1).

This study focuses on one area of legal empowerment – on using legal processes to increase local users’ control over the resources on which they depend, particularly land but also subsoil and surface resources. This focus reflects the importance of access to land and natural resources for the livelihoods of much of the rural population in sub-Saharan Africa. Increasing **local resource control** entails improving security of resource rights and strengthening leverage in decision-making affecting those rights. **Security of rights** refers to the extent to which resource users can be confident that they will not be arbitrarily deprived of their resource rights and/or the benefits deriving from these. This confidence includes both objective elements (nature, content, clarity, duration and enforceability of rights) and subjective elements (the resource users’ perception of the security of their rights). **Leverage in decision-making** refers to the extent to which resource users can influence decision-making processes that affect their resource rights – ranging from no say to consultation through to veto power.

The study analyses the legal and para-legal tools that can be used to increase local resource control. **Legal tools** are institutional arrangements that are designed to respond to specific needs or problems (hence “tools”), and that draw legitimacy from their being anchored to the legal system (e.g. legislation or case law; hence “legal”). Relevant tools examined here include for instance community land registration, mandatory community consultation, negotiated benefit-sharing agreements, social impact assessment, compensation for takings and remedies for damage to property (injunctions, restoration and compensation). **Para-legal tools** are materials and activities to build local capacity in order to enable poorer and more marginalised groups to use those legal tools more effectively; and, more

<b>TABLE 1. FOREIGN INVESTMENT IN AFRICA – SELECTED COUNTRIES</b>									
	FDI Flows (millions of dollars)		FDI Stock (millions of dollars)			FDI Stock as percentage of GDP (%)			
	1980-5 (annual average) (1)	1990 (1)	2005 (2)	1980 (3)	1990 (2)	2005 (2)	1980 (3)	1990 (2)	2005 (2)
Sub Saharan Africa	897	850	17,934	27,724	35,023	179,216	10.9	12.0	27.7
Burkina Faso	1	2	19	18	39	68	1.0	1.4	3.9
Cameroon	154	32	18	330	1044	1072	4.9	9.4	13.9
Ghana	10	15	156	229	319	2073	5.2	5.4	23.2
Kenya	26	26	21	386	668	1113	5.3	7.8	7.5
Mali	4	-1	159	16	229	915	0.9	1.7	16.1
Mozambique	1	0	108	15	42	2386	0.4	1.7	42.6
Namibia	NA	NA	349	1994	2047	2440	86.4	80.9	39.1
Niger	11	0	12	190	45	127	7.6	11.5	16.6
Nigeria	210	588	3403	2405	23,786	34,806	3.7	28.3	42.6
Senegal	9	2	54	150	258	1126	5.0	4.5	15.3
South Africa	83	-5	6379	16,519	9,207	69,372	20.5	8.2	18.5
Tanzania	8	-2	473	47	388	6029	0.8	0.1	32.9
Uganda	1	0	258		6	1830	0.9	2.2	26.8

Sources : (1) UNCTAD, 1992; (2) UNCTAD, 2006; (3) UNCTAD, 2004.

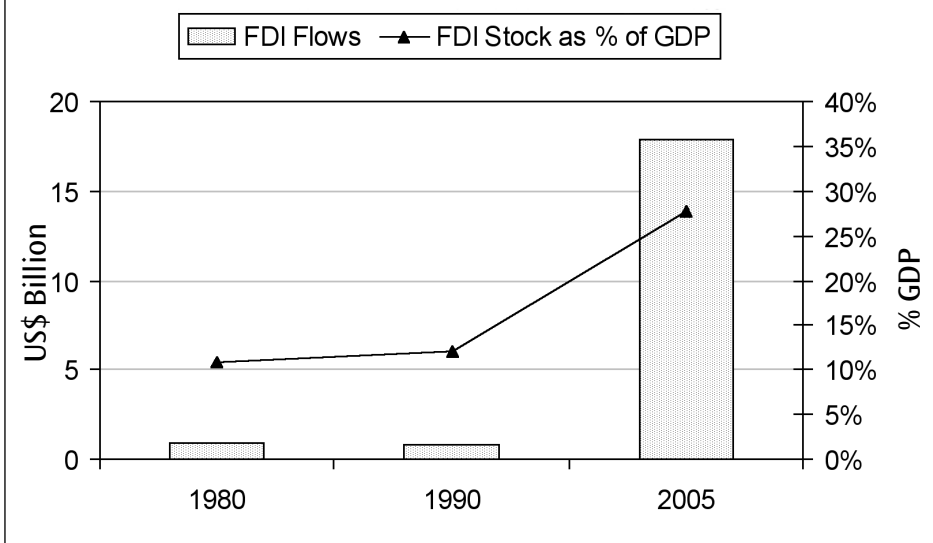
generally, the range of strategies and tactics for helping these groups make the most of the opportunities offered by the law. The concept of legal and para-legal tools is further discussed below (section 2.3).

The study tackles these issues with specific regard to foreign investment projects in Africa. **Foreign investment** is defined here following internationally recognised definitions of “foreign direct investment” (FDI). According to UNCTAD, FDI refers to investment made to acquire “a lasting interest and control” in an enterprise operating outside the economy of the investor, and with a view to having “a significant degree of influence on the management of the enterprise” (UNCTAD, 2006:293). As parent companies usually operate in other countries through subsidiaries established under the law of the host state, the term “foreign investor” includes local subsidiaries that are owned or controlled by foreign nationals.

The focus on foreign (as opposed to domestic) investment is motivated by socio-economic and policy factors on the one hand, and by legal factors on the other. As for the former, in recent years many African states have made policy efforts to attract foreign investment. A focus on foreign investment is therefore of significant policy relevance.

In addition, several African countries have experienced substantial increases in foreign investment flows and stocks (see Table 1 and Chart 1) – although to different degrees (with big shares of investment concentrated in South Africa and in countries with important petroleum and mineral resources, particularly Nigeria; see Table 1); and not to the same extent as other regions like Latin America and South-East Asia (see Table 2). Countries like Ghana, Mali, Mozambique, Senegal and Tanzania, which received limited or very limited foreign investment until the early 1990s, now host sizeable stocks of foreign investment (see Table 1 and Chart 2). And although within the global economy sub-Saharan Africa remains a marginal destination for foreign investment (as suggested by Table 2), for many African countries foreign investment is increasingly important – as indicated by substantial increases of FDI-to-GDP ratios (see Table 1 and Chart 1). While much of the literature has traditionally tackled resource access for local groups in Africa as an eminently “local” issue, this changed situation requires placing local relations within their global context. This includes tackling the specificities of securing local resource rights within the context of foreign investment projects.

**CHART 1. FOREIGN INVESTMENT IN SUB-SAHARAN AFRICA**



**TABLE 2. FOREIGN INVESTMENT IN AFRICA, COMPARED TO LATIN AMERICA AND EAST/SOUTH EAST ASIA (FDI FLOWS, MILLIONS OF DOLLARS)**

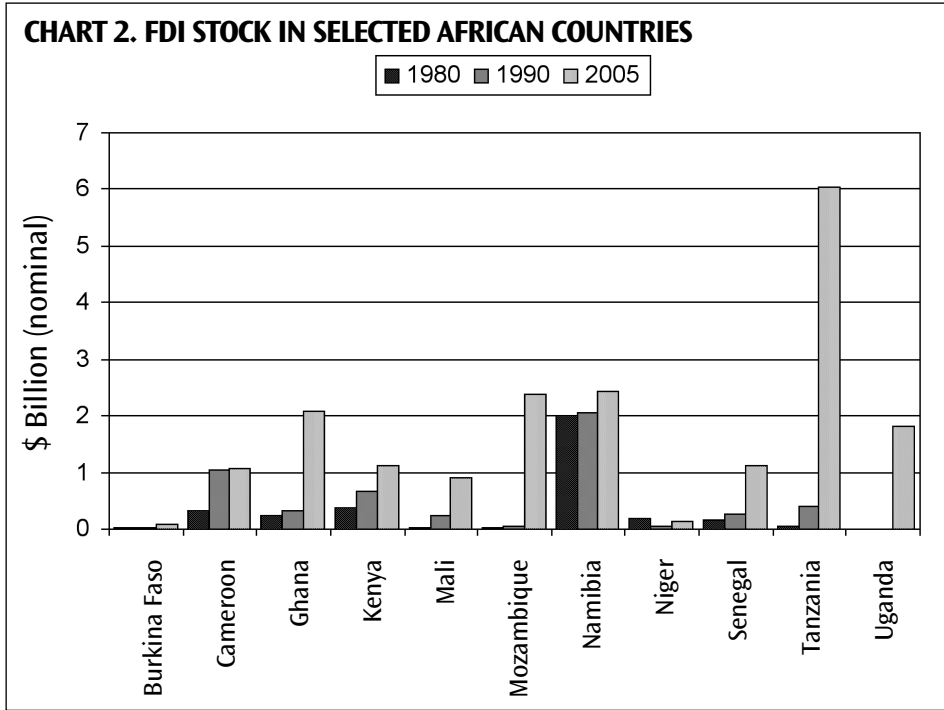
	1980-1985 (annual average) (1)	1992-1997 (annual average) (2)	2005 (3)
Sub-Saharan Africa	897	4,010	17,934
Latin America and the Caribbean	6,035	38,167	103,663
South, East and South East Asia	4,644	69,609	165,093

Source: (1) UNCTAD, 1992; (2) UNCTAD, 2004; (3) UNCTAD, 2006.

Another socio-economic factor underpinning the focus on foreign investment is the correlation between investment size and foreign participation, which tends to exist in much of sub-Saharan Africa. Due to limits affecting the internal capital market, local technological capacity, human capital and other factors, complex, large-scale projects typically involve foreign investment. This brings in economic clout, negotiating power and human skills that tend to outweigh those enjoyed by domestic players.

The focus on foreign investment is also motivated on legal grounds. Differently to domestic investment, foreign investment is regulated and protected by international economic law, including a great and growing





number of investment treaties. In several countries, it is also regulated by specific rules under domestic law. And, the presence of foreign investors is frequently associated with “internationalised” contracts with the host state (“foreign investment contracts”), and with use of international arbitration as a means to settle disputes. In this respect, the legal issues raised by foreign investment differ from those concerning domestic investment.

Within foreign investment projects, the study focuses on the **natural resource sector**, which accounts for a large share of foreign investment flows to sub-Saharan Africa (UNCTAD, 2005). This includes projects for the exploitation of natural resources such as land, timber, petroleum and minerals. Other natural resources such as fisheries and genetic resources are outside the scope of this research.

The focus on **sub-Saharan Africa** differentiates this study from much of the legal literature on foreign investment, which tends to treat “developing countries” as a rather homogenous group. This follows the recognition of the extreme diversity of “developing country” contexts – from the emerging economies of Latin America and East Asia to rich oil-producing countries in

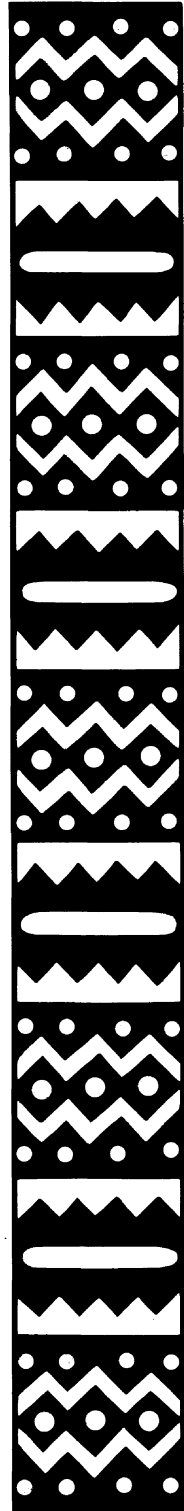


*Villagers inspect the toxic waste dumped in an abandoned gold mining pit. Local residents are concerned about the threat that the dump poses to both their health and the surrounding farmland (Ashanti region, Ghana).*

the Middle East, to sub-Saharan Africa, which includes the poorest countries in the world. Sub-Saharan African countries present great diversity in terms of culture, level of GDP, political system and legal tradition. However, they also present important commonalities in terms of history, average GDP levels compared to other regions of the world, economic development challenges, and issues concerning resource access for local resource users. Given the important specificities (legal, cultural, historical, political, etc.) differentiating Northern Africa from the rest of the continent, the focus here is on sub-Saharan Africa alone.

The study draws particularly on the legal experience of Cameroon, Ghana, Mozambique, Senegal and Tanzania. Where relevant, legislation and case law from other African countries are also analysed. This selection of countries enables comparisons of experience from different parts of Africa (West Africa: Ghana and Senegal; Central Africa: Cameroon; East Africa: Tanzania; and Southern Africa: Mozambique); and from different legal traditions (Anglophone, Francophone and Lusophone).

## II. CONCEPTS AND CONTEXT



## 2.1. POWER AND LEGAL EMPOWERMENT

Empowerment is the process whereby disadvantaged groups acquire greater control over decisions and processes affecting their lives. Legal empowerment is empowerment brought about through use of legal processes.

### 2.1.1. Power

Power is at the heart of the concept of legal empowerment as used in this study. It refers to the capacity to influence human behaviour. This capacity is crucial to exert control over decisions and processes affecting one's life.

The concept of power has been at the centre of a vast debate, which is beyond the scope of this study (for clear and accessible reviews of this debate, see Scott, 2001, and Vermeulen, 2005). Broadly speaking, there are two bodies of literature on power, which represent different ways of conceptualising it.

The first one refers to Weber's definition of power as the capacity of one actor to influence the behaviour of another. In this view, power is a capacity that actors may or may not have ("powerful" and "powerless"), that is exercised (or not) intentionally, and that is inserted in a relationship of subordination between two or more actors (between "dominant" and "subordinate" actors). Coercion, or threat of coercion, explicit or implicit, is the ultimate guarantor of compliance. This model was subsequently developed by other writers (e.g. through a reformulation in terms of capacity to alter the incentive structure to which other actors respond).

The second way of conceptualising power focuses (not so much on the actors involved in power relations but) on the way power is exercised in society. This body of thought has been much influenced by the work of Foucault. This shows that power is not a capacity in the hands of a restricted number of actors, but is diffuse within society. The most effective form of social control, according to Foucault, is not the threat or use of coercion, but the production of bodies of knowledge and truths ("discourses") which shape values and behaviour and induce self-compliance. This process is not consciously controlled by a dominant group or class, but unfolds through interactions throughout society.<sup>2</sup>

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2. Foucault's ideas owe much to earlier thinkers, particularly Gramsci and his concept of "cultural hegemony". Gramsci emphasised that dominant classes exercised power largely with the consent of the dominated, through controlling cultural formation that internalises the legitimisation of class domination in the dominated. While Gramsci saw this process as consciously controlled by the dominant class, Foucault saw power diffused throughout all groups in society.

Following Scott (2001), this study takes these two ways of conceptualising power as complementary rather than as mutually exclusive. In the real world, “concrete patterns of power combine [coercive] and persuasive influence in various ways, forming both stable and enduring structures of domination and more fluid structures of interpersonal power” (Scott, 2001:12-13). On the one hand, coercion remains an important factor in power relations. On the other, power may unfold through influence over mind frames rather than through intentional commands, and usually involves (not dichotomised relations between the “powerful” and the “powerless” but) complex interactions among multiple interests with varying degrees of influence over one another.

Within the broad concept of power, particularly relevant here is the notion of “negotiating power”. This refers to power relations within the context of negotiations among two or more different actors – for instance, negotiations among foreign investors, the host state and local resource users on the terms and conditions for an investment project and for the sharing of the costs and benefits generated by it.

Differences in power relations within society shape differences in the negotiating power of different actors. Negotiating power is also influenced by the scope and the terms and conditions of the negotiation – who and what issues are included, excluded, and/or can be added to the negotiation through negotiation; how groups involved in the negotiation define their interests, priorities and negotiation strategies; which process and timeframe are to be followed; and who decides over these issues. These elements together define the “negotiation arena” (on this concept, see Vermeulen, 2005).

In this regard, Gaventa (2007) shows how negotiation arenas may be “closed/uninvited”, where decision-makers (e.g. bureaucrats or elected representatives) negotiate decisions among themselves without involving affected stakeholders; “invited”, where decision-makers invite affected stakeholders to negotiate decisions, with varying scope (one, more or all aspects of a decision) and voice (mere consultation to full negotiation); and “claimed/created”, where space for negotiation is created through the mobilisation of uninvited actors. The nature of the negotiation arena has implications for the negotiating power of invited and uninvited actors.

Process and timeframe can also affect negotiating power. This is particularly so in contexts characterised by strong imbalances in capacity and resources,

where short timeframes would prevent action to build the capacity of less powerful actors to participate in the negotiation on a more equitable basis.

The power to decide on the terms and conditions of the negotiation process is itself a source of negotiating power if it is vested with one of the parties to the negotiation process (e.g. the host state).

Finally, negotiating power is not a zero-sum game. Strengthening the negotiating power of one stakeholder may entail redistributing power among negotiating parties, and/or strengthening the power base of that stakeholder through new opportunities for greater voice that do not necessarily detract power from the other negotiating parties.

### **2.1.2. Rule of power or power of rules?<sup>3</sup>**

The relationship between law, power and social change has been at the centre of thinking and doing for centuries. On the one hand, law is shaped by power relations – including socio-economic and political power as well as more subtle forms of power manifested through the internalisation of knowledge and values by members of society. On the other, throughout history activists, politicians and lawyers have tried to use the law as a tool to address power asymmetries.

Law-making is an inherently political process: laws are the outcome of negotiations between competing interests in society, and reflect power asymmetries between those interests. In Plato's *Republic*, Thrasymachus famously stated that "justice is nothing but the interest of the stronger", as the law reflects the interests of more powerful groups.<sup>4</sup> What is "legal" and what is "illegal", which entitlements are legally protected and which ones are not, which protected entitlements entail access to effective redress mechanisms and which ones do not – these are all decisions of legal policy that are shaped by power relations. From the spoliation of land rights brought about by the imposition of colonial law in Africa, to the patriarchal family law norms until recently or still in force in many countries, there are many examples of how the law has served the more powerful to the detriment of the weaker.

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3. This heading paraphrases expressions used by Byers (1995-1996) and Simpson (2000).

4. *Republic*, at I.338d-e. Thrasymachus' argument implies that justice equals to obeying the law. In Plato's dialogue, Thrasymachus' statement is subsequently challenged by Socrates.

Even where “progressive” legislation that seeks to address power asymmetries is adopted, inequalities in the distribution of resources, knowledge and influence affect its implementation and may frustrate its ability to pursue its stated objectives. For instance, building on fieldwork in Niger, Lund (1998) shows how powerful actors anticipate and manipulate implementation of land tenure reform, and how litigants compete to mobilise “powerful institutions” (from customary chiefs to government administration to religious authorities to political parties) in order to influence the outcome of reform-related dispute settlement. And, some argue that much progressive legislation serves to appease political pressures and channel dissent without fundamentally altering power structures.

On the other hand, where appropriate conditions are in place, “law offers opportunities for breaking the vicious circle which links poverty with powerlessness” (Kjonstad and Veit Wilson, 1997: iii-vii). This is because legal entitlements contribute to define influence in decision-making and access to valuable assets and economic opportunities. This is the essence of **legal empowerment** – a concept first developed by the work of Stephen Golub (in ADB, 2001, and Golub, 2005). Building on Golub (2005), legal empowerment is defined here as the use of legal entitlements and processes to tackle power asymmetries and help marginalised groups have greater control over the natural resources on which they depend. Thus defined, legal empowerment requires both appropriate legal arrangements and adequate capacity to use them. Its promotion may entail:

- legislative interventions that shape the nature and content of legal entitlements (who has what right over what and towards whom) in a way that favours marginalised groups; and
- efforts to provide the legal services that are necessary for marginalised groups to make effective use of those entitlements.

As for the former, history provides many examples of legislative interventions aimed to accompany shifts in power relations – from the publication of the laws of the Twelve Tables in ancient Rome<sup>5</sup> to race-related “affirmative action” legislation in the US and more recently in South Africa, to gender equality

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5. This was the outcome of decades of social struggle between patricians and plebeians, and in turn altered the balance of power between these two groups by making the law accessible to plebeians for the first time. Therefore, more than in their content, the “empowering” element of the Twelve Tables was in their publication.



provisions embodied in the constitution of many countries,<sup>6</sup> to Burkina Faso's Land Reform Act challenging the power of customary chiefs.<sup>7</sup> The success of these legislative interventions has varied considerably from context to context, depending on a range of socio-economic and political factors (on which see below, section 2.3.2). Success is also linked to the extent of the power asymmetries that these legislative interventions seek to redress – the greater the asymmetries, the more difficult the success.

Legislative efforts aimed at addressing power asymmetries are more likely to produce results when accompanied by social mobilisation to exert pressure on interest groups resisting law implementation; and by vibrant civil society organisations providing legal services to the disadvantaged groups that stand to benefit from implementation. These services range from legal literacy training to legal assistance down to public interest litigation,<sup>8</sup> and help disadvantaged groups better to make use of the new opportunities offered by the law.<sup>9</sup>

Linkages between law and power are therefore bi-directional, with law both reflecting and shaping power relations. For instance, writing on the resurgence of customary chiefs in South Africa, Oomen (2005) describes how negotiations shaped by power relations inform the work of legal institutions, on the one hand; and how legal rules (together with other sources of authority) are invoked in those negotiations and affect their outcome, on the other.

These bi-directional linkages are reflected in the classification developed by Tuori (1997), which provides a useful conceptual framework for this report. It isolates three interlinked aspects of the relationship between law and power:

- Power *on* the law: how power relations in society (from conscious political power to the cognitive, linguistic and ethical structures internalised by members of society) affect the content and implementation of the law;

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6. See e.g. article 5(l) of the Constitution of Brazil; article 1(3) of the Constitution of Burkina Faso; articles 14 and 15(1) of the Constitution of India; article 3(1) of the Constitution of Italy; article 4 of the Constitution of Mexico; article II(14) of the Constitution of the Philippines; section 9 of the Constitution of South Africa.

7. *Réorganisation agraire and foncière* of 1984, last revised in 1996.

8. As for public interest litigation in Africa, see for instance the case *ACODE v. Attorney General* in Uganda and, at the regional level, the case *SERAC v. Nigeria*, brought before the African Commission of Human and Peoples' Rights.

9. On the important role of legal services and of civil society organisations that provide them, see Golub (2005).

- Power *in* the law: power relations within the legal professions (e.g. between legislators, judges and scholars), and between legal professionals and “laymen” (e.g. between lawyers and their clients);
- Power *by* the law: how the law contributes to shape power relations – through legal entitlements and rules that create, strengthen, limit and/or legitimise power, and through legal services that enable disadvantaged groups to use their entitlements. This third aspect underpins the concept of legal empowerment.

## **2.2. FOREIGN INVESTMENT PROJECTS IN AFRICA: DIFFERENCES IN POWER, DIFFERENCES IN LAW**

### **2.2.1. Power relations in foreign investment projects**

In foreign investment projects, power (in both its coercive and persuasive dimensions) informs relations among the many actors involved. These include:

- The corporation(s) implementing the investment project (the “investor(s)”). This comprises several legal entities (e.g. the parent company based in the home country and the subsidiary incorporated in the host country), which may bear different worldviews, interests and negotiating power. The investor may exert considerable power vis-à-vis other actors such as local resource users and the host state, based on differences in skills, resources and economic clout. However, this varies considerably across sectors: for instance, in the mining and petroleum sectors, investment is tied to a particular location for longer periods, which undermines the investor’s negotiating power vis-à-vis the host state; while logging companies can more easily move their investment, which tends to strengthen their negotiating power (Filer with Sekhran, 1998). Power relations between the investor, local resource users and the host state also vary during the implementation of the investment project (see below).
- Local resource users affected by the investment project. These experience substantial power asymmetries in their relations with foreign investors and the central state (e.g. due to illiteracy, lack of resources and lack of legal awareness); but may still dispose of (legal or illegal) ways of exercising power, including through sabotage of the investor’s assets (on these aspects, see e.g. Akpan, 2005, and Filer with Sekhran, 1998). Local resource users typically include different groups that have competing interests and unequal negotiating power (along status, wealth, age, gender and other lines). These internal divisions may be exacerbated by the higher stakes brought about by the investment project, when some groups may oppose the project while others may strike deals with foreign investors and with the central state to the detriment of other local groups (see e.g. Amanor, 1999).
- The host state in which the investment takes place. The host state sets the terms and conditions of the investment project (often on the basis of

negotiations with the investor), and is represented by politicians and government officials. The negotiating power between investor and host state is shaped by imbalances in skills, money and other assets, but also by the extent to which the project is crucially tied to the host country due to location of precious resources or other factors. Bureaucratic inertia and passive resistance from government officials may frustrate the implementation of deals concluded between investors and politicians, thereby undermining the power of investors (Filer with Sekhran, 1998). The host state engages in varying relations with local resource users (from support to repression). It is composed of different structures (different ministries; state-owned companies; central, deconcentrated and decentralised agencies) that represent possibly conflicting interests (e.g. ministries responsible for petroleum operations and for the environment). It acts through individuals whose behaviour is shaped by varying combinations of official government policy and self-interest (corruption, rent-seeking, protection of vested interests).

- International financial institutions (the World Bank through its IFC and MIGA but also IBRD and IDA arms; regional development banks) and commercial lenders supporting the investment project. These may require the investor to comply with their institutional policies (e.g. on environmental and social impact assessment), thereby affecting relations between investors and local resource users. International financial institutions may also exert considerable influence on the host state because of the importance of their overall lending to the state.
- The home state where the investor's parent company is based. This may exert pressures on international financial institutions and/or on the host state (including through its official development agency and through international financial institutions), so as to affect decisions on whether the project should go ahead and under what terms.
- National elites in the host country, including government officials, domestic business and traditional elites (linked by relations ranging from confrontation to, more often, alliance or even hybridisation; Bayart, 1993). These may have vested interests in the investment project in terms of business opportunities through backward and forward linkages, of opportunities for rent-seeking and personal gain, of consolidation of in-

country power structures through mobilising external support (on this, see Bayart, 1993), and of other aspects.

- Non-governmental organisations (NGOs) scrutinising the investment project. These may undertake public campaigns against the project or for its adopting higher social and environmental standards. This may put pressure on investors and lenders as well as on the home and host states, and affect their behaviour.

These diverse actors are involved in power relations that vary widely from context to context. Such relations are not static, but evolve as a result of changing circumstances and of the unfolding of the different stages of the investment project – from negotiation to construction through to operation and decommissioning. During the negotiation phase, a host country competing with other countries to attract foreign investment may be under pressure to give out concessions to the investor. But once the bulk of the investor’s capital injection has taken place (e.g. after the construction of a pipeline), the investor is “hostage” of the host state: it depends on being able to operate the facility for sufficiently long a time and under the terms agreed in order to recover costs and gain profits; but is vulnerable to regulatory action on the part of the host state. Involvement of international financial institutions may affect the balance of power between the investor and the host state in post-construction stages, particularly where the host state is heavily dependent on financial flows from those institutions beyond the investment project.

As for relations between foreign investors and local resource users, several factors contribute to produce power asymmetries – with the former usually being in a stronger negotiating position than the latter. These factors are outlined in Table 3 (right), and include:

- Differences in the capacity to influence decision-makers and opinion formers, to mobilise “powerful” actors (such as home and host state governments, international financial institutions, and others), and to draw power from other negotiating tables;
- Differences in access to financial and other valuable resources (e.g. money, technology), as well as to knowledge (e.g. legal expertise) and skills (e.g. negotiation skills);

<b>TABLE 3. SOURCES OF POWER ASYMMETRIES</b>	
Political capital	- Influence over decision-makers and opinion formers; - Capacity to mobilise “powerful” actors (e.g. home and host state governments) and/or to draw power from other negotiating tables; - Internal cohesion/divisions.
Economic capital	- Access to financial and other valuable resources (e.g. technology).
Human capital	- Skills; - Knowledge; - Self-confidence.
Social capital	- Status; - Information asymmetries; - Contacts/relations.
Cultural capital	- Assumptions, values and attitudes internalised by the different stakeholders – e.g. ideas on the “modernity” and “backwardness” of different forms of resource use.
Project nature/ “importance”	- Extent to which the project depends on a specific location e.g. due to availability of valuable resources (e.g. minerals – “location dependency”); - Vulnerability to local activities capable of affecting the cost-benefit equilibrium of the project (e.g. sabotage); - Relative importance of the project to the investor; - Ease with which the investor can demobilise assets and move elsewhere (“asset mobility”).
Coercion	- Access to a coercive apparatus – e.g. capacity to mobilise the police or military forces of the host state to further one’s interests.

- Differences in social status, in access to information (e.g. about the existence and location of valuable subsoil resources) and in contacts and social relations (e.g. with politicians and the government administration); and
- Differences in the degree of internal cohesion, for instance where local resource users are divided in their position vis-à-vis proposed investment projects.

These factors may be reinforced by cultural aspects such as widespread beliefs and internalised assumptions concerning the “modernity” and “backwardness” of different forms of natural resource use (for instance, with pastoral use being perceived as “backward” in many contexts, while foreign investment is seen as a key element of “modernisation”).

On the other hand, factors concerning the nature of the investment project may reduce these asymmetries. Location dependency (i.e. the need for the

investor to access a specific location e.g. due to distribution of mineral or other resources) and vulnerability to local population activities capable of affecting the cost-benefit equilibrium of the investment project (e.g. sabotage, unauthorised abstractions from oil pipelines) tend to improve the negotiating power of local resource users. But where the investor can easily demobilise assets and move activities elsewhere, the negotiating power of local resource users (and of the host state, for that matter) is undermined.

The relative importance of the investment project to the investor also affects negotiating power. Broadly speaking, the more the investor has “invested” in the project (in terms of resources, time, effort, social relations, reputation, etc.) and the greater the strategic importance of the project for its overall business activities (including through linkages with other projects), then the greater the likely degree of dependency of investor on the project and the lesser its likely negotiating power vis-à-vis the host state and, possibly, local resource users.

### **2.2.2. The legal context: asymmetries in the protection of resource rights in Africa**

The natural resource rights of foreign investors and of local resource users in Africa have been tackled by separate literatures, with little or no cross-fertilisation between the two. Few if any works have compared the way in which these resource rights are legally protected – whether at local, national and international levels. This study has undertaken such analysis.

Both foreign investors and local resource users need secure resource rights. For rural people depending on natural resources, secure rights over such resources are key to supporting their livelihoods, to creating incentives for sustainable resource use and to promoting local development (for a review of the evidence on this, see Deininger, 2003). Secure property rights are also important for foreign investors, as they may affect the investor’s assessment of the risks and returns of a potential investment project (Salacuse, 2000). This is particularly so in energy and natural resource projects, “where investment is long-term, capital intensive and highly dependent on the exercise of government’s regulatory powers” (Waelde and Kolo, 2001:819).

Yet, overall, the security of resource rights is problematic for both foreign investors and local resource users in much of sub-Saharan Africa. This is due to ill-drafted and/or ill-coordinated laws, weak government capacity to enforce them, limited effectiveness and independence of the judiciary and other factors.

Within this, efforts to secure resource rights have tended to focus on foreign investment. As a result, the legal protection of resource rights tends to be differentiated: the resource rights of some are granted greater protection than those of others. This differentiation broadly reflects asymmetries in power relations between actors – with foreign investors tending to enjoy greater protection than local resource users.

*Universal principles but differentiated rules: the protection of property under international law as it applies to Africa*

At the international level, security of resource rights is influenced by the international rules on the protection of property. The right to property affirmed by international human rights law protects both the resource rights of local groups affected by large-scale investment projects, and the property rights of foreign investors. In addition, foreign investment is also protected under international economic law. This includes norms on the protection of foreign property, which extends to resource rights based on contracts between the investor and host state (e.g. forest or mining concessions).<sup>10</sup>

International economic law protecting foreign property emerged in the 19th century. In the 1960s and 70s, it formed the object of considerable debate between capital-exporting and capital-importing states. More recently, polarisations have given way to a significant strengthening of the protection of foreign property, in many respects well beyond the protection granted to nationals. This includes:

- The development of international rules on the taking of foreign property, particularly those establishing the conditions for the legality of takings (public purpose, non-discrimination, due process and payment of

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10. International arbitrators have consistently adopted a very broad definition of property rights, including “all interests and rights which [...] may be evaluated in financial and economic terms” (*Liamco v. Libya*); and “any right which can be the object of a commercial transaction [...] and has thus monetary value” (*Amoco v. Iran*). Broad definitions of property rights are also used in virtually all bilateral investment treaties. As a result, breaches of investors’ contractual rights have been treated as takings of property, with implications for the strength of the protection of foreign investors’ assets (see e.g. the cases *BP v. Libya*; *Texaco v. Libya*; *Aminoil v. Kuwait*).



compensation),<sup>11</sup> and those on the borderline between regulation and takings of property;<sup>12</sup>

- The gradual emergence of a web of more than 2000 bilateral investment treaties, which typically includes provisions on the protection of foreign property<sup>13</sup> (not only on takings of property, but also for instance on “fair and equitable treatment”);
- The growing use of international arbitration (rather than domestic courts) in investment disputes; and
- Tailored contractual commitments to ensure the stability of the investor’s property rights and of the regulatory framework governing them (“stabilisation clauses”).<sup>14</sup>

African countries have been part of this process, for instance through signing a large number of bilateral investment treaties, through integrating various types of stabilisation clauses in their contracts with foreign investors, and through accepting international arbitration as the means to settle investment disputes.

International rules on the property rights of nationals (which protect local resource rights) emerged only after World War II with the development of international human rights law. In Africa, these rules are not very robust, however, and provide lower standards compared to international economic law.

Article 17 of the 1948 Universal Declaration of Human Rights recognises the right of “everyone” (whether nationals or foreigners) to own property and not to be arbitrarily deprived of it. However, due to the ideological confrontation

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11. These requirements are spelt out in a large number of legal instruments (e.g. UN General Assembly Resolution 1803 of 1962), of bilateral investment treaties (BITs) and of arbitral awards. For examples of BIT provisions concerning Africa, see e.g. Kenya-UK BIT 1999, article 5; Mozambique-Netherlands BIT 2001, article 6; France-Madagascar BIT 2003, article 5; France-Uganda BIT 2003, article 5; and Mali-Netherlands BIT 2003, article 6.

12. International economic law provides that, where regulatory changes affect an investment project to such an extent to undermine its very commercial viability, regulation amounts to taking of property and requires the host state to pay compensation. This approach has been taken the furthest in the case law developed under NAFTA (namely in the *Metalclad v. Mexico* case), although more recent NAFTA arbitrations have followed a more balanced approach (e.g. *Methanex v. US*).

13. See footnote 11 above.

14. Under increasingly broad stabilisation clauses, the host state may commit itself not to unilaterally change the regulatory framework in a way that affects the “economic equilibrium” of an investment project (see Cotula, forthcoming).

# JOURNAL OFFICIEL DE LA REPUBLIQUE DU CAMEROUN

# OFFICIAL GAZETTE OF THE REPUBLIC OF CAMEROON

PARAISSANT LE 1er ET LE 15 DE CHAQUE MOIS A YAOUNDE  
 PUBLISHED AT YAOUNDE ON THE 1st AND 15th OF EACH MONTH

ABONNEMENTS	AVIS IMPORTANT	TARIF DES ANNONCES
<p>Tarifs applicables à compter du 1er janvier 1997</p> <p><b>CAMEROON</b> (Vols recommandés exclusivement)</p> <p>Année ordinaire ..... 30.000 FCFA                      Années ordinaire et supplémentaires ..... 500 FCFA                      Années supplémentaires ..... 5.000 FCFA</p> <p><b>ETRANGER</b> (Vols aériens recommandés)</p> <p>Afrique Centrale ..... 48.000 FCFA                      Autres pays d'Afrique ..... 105.000 FCFA                      Europe ..... 105.000 FCFA                      Autres pays d'Europe ..... 105.000 FCFA                      Amérique, Canada, etc ..... 145.000 FCFA</p>	<p>Les abonnements et insertions sont payables d'avance par mandat postal ou chèque au nom de M. le Secrétaire Général de la Présidence de la République à Yaoundé.</p> <p>Les abonnements ne sont pas renouvelés automatiquement, ils ne sont renouvelés que sur la demande des intéressés.</p> <p>Les bandes du J.O.R.C. portent la date de la fin d'abonnement.</p> <p>Pour les changements d'adresse, joindre la dernière bande et un mandat de 200 francs au nom de M. Le Secrétaire Général de la Présidence de la République Yaoundé</p>	<p>Announces et avis, la ligne (56 lettres, signes et espaces) .....</p> <p>Avis de changement de nom .....</p> <p>Publication relative à la propriété foncière et minière, la ligne .....</p>
<p><b>SUBSCRIPTIONS</b> Subscription rates applicable as from 1 Jan. 1997</p> <p><b>CAMEROON</b> (By registered post exclusively)</p> <p>Year ..... 30,000 CFAF                      Yearly Ordinary Issue ..... 500 CFAF                      Yearly Extra Supplement ..... 5,000 CFAF</p> <p><b>ABROAD</b> (By registered air mail)</p> <p>Central Africa ..... 48,000 CFAF                      Other African Countries ..... 105,000 CFAF                      Europe ..... 105,000 CFAF                      Other European Countries ..... 105,000 CFAF                      America, Canada etc ..... 145,000 CFAF</p>	<p><b>IMPORTANT NOTICE</b></p> <p>Subscriptions and insertions are payable in advance by postal order or cheque made out to the Secretary General of the Presidency of the Republic, Yaounde</p> <p>Subscriptions are not renewed automatically but only upon application by subscribers.</p> <p>The wrappers of the Official Gazette of the Republic of Cameroon indicate the date of expiry of the subscription.</p> <p>In case of a change of address, send the last wrapper and a postal order for 200 francs to the Secretary General of the Presidency of the Republic, Yaounde.</p>	<p><b>CHARGE FOR ADVERTISING</b></p> <p>Notices and announcements (56 letters, signs and spaces) .....</p> <p>Change of Name .....</p> <p>Notices concerning landed estate, forestry or mining property, per line .....</p>

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Lorenzo Cotula, 2005

*The COTCO-Cameroon contract for the construction and operation of the Chad-Cameroon oil pipeline. Contracts between foreign investors and host states can embody tailored protection of the investor's property rights.*

that characterised the Cold War, no right-to-property provision was included in either of the two main UN human-rights Covenants (the ICCPR and the ICESCR). Therefore, at the global level, treaty provisions on the right to property are confined to specific aspects, particularly in relation to the natural resource rights of indigenous peoples (ILO Convention 169) and to non-discrimination in property relations on the basis of gender (article 15 of the CEDAW) and race (article 5(d)(v) of the ICERD).

Despite the weakness of the global human-rights protection of property, regional human rights systems in Europe and (to a lesser extent) the Americas have developed standards of protection similar to those applicable to foreign investment under international economic law.<sup>15</sup> But differences remain, for instance with regard to requirements concerning exhaustion of domestic remedies<sup>16</sup> and to standards of compensation.<sup>17</sup>

However, the gap between the protection of property rights under economic and human rights law is much wider in Africa. Here, the human rights protection of property remains weak. This is due to the more vague formulation of the right to property under the African Charter on Human and Peoples' Rights (ACHPR) which does not require payment of compensation for takings of property.<sup>18</sup> It is also linked to the less effective remedies provided by the African human rights system compared to its European and American counterparts (e.g. the African Court of Human and Peoples' Rights was only established in 2006).<sup>19</sup>

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15. In Europe, under article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) and the extensive case law developed on the basis of this article. In the Americas, under article 21 of the American Convention on Human Rights (ACHR) and the (more limited) case law based on it. The ACHR case law specifically tackles the protection of local resource rights within the context of foreign investment projects, namely in the cases *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* and *Maya Indigenous Communities of the Toledo District v. Belize*.

16. Under human rights treaties, persons claiming that their rights have been violated can access international human rights institutions only after having unsuccessfully brought their claims before national courts ("exhaustion of domestic remedies"). On the other hand, where international arbitration applies, foreign investors can access it without having to go before domestic courts first.

17. Standards of compensation for takings of property tend to be stronger under international economic law than under human rights treaties (see e.g. the ECHR case *James v. UK*).

18. Article 14 of the ACHPR affirms: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws". Thus, article 14 of the ACHPR does not explicitly require payment of compensation for takings of property – it merely refers to the "provisions of appropriate laws".

19. Until the creation of the African Court in 2006 based on a 1998 ACHPR Protocol, successful ACHPR cases only led to the non-binding decisions of the African Commission on Human and Peoples' Rights. Even after the establishment of the Court, the Commission is likely to continue to play a key role due to limits in access to the Court for individuals and groups. The non-binding nature of the Commission's decisions contrasts with the final and binding nature of international arbitral awards under international economic law. The judgements of the African Court are binding – but sanction mechanisms for state non-compliance remain unclear. On the other hand, foreign investors may rely on final arbitral awards to seize host state assets in third countries, thereby obtaining reparation for violations and creating incentives inducing compliance ("pursuit actions").

<b>TABLE 4. THE PROTECTION OF PROPERTY RIGHTS UNDER INTERNATIONAL HUMAN RIGHTS AND ECONOMIC LAW, AS IT APPLIES TO AFRICA</b>		
	<b>Human rights law</b>	<b>Economic law</b>
<b>Scope of application</b>	Nationals and non-nationals	Non-nationals
<b>Substantive protection</b>		
Definition of property	No explicit definition <sup>20</sup>	Very broad definition – all interests having economic value, including contractual rights
Taking: public purpose	Required by the ACHPR	Required (customary law and BITs)
Taking: non-discrimination	Required by the ACHPR and UDHR non-discrimination provisions <sup>21</sup>	Required (customary law and most BITs)
Taking: due process	Not required by ACHPR; implicit in UDHR <sup>22</sup>	Required in most BITs
Taking: compensation (duty to pay)	Not required by ACHPR; implicit in UDHR <sup>23</sup>	Required (customary law and BITs)
Taking: compensation (standard of)	Not required <sup>24</sup>	Several formulae; “prompt, adequate and effective” compensation increasingly used
Regulatory takings	Not developed <sup>25</sup>	Well established <sup>26</sup>
Tailored state commitments not to interfere with property	Not practiced; if it was, it would violate the principle of non-discrimination in enjoyment of rights	Stabilisation clauses in investment contracts held valid and legally binding
<b>Remedies/procedures</b>		
Forum	Domestic courts first, international bodies then	Directly international arbitration if host state consents (usually so in BITs); domestic courts and diplomatic protection otherwise
Nature of remedy	Declaration of illegality, restoration (if possible), compensation, other	Range of remedies – but mainly compensation
Legal instrument	ACHPR Commission (non-binding) decisions only, until 2006; the same and/or ACHPR Court judgments, 2006 on	Binding and enforceable awards
Strategies to ensure compliance	Lack of robust sanctions in case of non-compliance	Compliance-inducing strategies, e.g. “pursuit actions” <sup>27</sup>

20. However, outside the African context, ECHR case law provides a broad definition of property.

21. Required under ECHR and ACHR. Gender and race discrimination are prohibited under the CEDAW and the ICERD, respectively.

22. Namely, in its prohibition of “arbitrary” deprivation of property.

23. Namely, in its prohibition of “arbitrary” deprivation of property. Compensation is also required for the “spoliation” of peoples’ right to freely dispose of their natural resources; and for eviction from residential property (right to housing) and for dispossession of land necessary for food production (right to food). Outside Africa, it is required under the ECHR and ACHR.

24. Case law on the right to property under ECHR.

25. Case law on regulatory takings has been developed under ECHR.

26. Particularly under NAFTA and in the Iran-US case law, but relied on in other contexts, including Africa.

27. This involves seizing goods, freezing bank accounts and/or taking other action affecting host state interests in a third country, on the basis of an arbitral award declaring the illegality of host state conduct. This may put pressure on the host state to comply with the award or to settle the case.

As a result, the international legal framework regulating property rights as it applies to Africa enshrines differentiated protection, with international economic law providing stronger protection than international human rights law; and, as a result, with foreign investment (protected under both economic and human rights law) enjoying greater protection than local resource users (protected only under human rights law). This applies both to substantive provisions (e.g. payment of compensation and due process are required as conditions for the legality of takings under international economic law but not under the ACHPR); and to procedures and remedies (e.g. in relation to direct access to international dispute settlement bodies).

In addition to the right to property, other human rights are relevant to the protection of local resource rights. This includes both individual rights (e.g. right to an adequate standard of living, including food and housing;<sup>28</sup> right to legal redress<sup>29</sup>) and group rights (e.g. peoples' rights to freely dispose of their natural wealth and resources;<sup>30</sup> indigenous peoples' natural resources rights).<sup>31</sup> These rights offer valuable legal "hooks" for government efforts to secure local resource rights: taking measures to secure resource rights is required by international human rights law. However, this is not enough to reverse the asymmetries in the substantive protection and available remedies outlined above (as shown in Table 4 on page 33).

### *Trends in domestic legislation*

At the national level, legislation on property rights and on natural resources varies substantially across countries. In much of Africa, however, the central state enjoys significant control not only over subsoil resources such as mineral and petroleum (which is commonly the case in other continents as well); but also over land and surface resources.<sup>32</sup> In many contexts, this has

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28. Recognised by the UDHR (article 25) and the ICESCR (article 11).

29. The right to an effective remedy is recognised in the UDHR (article 8) and in the ICCPR (article 2(3)).

30. Affirmed in article 21 of the ACHPR, which states: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it". In the ACHPR case *SERAC v. Nigeria* (the "Ogoni case"), the African Commission on Human and Peoples' Rights found that the government of Nigeria had violated the right of the Ogoni people to dispose of their wealth and natural resources. The case concerned the environmental degradation and economic deprivation caused by oil production.

31. Stated in the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (Convention 169 of 1989). To date, no African country has ratified this Convention.

32. After independence, most African countries nationalised land. For instance, land was nationalised in Senegal and Burkina Faso in 1964 (*Loi 64-46 sur le Domaine National*) and 1984 (*Réorganisation Agricole et Foncière*), respectively. Similarly, land was nationalised in the Republic of Congo (Constitutions of 1973 and 1979 and Land Code 1983), in the Democratic Republic of Congo (former Zaire – 1971 Constitution and 1973 Land Act), in Nigeria (where the Land Use Act 1978 vests land ownership with the governor of each federated state), in Guinea (1959 Land Law), and in Mozambique (at independence in 1975 and under the land law of 1979). A few countries enabled and/or promoted private property (e.g. Kenya). In the 1990s, political democratisation and economic

its roots in the colonial legal system, which (with the exception of settler colonies) aimed not to create strong local resource rights but rather to establish an effective government apparatus for the appropriation and exploitation of natural resources.

In addition, the past 15 years have witnessed the emergence of legislation to attract foreign investment. While in some cases this legislation applies to foreign investment alone (e.g. under Namibia's Foreign Investment Act 1990), in others it formally applies to both nationals and non-nationals.<sup>33</sup> In these cases, however, legislation may apply to investment above a minimum size – which excludes the investment in time, resources and effort of local resource users.<sup>34</sup> More generally, even where legislation applies to both nationals and non-nationals, it tends to be conceived for the needs of foreign investment.

Besides granting tax breaks and other financial incentives, investment legislation may specifically protect investors' property rights. This includes the reception of international norms on expropriation, including the public purpose, non-discrimination and compensation requirements;<sup>35</sup> provisions enabling the government to grant additional safeguards through contracts with foreign investors;<sup>36</sup> and use of international arbitration as the primary forum to settle investment disputes with foreign (as opposed to domestic) investors.<sup>37</sup>

As for resource rights in particular, several countries have removed or eased restrictions on foreign investors' access to land ownership<sup>38</sup>. Some countries

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liberalisation have brought about law reforms introducing or strengthening protection of private property rights in many countries – e.g. Burkina Faso (*Réorganisation Agraire et Foncière*, as revised in 1991 and 1996), Republic of Congo (1992 Constitution and 1997 Fundamental Act) and Guinea (1992 Land Code). However, in most African countries, including those where private property is recognised, the state remains the key player in land relations.

33. E.g. under the Nigerian Investment Promotion Commission Act; Senegal's Investment Code 2004; Mali's Investment Code 1991, as amended in 2005; Cameroon's Investment Charter 2002, as amended in 2004; and Mozambique's Investment Act 1993. Application to both nationals and non-nationals avoids problems in establishing who is entitled to the legal protection – particularly given that foreign investors usually operate through a local subsidiary incorporated in the host state.

34. E.g. 300,000 USD for foreign investors and 100,000 for domestic ones, under article 2 of the Tanzania Investment Act.

35. For instance, under the Nigerian Investment Promotion Act 1995. While the Nigerian Constitution requires payment of "prompt" compensation for takings without setting *quantum* standards (article 44), the Act goes beyond that and requires that investors be paid "fair and adequate" compensation (article 25).

36. Under the 1999 Petroleum Code of Cameroon, for instance, petroleum contracts "may provide for special regimes with regards to [...] the stabilisation of economic and tax conditions" (article 114).

37. E.g. article 12 of Senegal's Investment Code and article 25 of Mozambique's Investment Act.

38. While outright bans on foreign land ownership still exist in some African countries (e.g. under the 1998 Land Law of Cote d'Ivoire), there is a trend towards the removal or easing of these restrictions. In some countries, prior government authorisation or simple notification to the government are required for the acquisition of foreign land ownership (Hodgson *et al*, 1999).

have also created government agencies to assist investors in obtaining land rights, licences, permits and other necessary conditions from other government agencies (e.g. the *Agence Nationale Chargée de la Promotion de l'Investissement et des Grands Travaux*, APIX, in Senegal; and the Tanzania Investment Centre in Tanzania).

On the other hand, local resource users tend to enjoy rather insecure resource rights – although this varies substantially across countries. In several African countries, registration of individual land rights leads to legally protected ownership rights. But registration programmes in Africa have proved slow, expensive, difficult to keep up-to-date and hard for poor people to access. As a result, very little rural land has been registered – only between 2 and 10% of the land (Deininger, 2003).

The vast majority of the rural population gains access to land through local (“customary”) arrangements. In several countries, this form of resource access is protected through “use” rights, which are recognised so long as their holders put land to productive use.<sup>39</sup> Lack of clear definition of “productive” use and entrenched preconceptions about the productivity of some forms of resource use (e.g. with pastoralism not being recognised as “productive” for the purposes of land legislation in several countries) open the door to abuse and further undermine local resource rights.

Some countries have recently taken important steps to strengthen local resource rights. This includes legally protecting “customary” resource rights, and requiring payment of compensation of takings of these rights.<sup>40</sup> But even here, control over valuable resources on or below the land (such as timber, minerals and petroleum) tends to remain in the hands of the central state. Innovative ways for securing local resource rights are analysed in more detail in Part III below.

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39. See for instance the legal concept of “*mise en valeur*”, which features in the land legislation of much of Francophone West Africa.

40. Customary rights are protected for instance under Uganda’s Land Act 1998, Mozambique’s Land Act 1997, Tanzania’s Land Act and Village Land Act 1999, Niger’s Rural Code 1993 and Namibia’s Communal Land Reform Act 2002. In Niger, the Rural Code specifically recognises customary rights as a legitimate source of land claims (article 9). In Mali, while post-independence legislation abrogated customary rights, the Land Codes (*Codes Domaniaux et Foncier*) of 1986 and 2000 (as amended in 2002) legally recognise customary land rights and grant them (some degree of) legal protection. However, in many other African countries domestic legislation does not recognise customary rights (e.g. under Eritrea’s Land Proclamation 1994 and Burkina Faso’s *Réorganisation Agricole et Foncière* 1984, as amended in 1991 and 1996; equally, customary rights are not recognised in Senegal). On compensation issues, see chapter 3.3 below.



*In Senegal, the APIX works to attract foreign investment.*

Overall, security of resource rights tends to be problematic for both foreign investors and local resource users in much of sub-Saharan Africa. But, in many countries, efforts to secure these rights seem to have prioritised foreign investment. In some cases, this is compounded by differences in the speed of law-making processes: in Mali, for instance, the Pastoral Charter 2001 (a law aimed at securing the resource rights of pastoralists) took several years to draft, and its implementing regulations were only adopted in 2006; while the Mining Code 1999 and its regulations were adopted in a very short period of time.

In addition, while many foreign investors are able to insulate their assets and activities from the host state's domestic legal system through a range of legal devices (including investment contracts and international arbitration), local resource users do not have recourse to these devices, and must rely on the (weak) legal protection accorded by domestic law.





Lorenzo Cotula, Ghana, 2005

*In Africa, very little land has been registered. If unregistered rights are not adequately protected by the law, local resource users may lose access to the resources on which they depend without adequate compensation.*

### *Resource access under “customary” systems*

At the local level, lack of financial resources and of institutional capacity in government agencies, lack of legal awareness and, often, lack of perceived legitimacy of official rules and institutions all contribute to limit the outreach of state regulation in rural areas. On the other hand, “customary” resource tenure systems are often applied even where they are inconsistent with legislation, because they tend to be more accessible to rural people. Such systems claim to draw their legitimacy from “tradition”, as shaped both by practices over time and by systems of belief. However, they have been profoundly changed by decades of colonial and post-independence government interventions, and are continually adapted and reinterpreted as a result of diverse factors like cultural interactions, population pressures, socio-economic change and political processes.

While customary systems are extremely diverse, land is usually held by clans or families on the basis of diverse blends of group to individual rights, accessed on the basis of group membership and social status, and used through complex systems of multiple rights. Customary systems tend to affirm the primacy of the resource rights of locals (the “first occupants”) vis-à-vis outsiders. Outsiders must usually negotiate access to resources with the first occupants or their descendants (e.g., on the “tutorat” in West Africa, see Chauveau, 2006).

The application of these rules would favour local resource users in their relations with foreign investors, who would have to come to terms with the first occupants in order to gain access to resources. In Ghana’s early stages of colonisation, for instance, mining companies negotiated access to resources directly with customary chiefs – although this authority was subsequently centralised by the colonisers (Date-Bah, 1998).

However, in many parts of Africa, chiefs are manipulating customary rules to claim greater powers, and are transferring resource rights to incoming investors without the consent and to the detriment of local resource users.<sup>41</sup> In addition, the primacy of locals under customary systems may come into conflict with the application of national legislation, which tends to be more geared toward affirming the central role of the state in resource allocation.

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41. On attempts to reinterpret customary law to strengthen chiefly powers in Ghana, see Ubink (2007).

When conflicts between local and state norms arise, the legal system assisted by the more effective sanctions apparatus and capacity to manipulate rules and co-opt elites in the competing system(s) tends to prevail. In most cases, it is the national legal system that tends to overpower local tenure systems.

***Differences in the capacity to claim legal entitlements***

Enjoyment of resource rights is shaped not only by the substantive protection and procedural remedies offered by the law (whether international, national or local/“customary”), but also by the capacity of right holders to claim what they are entitled to (“capacity to claim”). This capacity is in turn affected by factors that tend to reinforce the imbalance between the legal protection offered to foreign investment and that available to local resource users (see Table 5 below). Such factors are linked to the sources of power asymmetries analysed above (Table 3), including differences in skills, economic resources and political influence.

For instance, foreign investors and local resource users tend to have very different degrees of legal literacy/awareness, capacity to mobilise legal expertise and access to courts. Legal awareness is notoriously limited in rural Africa, where a substantial part of the population is illiterate and does not speak the official language used by the law. Access to courts tends to be hindered by economic, geographical, linguistic and cultural barriers. This is even more so as legal aid programmes in much of Africa are under-funded and

<b>TABLE 5. FACTORS AFFECTING THE “CAPACITY TO CLAIM”</b>	
Human	- Literacy and ability to speak the official language; - Legal awareness; - Self-confidence.
Economic	- Capacity to mobilise good-quality legal expertise/assistance.
Political	- Enjoyment of civil and political rights (e.g. freedom of assembly, association and expression) and capacity to use them to exert pressure on law and decision-makers; - Internal cohesion/divisions.
Geographic	- Distance of courts, and transport/transaction costs to reach them.
Cultural	- Internalised beliefs concerning the “appropriateness” of using legal processes to defend one’s rights; - Deference to authority flowing from history/tradition.
Procedural	- The degree of complexity and level of cost of judicial, administrative and other procedures to claim/enforce legal entitlements.



*Access to courts is problematic in much of rural Africa.*

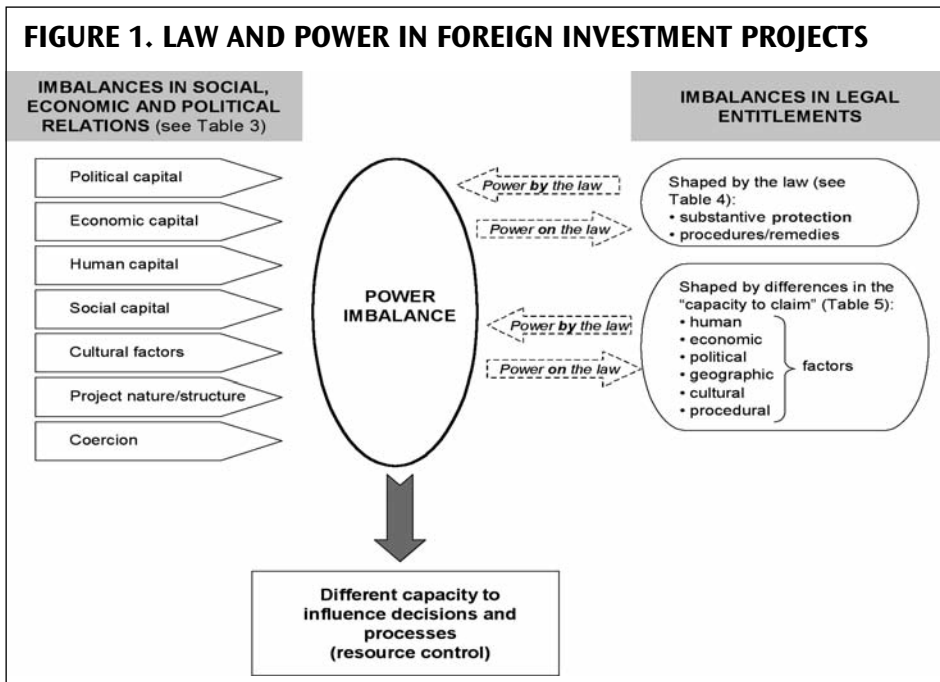
are targeted on criminal law cases (which excludes disputes between local resource users, foreign investors and/or the host state).

Because of these asymmetries in the “capacity to claim”, foreign investors may be better able to use available opportunities for securing resource rights to their full potential. This reinforces asymmetries in the protection of resource rights.

### **2.2.3. To sum up**

The analysis undertaken in this chapter has revealed power asymmetries between foreign investors, the host state and local resource users. These asymmetries are rooted in social, political, economic, cultural and other factors. It has also revealed how the legal architecture governing resource

**FIGURE 1. LAW AND POWER IN FOREIGN INVESTMENT PROJECTS**



rights in Africa tends to vest significant control over natural resources with the central state, and to accord greater protection to the resource rights of foreign investors than to those of local resource users. In addition, foreign investors tend to have greater “capacity to claim” their legal entitlements than local resource users, due to economic, political, social, geographic and other factors.

In other words, power asymmetries are reflected in differences in the content of the law and in the capacity to use it (“power on the law” in the conceptual framework followed here – see section 2.1.2 above); while unequal protection of legal entitlements reinforces power asymmetries – with the negotiating power of local resource users vis-à-vis investors being undermined by the insecurity of their resource rights (“power by the law”, section 2.1.2 above). These findings are visualised in Figure 1 above.

Power relations also exist *within* the law. They permeate relations between different bodies of rules within the same legal system (e.g. within international law, between human rights law rules providing high principles not backed by effective enforcement mechanisms, and economic law rules providing more effective substantive protection and remedies); and

between different legal systems (e.g. between national legislation emphasising the role of the state in resource allocation and “customary” systems giving priority to the resource rights of first-occupants) (“power *in* the law”, see section 2.1.2 above). These power relations within the law have important repercussions for the ability of the law to address power asymmetries (“power *by* the law”).

As a result of these asymmetries, local resource users may enjoy little control over the resources on which they depend: they may have little say in decision-making processes affecting those resources, and may hold entitlements that are vulnerable to dispossession without appropriate safeguards. The remainder of this study analyses ways to use legal processes to address these asymmetries and strengthen local resource control.

## **2.3. TOOLS FOR LEGAL EMPOWERMENT: DEFINING THE CONCEPT**

Recent years have witnessed substantial experimentation with using legal processes to increase local resource control in Africa. Court litigation, possibly spearheaded by public interest law firms, is the type of legal process that tends to immediately spring to the mind of non-lawyers – not least because it tends to more easily receive the attention of the media. This is illustrated by the 2006 Botswana case *Sesana, Setlhobogwa and Others v. Attorney General*, concerning the relocation of the San from a game reserve – which featured widely in the press in Botswana and abroad.

In reality, litigation is far from being the main way of using the law as a means for empowerment. This usually entails engaging with a much broader set of processes anchored in the legal system – from registering collective land rights to using legal requirements for public consultation as a means to express the aspirations of marginalised groups. Also, more than one-off events such as court litigation, legal empowerment requires sustained investment in building local capacity better to make use of the opportunities offered by the law (e.g. through legal training, assistance and advice); and better to exert pressure on lawmakers for them to expand and improve those opportunities.

In reviewing this wide-ranging experience, this report uses the concept of “legal tool”. This brings together within the same conceptual framework legal arrangements as diverse as community land registration, social impact assessment and prior informed consent. Taking “tools” as the entry point for this analysis reflects the acknowledgment that strong but general statements of principles embodied in the constitution and in other legal instruments are unlikely to address power asymmetries unless they are accompanied by practical arrangements that can affect the negotiating power of different actors.

### **2.3.1. The concept of legal tool**

Tools are “instruments, approaches, schemes, devices and methods” that “help people get from a problem to a solution” (Vermeulen, 2005). Over the past few years, work has been done on policy tools (mechanisms for influencing and/or implementing decision-making on natural resources;

## **BOX 2. LEGAL AND PARA-LEGAL TOOLS – DEFINITIONS**

**Legal tools** are institutional arrangements anchored to the legal system that help increase local resource control. This includes tools to secure resource rights (such as community land registration, mandatory community consultation and compensation for takings and damage to property) and tools concerning “procedural rights” (access to information, public participation in decision-making and access to justice). The focus here is on tools to secure resource rights.

**Para-legal tools** are the range of materials and activities to build local capacity in order to enable poorer and more marginalised groups to use legal tools more effectively; and, more generally, the range of strategies and tactics for helping these groups make the most of the opportunities offered by the law.

see e.g. Mayers and Bass, 2004), and within that on "power tools" ("policy tools that address power asymmetries"; Vermeulen, 2005). This analysis builds on that work, focusing on a particular type of tool – legal tools.

“Legal tools” are broadly defined here as institutional arrangements that are designed to respond to specific needs or problems (hence “tools”), and that draw legitimacy from their being anchored to the legal system (e.g. legislation or case law – hence “legal”; see above, section 1.2). The focus here is on legal tools that can help increase local resource control within the context of foreign investment projects. In particular, the study focuses on three sets of tools:

- Tools to vest broader and/or stronger natural resource rights with local resource users, or with local government bodies representing them;
- Tools concerning mandatory consultation processes and benefit-sharing arrangements negotiated between local resource users and foreign investors;
- Tools to minimise and compensate negative impacts on local resource rights, including taking of property and pollution of natural resources.

Legal tools are shaped by the interplay of state and non-state actors. As legal tools are anchored to the legal system, law-makers and judges play a key role in shaping them. But the practical operation and social outcomes of legal tools also depend on the way government officials, legal professionals and



citizens at large use them. The development of legal tools is therefore a complex process – in relation to both their design and their implementation.

### *Design/shaping*

As for design, the theory is that problem analysis leads to the definition of policy objectives, which are then pursued through a range of policy instruments, including legal tools. For instance, in the case of Mozambique's Land Act, policy-makers identified low investment as a constraint on rural development. To address this problem, the National Land Policy of 1995 states the two-fold objective of attracting foreign investment and of securing local land rights. The Land Act 1997 pursues these policy objectives through a range of legal tools, such as registration of community lands and mandatory consultation processes that investors are to follow in order to obtain resource rights from the government.

In reality, however, the relationship between policy objectives and legal tools is more complex and less "rational" than the theory suggests. Legislation may be adopted in the absence of clear policy vision or not fully in line with stated policy objectives. This is because legislation is the outcome of a negotiation process between different stakeholders – from interest groups with varying influence to government officials, from parliamentarians to legal consultants, from donors to campaigning institutions (Lavigne Delville, 1998). While stated policy objectives may constitute the point of departure for such negotiations, their outcome depends on the interplay between these different actors and on the power relations between them. In other words, law reform is a function not only of legal factors (legal tradition, technical considerations concerning the ability of proposed tools to pursue policy objectives), but also of social, economic, cultural and political factors.

In addition, legal tools may be used not only to implement government policy but also to challenge it. This is illustrated by use of judicial review and constitutionality challenge procedures – though it may be argued that in these cases legal tools implement the overriding policy objective of enabling citizens to challenge legislation or government action.

### *Implementation and outcomes*

The implementation of legal tools pursues social outcomes (e.g. addressing power asymmetries) through two steps:

- First, the legal tool seeks to trigger change in the behaviour of state and non-state actors (e.g. requiring government officials to disclose information to citizens demanding it; or inducing negotiation between foreign investors and local resource users);
- Secondly, this change in social behaviour is expected to result in the desired outcomes (e.g. greater citizen access to public decision-making and increased participation in the benefits of foreign investment for local resource users, both of which may affect the balance of power among actors involved in the investment project).<sup>42</sup>

In practice, both steps are riddled with difficulties. While legal tools are shaped by the law, context (social, economic, cultural, political) crucially affects their practical operation and social outcomes. Whether a legal tool results in behavioural change depends not only on the design of the tool itself, but also on a host of (mainly extra-legal) factors, such as the extent to which the legal tool is known and “appropriated” by those who are to apply it or who stand to benefit from it; the economic incentives (both positive and negative) linked to compliance and non-compliance; the extent to which the newly introduced tool builds on local practice, and the behavioural change sought is culturally and socially acceptable; the interplay of vested interests and power relations, including between those who stand to benefit from implementation and those who stand to lose; and other factors.

As a result of these factors, legal tools may not trigger the desired behavioural change; or, more commonly, they may trigger changes in behaviour that are only partly consistent with the changes that were originally hoped for by law-makers. Even when behavioural change does materialise, the extent to which this results in the expected outcomes also depends on social, political and economic factors – many of which are outside the control of lawmakers. Because of this, legislative interventions may produce “unintended consequences” that differ from those originally sought by lawmakers (as documented e.g. by Lund, 1998, in Niger; and by Hunt, 2004, in Uganda). And, the same legal tool would operate differently and yield different outcomes in different social contexts – which entails a need for caution with “legal transplants”.

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42. These two steps are inspired by the “legislative theory” developed by Seidman and Seidman (2005).

### 2.3.2. Para-legal tools

The fact that legal tools for securing local resource rights are enshrined in the legal system does not necessarily mean that local resource users are in a position to use them and benefit from them. In much of rural Africa, use of the state legal system is constrained by a range of different factors – from lack of resources to cultural issues. Among these factors, economic, geographic, linguistic and other constraints on access to courts as well as lack of legal awareness tend to be recurrent problems. While laws are usually published in the official gazette, few people outside legal circles have access to this. Illiteracy, language barriers (as many people in rural areas may not speak the official language in which laws and gazettes are written) and lack of access to legal assistance constrain the extent to which rural populations know the law and can make it work for them. To be effective, legal tools must be accompanied by efforts to improve legal literacy, and access to the legal system. They also require building local confidence in the law – in many contexts, marginalised groups do not trust the legal system due to the widespread manipulation that it has historically been subjected to by the more powerful.

In many parts of Africa, a growing number of civil society organisations, development agencies and public interest law firms (collectively referred to here as “legal services organisations”) have developed experience with ways of tackling these issues. For instance, the implementation of Mozambique’s Land Act (particularly its community registration programme) owes much to the support that NGOs have provided to “local communities” (see below, section 3.1). Similarly, litigation in the areas of land takings and environmental pollution (see below, section 3.3) as well as in the area of human rights (e.g. *SERAC v. Nigeria*; see above, chapter 2.2.1) owes much to the legal assistance provided by legal services organisations.

In providing this support, legal services organisations have developed a range of approaches and support materials for providing training, legal assistance, advocacy and other services. These range from innovative approaches to legal literacy training; to use of rural radios to raise legal awareness; to participatory methodologies to identify, demarcate and register collective land rights; to approaches for supporting local resource users in their negotiations with government officials and foreign investors; to a range of tools for helping local resource users bring a case against the



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*Training sessions unite men and women, young and old, leaders and regular citizens, literate and non-literate members of the community, in order to discuss problems and potential solutions.*

government or large corporations; and to strategies combining use of legal processes with advocacy through media engagement and social mobilisation. These diverse strategies, activities and support materials are broadly referred to here as “para-legal tools”.

Para-legal tools are critical for legal empowerment for two reasons. First, as explained earlier, they are instrumental to helping local resource users make use of the law to their own advantage – thereby affecting power asymmetries between them and other actors such as the central state and/or foreign investors (“power *by* the law”, in the conceptual framework followed here; see above, chapter 2.1.2). Second, different para-legal tools are likely to have different implications for the relationship between legal services organisations and their clients (“power *in* the law”; see above, chapter 2.1.2). Use of appropriate para-legal tools may entail a shift from approaches where legal services organisations act “on behalf of” their clients but without much involvement of these; to approaches that

emphasise helping clients themselves make the strategic choices in their empowerment process.

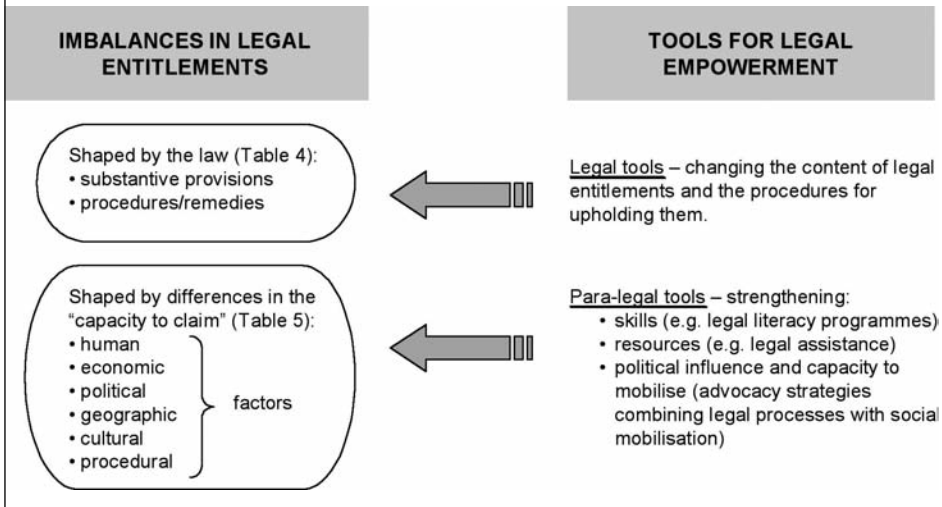
In addition to activities and materials to build the capacity of local resource users, para-legal tools also include efforts to work with government and private-sector actors. Addressing power asymmetries requires not only building the capacity of weaker actors better to articulate their views and have their voice heard; but also building the capacity of stronger actors better to listen to and take account of weaker actors' concerns. Working with government may include building the capacity of government officials, judges and others better to apply legal tools to the benefit of local resource users. Working with foreign investors may raise awareness about the positive and negative impacts of investment projects on local resource users; and about ways to maximise benefits and minimise costs, showing that these may be consistent with and even supportive of the investor's business interests.

The diversity of the para-legal tools that have been experimented and used in different parts of Africa calls for lesson-sharing and exchange of experience among legal services organisations; and for disseminating lessons learned and experience gained to a wider audience that may be inspired to start similar processes elsewhere. However, these issues are only briefly touched on in this study, mainly through boxes accompanying the main text and aimed at providing a flavour of the range of para-legal tools that can be used. These tools deserve far greater attention, and will be tackled more comprehensively in subsequent activities of the "Legal tools" project (see above, Box 1).

### **2.3.3. To sum up**

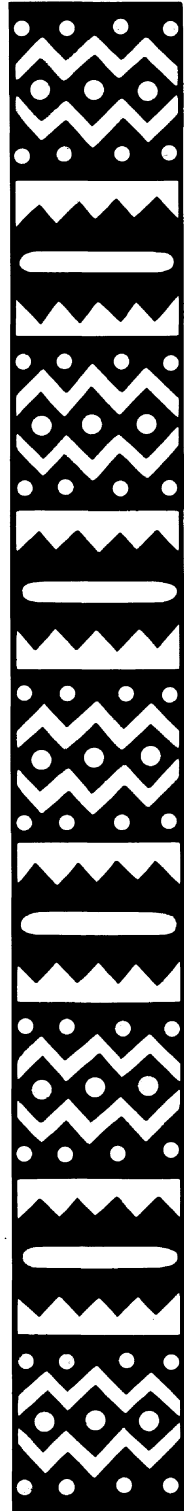
Appropriate legal tools can help local resource users have greater control over the resources on which they depend, through strengthening protection of their legal entitlements (in terms of both content and remedies). Implementation and outcomes of these legal tools are shaped by extra-legal factors (political, economic, social, cultural and other) that affect the capacity of local groups to claim their entitlements. Legal tools must therefore be accompanied by para-legal tools that strengthen local capacity to use the opportunities offered by the law (Figure 2).

**FIGURE 2. USING LEGAL AND PARA-LEGAL TOOLS TO ADDRESS ASYMMETRIES IN LEGAL ENTITLEMENTS**





### **III. LEGAL TOOLS TO SECURE LOCAL RESOURCE RIGHTS**





## **3.1. TOOLS TO VEST RESOURCE RIGHTS WITH LOCAL GROUPS**

### **3.1.1. Overview**

A first set of tools concerns broadening the scope of local resource rights, for instance in terms of duration or content (from use rights conditioned to continued fulfilment of productive-use requirements; to longer-term and less qualified use rights; through to full ownership); and/or strengthening those rights through more effective legal protection and enforcement mechanisms.

Broader/stronger resource rights may be vested with individuals or groups. But where emphasis is on securing local rights vis-à-vis outsiders like foreign investors, legal protection of collective – rather than individual – resource rights may be an effective option. In its recent Policy Research Report, the World Bank argued that “while the individualisation of land rights is the most efficient arrangement in many circumstances, in a number of cases [...] definition of property rights at the level of the group [...] can help to significantly reduce the danger of encroachment by outsiders while ensuring sufficient security to individuals” (Deininger, 2003:76). Indeed, others have argued, “where the primary source of tenure insecurity is outsider encroachment, the best legal response is to recognise and enforce local group rights, and (where it does not cause undue conflict) to demarcate and record certain lands in the name of that group” (Fitzpatrick, 2005:465). For these reasons, the focus here is on tools to vest resource rights with local “communities” (on this concept, see below).

This includes two legal tools:

- Vesting collective resource rights with private legal entities established by local resource users; and
- Decentralisation of natural resource rights, which entails transferring resource rights to elected local government bodies as representatives of local resource users.

These tools may be used as alternatives, or coexist in the same country – for instance where local resource users are allowed to choose between different

institutional arrangements, or where different types of natural resource rights are vested with private entities and local governments. Choices between the two models have fundamental implications for local democracy, as they entail choices on what type of institution can legitimately represent local resource users – whether private entities established by such users themselves or public-law bodies elected by them. They also have important practical implications for the internal functioning of the collective entity holding resource rights – as will be discussed below.

Both tools must come to terms with similar legal issues. Because of this, this chapter examines them together, and compares the way they address those issues. In particular, both tools require clarifying:

- Who are the “communities”?
- What rights are such “communities” vested with?
- What are the conditions and arrangements for the vesting of such rights?

Recent legislation from different parts of Africa has taken different approaches to tackling these issues. The next few sections review these approaches.

### **3.1.2. Who are the “communities”?**

Recent legislation from several African countries vests collective resource rights with “communities” (e.g. “rural communities” in Senegal; “village communities” in Cameroon; and “local communities” in Mozambique) or similar entities (e.g. “villages” in Tanzania). This raises the need to clarify the nature of this collective holder of resource rights.

The legal construction of “community” varies in the two tools explored here. In decentralisation of resource rights, “communities” are public-law local government bodies to which the central state devolves resource ownership or management rights. In arrangements to vest resource rights with private bodies, on the other hand, “communities” are private legal entities that hold resource rights collectively on behalf of their members.

#### *“Communities” as private legal entities*

This approach is exemplified by Mozambique’s Land Act 1997. Under the Act, “local communities” are established as private legal entities capable of holding collective land rights. The legal definition of community is

deliberately left open, both because the approach followed focuses on relations between the community and the outside world rather than on intra-community relations; and because the same legal concept needs to fit very different local contexts (Tanner, 2002).

The Act defines a community as “a grouping of families and individuals, living in a circumscribed territorial area at the level of a locality [the lowest official unit local government in Mozambique] or below, which has as its objective the safeguarding of common interest through the protection of areas of habitation, agricultural areas, whether cultivated or in fallow, forests, sites of socio-cultural importance, grazing lands, water sources and areas for expansion” (article 1(1) of the Land Act, as translated in FAO, 2002).

As Tanner (2002) notes, this definition makes no reference to kinship or other ties between community members, nor to size of the communities or of their landholdings, nor to who represents the community. As it stands now, the definition may cover any grouping of people living together and claiming collective rights over a given land area. In practice, a Technical Annex issued under the 1997 Land Act provides for case-by-case processes of community self-identification, enabling communities themselves to identify their lands and to define the rules governing their internal organisation (including through the application of customary law). The size of communities and of their landholdings varies substantially – from some 600 people and 3,000 hectares in Mucombwe to over 20,000 people and 200,000 hectares in Mongoma (Norfolk, 2004).

In Ghana, the legal concept of “community” is shaped by customary law, which is part of Ghanaian law (article 11 of the Constitution). Under customary law, communities are corporate bodies (“stools”, “skins”, etc.) headed by a chief or family head. Chiefs and family heads hold resource rights in trust for the members of their community (article 36(8) of the Constitution). In practice, they enjoy considerable latitude in the exercise of their natural resource responsibilities.

In other countries, legislation refers to communities as private entities entrusted with resource rights but does not define what a community is. In Mali, the Land Code 2000, as amended, merely “confirms” customary rights held “individually or collectively”, without developing on the nature of collective landholders.

In Cameroon, efforts to vest stronger resource rights with local users have focused on the forestry sector (although the Land Ordinance No. 1 of 1974 does include a brief provision enabling “customary communities” to register land collectively – article 7). Here, the Forest Act 1994 establishes the legal concept of “community forest” – a forest managed by a local community on the basis of a contractual arrangement with the government. However, no definition of “community” is provided. While this may be a strength in that it enables greater flexibility and adaptability to diverse local circumstances, it has also engendered confusion in implementation (Egbe, 2001b). In order to perform acts with legal effects, communities must be established as legal entities. Neither village councils nor customary institutions are established as legal entities under Cameroon legislation (specifically under the 1974 law on the organisation of village councils and the 1977 law on the organisation of chieftaincy; Egbe 2001b). In practice, a 2001 study found that most communities had incorporated as associations (46 of the 82 communities surveyed), cooperatives or “economic interest groups” (essentially, private companies; Djeumo, 2001).

#### *“Communities” as local government*

A second approach entails vesting resource rights with elected local government bodies. In Senegal, legislation vests resource rights with “rural communities”, and defines these as “public-law legal entities” consisting of “a number of villages sharing the same land area, that are united by a sense of solidarity deriving for instance from geographical proximity, that have shared interests and that are capable of mobilising the resources required for their development” (article 192 the Local Governments Code, Law No. 06 of 1996, my translation).

Similarly, in Tanzania, the Village Land Act 1999 designates Village Councils, which are the lowest level of local government and are elected by the village population, as the collective holder and manager of local resource use rights on “village land”, and regulates the internal functioning of such bodies. “Village land” is defined as including land within the boundaries of the village as a local government body; and “land [...] which the villagers have been [...] regularly occupying and using as village land” during the 12 years preceding the Land Act, with the exception of “reserve land” (e.g. forest and other reserves; article 7 of the Village Land Act).

### **BOX 3. MAKING DECENTRALISATION WORK: LEGAL LITERACY FOR EMPOWERMENT**

For decentralisation of resource rights to promote local resource control, local groups must have at least a basic understanding of the law. Para-legal tools can help with this.

An example is provided by the work of a Malian NGO, Eveil (“awakening”), and by its innovative pedagogic approach called “literacy for empowerment” (“*alphabétisation conscientisante*”). The approach combines basic adult literacy with para-legal training, covering topics such as the Constitution, the functioning of government institutions and of local governments, and alternative dispute resolution. Rather than providing expert lectures on predefined topics, literacy for empowerment aims to promote reflection among training participants. With the support of a facilitator and of PRA techniques, participants are encouraged to familiarise with the law through discussing real-life issues. The training is in a local language, Ffulfulde, which facilitates the participation of those who do not speak the official language (French).

Similar approaches have been developed in many parts of Africa and elsewhere. In India, for instance, where legislation devolves important responsibilities to village assemblies, the Enviro-Legal Defence Firm (a legal services organisation) holds village-level legal literacy camps in which legal jargon is “demystified” and the law made more accessible to local groups through participatory techniques, discussion of real-life problems and use of local language (on this experience, see Upadhyay, 2005).

While in Mozambique resource-holding communities are private entities, in Senegal and Tanzania they are public law bodies and constitute the lowest level of local government. While in Mozambique the law leaves “local communities” free to decide on their internal organisation and rules, in Senegal and Tanzania the internal functioning of “rural communities” and “villages” is thoroughly regulated by national legislation. While in Mozambique what constitutes a “community” needs to be determined on a case-by-case basis following principles of self-identification, in Tanzania and Senegal “communities” are predefined legal entities endowed with predefined institutions and processes. Hence, “while there will be in many cases a need to define the land over which a particular village has jurisdiction, the governing entity is already in place” (FAO, 2002:225). On the other hand, concerns have been raised as to the existence of appropriate human, economic and other resources within local government bodies in many parts of Africa – resources that are indispensable for local governments to exercise their natural resource management responsibilities.

### *Group rights and individual rights*

In both legal constructions of “community” (private entity or local government), strengthening collective resource rights may be an effective way to protect the interests of the group vis-à-vis outsiders such as foreign investors; but it does not automatically result in more secure rights for individuals, households and smaller groups within the community. This is function of the internal regulation of relations within the community, and of the protection of individual rights within the collective resource-holder.

This issue is important because local resource users are rarely homogeneous groups. Membership of resource user groups may be fluid and include non-resident users (e.g. transhumant pastoralists). In addition, groups tend to be differentiated on the basis of income, wealth, status, gender, age, professional groupings (farmers, herders, etc.), and other factors. Although the focus here is on “external” relations between local resource users (the “community”), the central state and foreign investors, intra-community differentiation may play a role in shaping those “external” relations. Research from Ghana (Amanor, 1999) has shown that, within communities, local elites may establish alliances with the central state and foreign investors to the detriment of other community members. In many cases, rather than protecting local interests vis-à-vis outsiders, customary chiefs are appropriating common resources and allocating them – or even selling them – to big business for personal gain (Amanor, 1999). Internal checks and balances for regulating relations among community members are therefore key.

Approaches to tackling these issues vary considerably. Mozambique’s land legislation leaves “communities” free to define their internal land management rules and institutions – although the implementing Regulation and the Technical Annex of the Land Act do require community consultation reports to be signed by at least three and up to nine representatives (article 27 of Regulation and article 6 of the Annex, quoted in CTC Consulting, 2003). In some cases, these nine representatives have de facto evolved into a sort of standing committee responsible for land management decisions – although this has no basis in the law (CTC Consulting, 2003).

Mozambique’s “minimalist” approach, whereby land rights are vested with local communities without substantial “legal intrusion” into intra-community land relations (Fitzpatrick, 2005), may enable greater flexibility better to fit

diverse local contexts; but may also entail accepting inequitable relations within the community. This is particularly so given that, as already mentioned, the size of a community in Mozambique can reach over 10,000 people and tens of thousands of hectares. Securing the resource rights of such a large entity may have little impact on the security of the rights enjoyed by individuals and households within their entity (Kanji *et al*, 2005).

Other legal systems regulate intra-community relations to a greater extent. The archetype in this regard is South Africa's Communal Property Association Act 1996. This provides for the creation of a corporate structure endowed with a written constitution and with legal capacity, and regulates intra-community affairs – e.g. requiring the constitution to provide for democratic decision-making, non-discrimination in relation to membership, accountability and transparency (Fitzpatrick, 2005).

As for the focus countries, Ghanaian legislation emphasises the fiduciary obligation of chiefs and family heads to perform their functions for the benefit of their community or family (article 36(8) of the Constitution) – although in practice customary chieftaincies enjoy considerable latitude in the exercise of their natural resource responsibilities.<sup>43</sup> In Cameroon, local resource users must establish associations, cooperatives or other legal entities in order to exercise their resource rights under the “community forestry” scheme. This means that they must comply with legal requirements concerning the internal functioning of those entities – which includes democratic decision-making and non-discrimination.

Evidence suggests that these requirements may have little impact on the ground, however. In Ghana, many chiefs have engaged in appropriating lands for personal use, and in renting or even selling it to outsiders for personal gain (e.g., on the Tamale area, see Abudulai, 2002). Ghanaian law does require consent of the principal elders in the community for such transactions (*Allotey v. Abrahams*); but lack of consent makes transactions voidable rather than automatically void, and time-consuming processes are required in order to void them (Ayine, pers. comm.). This shows how vesting resource rights with customary chiefs may leave group members exposed to abuse by the chiefs, and make them vulnerable to losing the resources on which they depend.

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43. On intra-community relations under customary law in Ghana, see Ubink (2007).

#### **BOX 4. TOOLS FOR LOCAL GOVERNMENT ACCOUNTABILITY**

Besides end-of-term elections, day-to-day downwards accountability of local government bodies is important to promote local resource control. In Malawi, a tool has been developed to facilitate this, with specific regard to forest management (“local government accountability tool”). It entails raising awareness about forest management issues among forest users; undertaking participatory assessments of forest resources; supporting the emergence of credible community-based organisations; and building the capacity of these organisations to demand better performance from local government authorities. The last element includes defining performance standards; demanding access to documentary evidence of forest management decisions and other relevant information; pressing local government periodically to hold local meetings to discuss local needs and compliance with performance standards; and seeking access to information concerning use of financial resources (Kafakoma *et al*, 2005).

Similarly, in Senegal IED Afrique has developed a tool (“Participatory monitoring and evaluation of decentralisation”) to better enable citizens to monitor the work of local governments (on this, see Guèye, 2005)

Where resource rights are vested with local government bodies (e.g. Senegal, Tanzania), checks and balances against intra-community elite capture are to be provided by the democratic process characterising elected local government bodies – including non-discriminatory universal suffrage and democratic accountability mechanisms. In Senegal, the elected council governing “rural communities” is responsible for allocating and withdrawing land use rights to individuals and groups (article 195 of Law 96-06 of 1996). In Tanzania, elected village councils allocate to individuals, families and groups “customary rights of occupancy” of indefinite duration on village land. In the performance of these management responsibilities, the principles of trusteeship apply, and allocated rights are regulated by customary law (section 18 of the Village Land Act). With regard to trusteeship principles and application of customary law, interesting parallels exist between the role of customary chiefs in Ghana and of elected local governments in Tanzania.

Elite capture problems may nonetheless exist, with the elected council being dominated by a few families having stronger (land tenure or other) status under customary law, greater capacity to mobilise resources from the outside world through political or other connections, and/or more



economic resources (for evidence of this from Senegal, see e.g. Cotula and Sylla, 2006). In addition, where the allocation of resource rights to group members is made by a political body, a risk exists that allocations are used as an instrument for political patronage – favouring groups aligned with the ruling political party.

### **3.1.3. What resource rights?**

Beyond the identification of the right holding entity, a key challenge in vesting resource rights with local groups is defining what these rights are, in relation to their content (e.g. full ownership, long or short-term use), source (e.g. legislation, customary law) and object (land and/or other resources).

This issue is shaped by the legal context prevailing in many African countries, which was outlined above (chapter 2.2.2) – namely the central role of the state in land/natural resource ownership and control; the limited incidence of registered private ownership; the growing legal recognition of local (“customary”) resource rights in several African countries, albeit with qualifications; and the separation between rights over land and rights over other resources (forests, minerals, petroleum, water, etc.), which entails that, even where legislation does protect local land rights, control of other resources remains in the hands of the state.

#### ***Ownership vs management/use rights***

Consistently with this overall context, very rarely have legal reforms to strengthen local resource control led to the transfer of ownership rights to the range of collective right holders identified in the previous section. More commonly, local resource users are vested with various combinations of use and management rights, while the central state retains control over valuable resources.

This tends to be the case where resource rights are vested with local government bodies. In Senegal, local governments (the “rural communities”) are responsible for the management of village lands (the “*zones de terroir*”) but do not own them – it is the state that “holds” (“*détient*”) them (article 2 of the 1964 Land Law). Similarly, in Tanzania, although local governments (“village councils”) are responsible for the management of village lands (which constitute most of the land in the country), ownership is vested with the president in trust for the nation

(section 1 of the Land Act and section 18 of the Village Land Act 1999).

Recognition of full ownership rights to local resource users is rare also where rights are vested with private legal entities. In Mozambique, the Land Act 1997 upholds the constitutional principle that ownership of land and natural resources, both surface and subsoil, is vested in the State (articles 98 and 109 of the Constitution). “Local communities” are therefore granted long-term use rights over the lands they collectively hold, whether on the basis of customary law or of long occupation (articles 12-13 of the Land Act 1997).

In Cameroon, community forestry involves the transfer of *management* rights over a forest area on the basis of a convention between the “village community” and the government administration. While forest products belong to the village community, ownership of the trees and of the land usually remains with the state – unless the trees are planted by local resource users on legally registered land (article 37 of the Forest Act 1994).

On the other hand, land legislation in Ghana and Cameroon does recognise private ownership rights (along with other types of resource rights). In Cameroon, however, the acquisition of private ownership is constrained by the long, costly and cumbersome land registration procedure, which is required as a precondition for acquiring ownership rights.

It is worth noting that, outside the African context, there are examples of legislation recognising collective ownership rights to local users. In the Philippines, for instance, the Indigenous Peoples’ Rights Act 1997 provides for the recognition, demarcation and titling of indigenous peoples’ “ancestral domains”. Differently to Mozambique’s community land registration experience, local communities may be granted full ownership rights over their land.

It must be noted that the debate on establishing private ownership rights in Africa is longstanding, complex and often polarised between opposed ideological positions – particularly those emphasising the alleged economic benefits of creating individual land ownership rights as a key step to promoting capitalistic development (e.g. de Soto, 2000), and those stressing the specificity of land relations in rural Africa, the safety net function of (often idealised) “customary” tenure systems and the alleged extraneity of full ownership rights in such customary systems.

Clear, long-term and enforceable use rights may offer a degree of tenure security that does not significantly differ from full ownership – particularly in those countries where land is nationalised, and private land ownership does not exist at all (e.g. Mozambique). But much depends on the specific content of those use rights, and on the conditions under which the state as holder of the radical title may withdraw them.

Full ownership rights may still be withdrawn (“expropriated”), but only under restricted conditions (typically including payment of compensation, non-discrimination, public purpose and due process; see below, section 3.3). Security of use rights vis-à-vis withdrawals from the state depends on the extent to which the safeguards typically found in expropriation of ownership rights also apply to withdrawals of use rights. In Senegal, the central state can withdraw land not only through expropriation for a public purpose (in which case the land enters its “*domaine public*”) but also through registering it in its name (“*immatriculation*”, which transfers the land into the state’s “*domaine privé*”; article 3 of Law 64-46 of 1964). In the latter case, no public purpose is required, and the central state can transfer the land on to third parties. In both cases, compensation is limited to improvements (buildings, crops, trees) and excludes the land itself (see below, chapter 3.3). This weakens the security of local resource rights and the negotiating power of local resource users.

In addition, where continued enjoyment of local resource use rights is subject to administrative ascertainment of vaguely defined “productive resource use” requirements (such as the so-called “*mise en valeur*” found across Francophone Africa, including Cameroon and Senegal), the security of those use rights tends to be undermined.

Productive use requirements are particularly problematic for certain types of resource use that are traditionally not deemed as “productive enough” for the purposes of land legislation – such as, in many parts of Africa, pastoralism. In these cases, conditioning protection of local resource rights to productive use requirements may leave such rights without legal protection. Some countries have recently taken steps to recognise pastoralism as a form of productive use. In Mali, for instance, the Pastoral Charter 2001 and its Decree 06-439 of 2006 provide that the “habitual and prolonged exercise of pastoral activities” constitutes “*mise en valeur*” and entails use rights protected against third parties (articles 15, 17 and 18 of the Decree).

## BOX 5. LOCAL CONVENTIONS

Where stronger/broader resource rights are vested with local resource users, there is a need to develop tools that assist them in exercising their resource management responsibilities. The experience with “local conventions” for natural resource management, developed in the Sahel over the past few years, provides an example of this.

Local conventions are a tool for the decentralised management of natural resources. They are sets of rules and institutions negotiated and agreed by local resource users with a view to regulating resource access and use. They have been developed in several Sahelian countries, including Senegal, and can help local governments exercise their natural resource management responsibilities in an inclusive and participatory way. In agro-pastoral contexts, local conventions may be particularly valuable in reconciling the competing resource interests of herders, farmers and agro-pastoralists, for instance in regulating issues like pastoral mobility and access to water points, dry-season pastures and post-harvest fields.

In many cases, development agencies facilitate the process through which the resource users are identified, trained, supported in the establishment and consolidation of community based organisations, and accompanied in the negotiation, drafting and implementation of the convention.

In some cases, the convention is formalised through local government bylaws. Questions about the legal status of these conventions nonetheless remain, particularly where resource ownership and management rights are held, in whole or in part, by the state rather than by local authorities (Djiré, 2004). This unclear legal status may undermine the effectiveness of local conventions, particularly when powerful outsiders such as foreign investors enter the local arena.

With specific regard to decentralisation, a key issue affecting the degree of local resource control is the relationship between local government bodies and the representative of the central state at the local level (“deconcentrated” authorities, such as the *préfet* or *sous-préfet* in Francophone Africa). Common requirements that the acts of local government bodies be approved by deconcentrated authorities before they become effective tend to curtail the decision-making power of local governments. In Senegal, on the other hand, legislation requires the *sous-préfet* to approve only those local government acts falling within specified areas (which include budget and land matters); and provides that lack of reaction within a month entails tacit approval (Decree 96-228 of 1996). This mechanism constitutes a significant shift of power from the

central state to local governments – although evidence suggests that little practical use has been made of it. Also crucial is the extent to which local governments depend on the central state for access to financial resources.

Reform to strengthen the nature and broaden the content of the resource rights vested with local resource users can increase local resource control. Where recognition of ownership is not an option, this can be done through reducing the number and scope of conditions attached to the legal protection of use rights, such as productive use requirements; through the application of safeguards for expropriation (compensation, non-discrimination, public purpose and due process) to the taking of use rights; and through reducing central state control over local government decision-making.

### *Land rights and rights over valuable resources*

Even where stronger and/or broader land rights are vested with local groups, their practical implications may depend on the extent to which they entail greater control over valuable resources (timber, minerals) located above or below the land. As discussed above (chapter 2.2.2), this is rarely the case. However, in some countries, greater protection of land rights has been accompanied by devolution of (some degree of) control over other resources.

In Mozambique, for instance, a substantial portion of Mozambique's land area is covered by forests (78% according to Siteo *et al*, 2003), and timber often constitutes the most valuable resource on the land. As a result, the livelihood implications of vesting land rights with "local communities" are affected by the interface between land legislation and forestry legislation (Forest and Wildlife Act 1999 and its Regulations). Forest legislation does accord some degree of protection to local tree rights. But it is more cautious than the Land Act in the scope of the rights it vests with "local communities".

In part, the Forest and Wildlife Act reinforces the provisions of the Land Act, as it follows the same definition of "local community" (article 1(5)) and as it requires landholding communities to be consulted before forest concessions are issued (article 17(2)). In other words, local users and outsiders are expected to negotiate terms and conditions under which local users may benefit from the outside investment. In addition, local communities are to benefit from 20% of the forest tax revenue flowing from timber exploitation in their land. This reinforces the resource use rights of local communities,

and is meant to shift the balance of power in favour of local resource users (Norfolk, 2004).

However, the forestry legislation is at odds with the Land Act on a range of issues. First, like the Land Act, it vests resource ownership rights with the state (article 3(a)). Forest resources can be commercially exploited only on the basis of a “simple permit” (for exploitation of limited size and value, undertaken by national operators and local communities) or of a renewable, 50-year concession contract (which is subject to more stringent requirements, such as the implementation of a management plan; Siteo *et al*, 2003). Like the Land Act, the Forest Act protects the resource use rights of local communities. However, very importantly, unlike the Land Act, such use rights are limited to exploitation for subsistence purposes, to the exclusion of commercial use at any scale (article 9).

Secondly, the Forest Act provides for the participation of local communities in the management of forest resources. Article 33 enables the state to delegate forest management powers to local communities, while article 31 establishes “local resource management councils”, in which local communities as well as the private sector and local governments are represented, for the purpose of participating in forest management.

In this sense, a disconnection exists between the Land Act, under which local communities are private entities holding extensive use rights in the land, and the Forest Act, under which local communities have only subsistence use rights but are meant to participate in the “management” of forest resources (Norfolk, 2004; CTC Consulting, 2003). As a result of this disconnection, even after communities have registered their land, their control over valuable resources such as timber remains limited. If they want to undertake economic activities on their own land which involve forest exploitation and some degree of commercialisation (e.g. sale of fuelwood), they need to apply for a permit (or a concession). And, government agencies may issue forest permits or concessions on community-held land to third parties, provided the landholding community is consulted, and with local communities maintaining subsistence use rights in the concession area (article 18 of the Forest Act).

In the other focus countries, the interface between rights over land and rights over other resources varies substantially, depending on the country

and on the resource. In Senegal, for instance, the resource management rights vested with local governments relate not only to land but also to some surface resources (e.g. forests) – but not to others (e.g. water). In Tanzania, local governments manage not only “village land” but also forests within that (under the Forest Act); and may exercise (more limited) management responsibilities with regard to wildlife through establishing joint Wildlife Management Areas together with neighbouring villages (under the 1999 Regulations to the 1974 Wildlife Conservation Act). In Cameroon, local resource users may acquire tree ownership rights only for trees they have planted on registered land – which is very rare in rural areas. In none of the focus countries is vesting land rights with local users accompanied by awarding some degree of control over subsoil resources (minerals, petroleum).

Reform to link stronger land rights with stronger rights over valuable natural resources located on or below the land would increase the degree of local users’ control on the resources on which they depend.

#### **3.1.4. Conditions and arrangements for vesting resource rights**

The protection of resource rights vested with local “communities” may be conditioned to certain formalities being completed or arrangements put in place – for instance, that such rights be formally registered with local communities. Compliance with required formalities and arrangements may be necessary in order to clearly identify rights and right-holders. In practice, however, it may also constrain access to legal protection – due to lack of resources for undertaking those formalities (e.g. registering land) and to the costly, long and cumbersome process that those formalities may entail.

To avoid the limited protection of rights that may ensue in these cases, legislation may legally protect local resource rights irrespective of their registration or formalisation. For instance, article 13(2) of Mozambique’s Land Act 1997 states that, although local resource rights can be registered, they are legally protected even if they are not. In contexts where formalisation processes (e.g. registration) are bound to take time and resources, this allows to grant some degree of protection from the very day the law comes into force (Tanner, 2002).

While a useful first step, however, this is not enough to secure resource

rights on the ground, which usually requires identifying right holders, demarcating boundaries and addressing various other issues. In other words, provisions like article 13(2) of Mozambique's Land Act do not in themselves clarify who has right over what and on the boundaries between different right holdings. Outside the African context, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* the Inter-American Court of Human Rights found that constitutional and legislative provisions protecting communal property rights, in absence of specific procedures for the demarcation and registration of communal lands, were not enough to meet the standard of protection required to fulfil the human right to property under the ACHR (see above, chapter 2.2.2).

This issue is particularly pressing where resource rights are vested with private legal entities (as in Mozambique) rather than with local governments (as in Senegal, Mali and Tanzania). To tackle this issue, Mozambique's land legislation provides for a procedure to register collective land rights.<sup>44</sup>

Under Mozambique's community land registration programme, "local communities" can register land rights collectively and obtain land titles from the provincial cadastral services. The land registration process is laid out in the 1999 Technical Annex. This provides for two distinct types of community land registration, both of which start upon request by the community. The first one is the "community delimitation" process, which starts with awareness-raising and leads to the registration of the landholding in the National Cadastre (article 5 of the Technical Annex; see Box 6 below). The second type of process – land demarcation – is more complex and expensive. It entails more accurate surveying standards, and

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44. Land registration is a process to document rights over land – whether ownership, use rights or other. Several African countries have long had legislation providing for the registration of individual land rights (e.g. Kenya and, to a much lesser degree, Cameroon, Ghana and Malawi). However, registration programmes in Africa have proved slow, expensive, difficult to keep up-to-date and hard for poor people to access. As a result, very little rural land has been registered, and formal tenure covers only between 2 and 10% of the land (Deininger, 2003; see above). Where titling and registration have been implemented, high monetary, transaction and other costs discouraged registration of subsequent land transfers, thus making land registers outdated and undermining their ability to secure land rights. Also, many registration programmes had negative distributive effects, as those with more contacts, information and resources were able to register land in their names, to the detriment of poorer claimants; and as holders of "secondary" land rights (such as women and herders) were effectively expropriated as these rights tend not to appear in the land register (there is a vast literature on this – see e.g. Shipton, 1988; Atwood, 1990; Migot-Adholla and Place, 1998; Lund, 1998; Firmin-Sellers and Sellers, 1999; and Platteau, 2000). Community land registration seeks to address some of these problems through registering land rights with a collective entity rather than with individuals.



## **BOX 6. ACCOMPANYING COMMUNITY LAND REGISTRATION IN MOZAMBIQUE**

In Mozambique, development agencies have played an important role in helping local communities register their lands, both through providing financial support and through facilitating the process to delimit and register community lands. The delimitation process starts with awareness raising, which entails community meetings to provide information on the Land Act and to discuss land registration. At this stage, up to nine community representatives are identified. The second step is a participatory rural appraisal (PRA) aimed at gathering information about the social organisation of the community and about land use and rights. Participatory mapping and other PRA tools are used to support this exercise. The third step is to cross-check the information and map provided by the community with neighbouring communities; to facilitate negotiation over possible disagreements; and to identify boundaries, including through geo-referencing. The fourth step is the restitution of this information to the community and its neighbours. Finally, the community's right over the delimited land is registered at the provincial cadastral service, and a certificate is issued to the community.

Registration fees are relatively low, but are usually beyond the means of local resource users. In many cases, they are paid with the support of NGOs and donor agencies. As for language, while the registration process is in Portuguese (the official language), NGOs facilitating community land registration help overcome this barrier. Recent research (Chilundo *et al*, 2005) found that, in NGO-supported community consultation processes, interventions made in Portuguese were translated into the local language, so that the majority could understand the process. The documents prepared and signed during registration (such as minutes of meetings and the reports from the participatory rural appraisals) are written in Portuguese. However, the main documents were read out loud and translated for the participants (Chilundo *et al*, 2005). In other words, the work of NGOs helps make the land registration process in Mozambique relatively accessible to rural communities, but is dependent on continued funding for NGOs to pursue land registration activities.

Source: Chilundo *et al* (2005); CTC Consulting (2003) ; Kanji *et al* (2005)

involves the construction of cement landmarks (CTC Consulting, 2003). Although several communities have opted for the more costly demarcation process, from a legal point of view there is no difference between the land rights formalised through delimitation and those formalised through demarcation. In both cases, communities enjoy long-term “use and benefit” rights (“DUAT”), which in fact exist and are protected even if not formalised through either delimitation or demarcation.



*Community land registration in Mozambique.*

In practice, community land registration has faced challenges due to lack of human and economic resources, and to problems in the economic and geographical accessibility of the process. As for geographical accessibility, for instance, the main authority in the land registration system is located in provincial capitals, rather than at district, locality or village levels. However, NGOs have played an important role in accompanying communities through the registration process, which has in many cases helped overcome these constraints (see Box 6). As of May 2005, about 200 communities had registered their land (against more than 6,000 land allocations to "investors"; Kanji *et al*, 2005).

Mozambique's experience with community land registration shows the important level of commitment and investment that registering collective landholdings requires. This includes setting up a special regime and procedure in the law; and tailored action to support and accompany local

<b>TABLE 6. TOOLS TO VEST RESOURCE RIGHTS WITH LOCAL GROUPS</b>				
	<b>Who is the right holder?</b>	<b>What resource rights?</b>		<b>What conditions/ arrangements?</b>
		<i>Land</i>	<i>Other resources</i>	
Cameroon	Various private entities, including customary landholders; in forestry, private entities organised in associations and other bodies	Use if customary; ownership if title (rare)	Forestry (subsistence use/ management);	Registration prerequisite for ownership
Ghana	Various private entities, including customary landholders	Various legal interests, including ownership		
Mozambique	Private legal entities, open definition (local communities)	Use/management rights	Forestry (subsistence use/ management); not subsoil	Protection irrespective of registration; community land registration
Senegal	Local government bodies ("rural communities")	Use/management rights	Some surface resources; not subsoil	
Tanzania	Local government bodies (villages)	Use/management rights	Some surface resources; not subsoil	

resource users in their efforts to register land. Other African countries formally do allow local resource users to register their rights collectively. In Cameroon, for instance, Ordinance 74-1 of 1974 suggests that “customary communities” can request and obtain land titles (article 7). However, vague legislative provisions that merely allow collective land registration, without addressing the legal specificities that this requires and the need for support in implementation, are unlikely to go far.

Reform to protect resource rights regardless of their legal documentation, and to facilitate the documentation of local resource rights (including through collective arrangements such as community land registration) can increase local control over natural resources.

### **3.1.5. To sum up**

This chapter has examined experience with two types of tools for vesting stronger resource rights with local users: decentralisation of natural resource rights, and arrangements to vest resource rights with private (yet collective) legal entities (e.g. on the basis of community land registration). These tools can give local resource users greater control over the resources on which they depend – provided that intra-community issues are

addressed. Reform to strengthen the content of local resource rights (from precarious rights to unconditioned, long-term use rights through to ownership), to link strengthening of land rights to greater control over valuable resources, to establish accessible processes for documenting local resource rights, and to protect resource rights irrespective of documentation can sharpen the effectiveness of these tools. These issues need to be addressed in a systematic way – documenting local resource rights would do little to strengthen these rights if their nature and content remain weak and unclear.

## **3.2. CONSULTATION AND BENEFIT-SHARING TOOLS**

### **3.2.1. Introduction**

A second set of tools concerns legal requirements for investors to consult local resource users and to negotiate with them benefit-sharing arrangements. Broadly speaking, these tools seek to address the mismatch that large-scale investment projects may produce, whereby much of the benefit accrues to the government and/or the country as a whole (e.g. in terms of taxation and royalties, and of contribution to the national GDP) while costs are mainly borne by local resource users (e.g. in terms of loss or damage to property). These tools seek to reduce this mismatch by enabling local resource users to participate in the benefits generated by the investment project. For instance, Ghana and Mozambique have adopted legislation that specifically regulates consultation and/or benefit-sharing arrangements in investment projects. Relevant provisions are also included in the legislation of the other focus countries (e.g. Tanzania).

Consultation and benefit-sharing tools present some degree of overlap with other tools examined here. For instance, local consultation may be required not only as a stand-alone process but also as part of broader social impact assessment processes (see below, section 3.3.2). Benefit sharing is conceptually distinct from compensation, as it aims to go beyond reparation for loss or damage suffered and is a continuing rather than a one-off mechanism; but, in some cases, the border line between compensation and benefit-sharing is in practice blurred (on this, see below, section 3.3.3.)

### **3.2.2. Mandatory consultation processes**

A first type of tool is for the law to require the government and/or the investor to “consult” local resource users as part of the process to approve a proposed investment project and/or to allocate resource rights to foreign investors. Consultation requirements may be embodied in sectoral legislation – such as mining and forestry legislation. As a result, the application of such requirements may vary not only across countries but also across sectors within the same country.

In Tanzania, for instance, when the president decides to transfer part of village-held land to “general land” under the direct control of the central

state, local resource users can “make representations” to the Land Commissioner (section 4(5) of the Village Land Act 1999). In Mozambique, both the Land Act 1997 and the Forest Act 1999 provide for mandatory community consultation processes before investors are allocated land use rights (“DUAT”) and forest concessions (articles 13 and 24 of the Land Act, and article 17 of the Forest Act). While under the Forest Act the mandatory consultation process only applies to forest concessions, the implementing regulations adopted under the Act extend consultation requirements to the issuance of forest permits.

In Ghana, while there is no general legal requirement for investors to consult local resource users, the Timber Resources Management Act 1997 requires the “authorization” of the “individual, group or owner concerned” for the issuance of Timber Utilisation Contracts in land areas that are *already in use*.

Local consultation procedures raise a range of legal issues and differ widely in the way they tackle them. The sections below explore these issues.

### *Who is consulted?*

The first element of any mandatory consultation process is clarifying who is to be consulted. All too often, consultation processes only concern a restricted number of people, usually local elites who may act to their own advantage and to the detriment of other local stakeholders. Legal requirements on who is to be consulted vary substantially across countries, for instance depending on whether consultation is limited to land “owners” and holders of other legally registered land rights, or whether it is extended to all resource users.

In Ghana, the consent requirement for the issuance of timber utilisation contracts in land areas currently in use refers to the “individual, group or owner concerned”, suggesting that it applies to holders of rights not amounting to full ownership (section 4 of the Timber Resources Management Act). In Mozambique, all land is owned by the state; locals and foreigners alike enjoy use rights on state-owned land. Here, local consultation of local holders of use rights is mandatory irrespective of whether such rights have been registered or not (articles 13(2) and 14(2) of the Land Act).

Generally, restricting consultation requirements to owners or other registered right holders alone substantially limits the applicability of this

requirement in much of rural Africa. This is because registered private ownership of rural land is rare in much of the continent (see above, chapter 2.3). Extending consultation requirements to a wider range of resource right holders is therefore crucial for the relevance and usefulness of mandatory consultation processes. In this sense, legal reform to secure local resource rights may include not only introducing new consultation requirements, but also extending existing requirements to a wider range of resource users.

Among resource rights not amounting to ownership and/or not legally registered, further differences of treatment may exist between different types of resource users – for instance between farmers and herders. This may reflect entrenched government perceptions about the economic contribution of different forms of resource use. In this contest, pastoralism has often not been considered as a form of productive resource use deserving legal protection – although the “pastoral” legislation recently adopted by some Sahelian countries has started to recognise pastoralism as meeting “mise en valeur” requirements (e.g. Mali’s Pastoral Charter 2001 – see above, section 3.1.3).

In addition, under customary resource tenure systems, pastoralists tend to hold rights that differ from those of farmers, and that focus on flexible arrangements enabling herb mobility and periodic access to strategic resources such as water and dry-season grazing (rather than on permanent exclusive rights over clearly delimited lands). While these resource rights are not less worthy than those held by farming groups, their lack of exclusivity makes them more vulnerable to encroachment.

This legal vulnerability of pastoral rights may also be reflected in consultation requirements. In Ghana, for instance, while the Timber Resources Management Act requires local consent for farmed land and for forest plantations, it is silent on grazing lands.

As a result of these differences in treatment, much pastoral land in many parts of Africa has been converted to other forms of resource use, usually with the explicit or implicit backing of the government – including within the context of foreign investment projects. Again, legal reform extending the application of consultation processes to all local resource users, including pastoralists, would help secure their resource rights.

Another aspect of “who to consult” concerns whether mandatory consultation requirements relate to individuals, to groups or to both. Under Ghana’s Timber Resources Management Act, both seem possible. In Mozambique, on the other hand, consultation requirements are established with specific regard to “local communities” (on which see above, chapter 3.1).

Where consultations are held with groups (“communities”), there is a need to clarify who represents the community in consultation exercises (particularly given the large size of many communities – see above, chapter 3.1); and which accountability mechanisms can be established between the representatives and the represented. Evidence from Mozambique suggests that, in many cases, consultation processes for the allocation of land rights and/or forest rights to investors only involve few community members, usually customary chiefs and local elites; that women are rarely involved; and that there is little internal discussion between community representatives and their constituents (Norfolk, 2004; Durang and Tanner, 2004; Tanner and Baleira, 2006).

### ***Object and scope of the consultation***

Another key variable of mandatory consultation processes concerns their object and scope. What are local resource users consulted about? Is the object of consultation the very desirability of the investment project in the land area they use, or the terms and conditions of such project? Or is it the more specific issue of its impact on local resource rights (the other more fundamental issues being reserved to determination by the central government without much consultation)?

The last scenario is the most common one: even where consultation is legally required, its scope is limited to obtaining the consent of local resource users for granting resource rights within their land area to the investor. For local resource users, the most that can come out of it is (not a reshaping of key decisions concerning the investment project but) some degree of benefit sharing. This is the case in Ghana and Mozambique.

In Mozambique, the consultation process is conceived slightly differently for land and forest rights. In the case of land rights, community consultation is required before land use rights are allocated to investors; the specific object of this consultation concerns ascertaining that the land area is “free” and



“has no occupants” (article 13(3) of the Land Act; see also article 24 (1)(c) of the same Act). If the area is not free, then landholding communities and investors are expected to negotiate some form of benefit sharing to compensate for loss of land access for the community (although the Land Act itself does not explicitly state this; see below, section 3.3). As for forest rights, the Forest Act simply requires “consultation with affected communities” before forest concessions are issued (article 17(2)). Differently to the Land Act, the Forest Act does not clarify the object and scope of the consultation. However, here too the expectation is that communities and investors would negotiate benefit-sharing agreements as part of the process to obtain the approval of local communities to the grant of resource rights to the investor.

Overall, the narrower the scope of the consultation process, the more limited its potential for local empowerment. Even with regard to the specific issue of resource access, local resource users may be under considerable pressure to endorse the investor’s resource access once all the other issues have already been resolved between the central state and the investor. This may reduce the significance and impact of the consultation exercise. Legal reform extending the scope of the consultation may give local resource users more negotiating power and greater control over the resources on which they depend.

*Process: sequencing, timing and quality*

Linked to the previous point, the timing of the local consultation and its position in the broader process for the allocation of resource rights is also key. Does the consultation take place when all options are still open, or does it happen when the key decisions (e.g. on whether the investment project should go ahead in the first place) have already been taken?

In general, the latter scenario is the most common. In Ghana, for instance, evidence suggests that timber contracts are usually issued before consultation with local resource users take place, and it is then up to the contract holder to find an arrangement with local users. As in the case of scope, the practical operation of this approach tends to undermine the negotiating power of local resource users.

In Mozambique, local consultation is to take place before the issuance of land and forest rights. But even in these cases, consultation still tends to

occur at a relatively late stage in the decision-making process – after the feasibility studies and the negotiation of the terms and conditions with government officials. At this point, key decisions have already been taken, and government bodies and/or officials may have a vested interest in the project to go ahead. This is in line with evidence from Mozambique suggesting that local resource users feel under pressure from government officials to welcome the investment project without major objections (Tanner and Baleira, 2006).

Generally speaking, the later the place of local consultation in the overall decision-making process, the lesser its ability to affect the design of the project, and to empower local resource users. Conversely, reform to anticipate the consultation exercise in the overall process would strengthen the negotiating power of local resource users.

In addition, consultation processes are typically characterised by major imbalances in skills and by significant information asymmetries among foreign investors, the central state and local resource users (as reflected in Table 3 above). Local groups may not fully understand the full implications of granting resource rights to foreign investors. They may also lack crucial information about the economic value of local resources in export markets. This creates the risk that consultation processes lead to benefit-sharing deals characterised by gross mismatches between the investor's profits and the benefits shared with local groups.

These issues call for tailored arrangements to ensure the quality of the consultation process. This may include provision of expert (legal and other) advice to local resource users. Timing is also crucial. Legal requirements imposing tight timeframes on the consultation process can have detrimental effects on its quality. For the consultation to be meaningful, time is required to raise awareness and build capacity among local resource users. Time constraints limit options for doing this. In Mozambique, for instance, a 2001 ministerial directive requires land requests from investors to be processed within 90 days. This has put pressure on consultation processes. A recent survey of 260 consultations in Mozambique found that the great majority of these consisted of a single meeting with a small number of community “leaders” (Tanner and Baleira, 2006).

### *Strength of “voice”: from consultation to consent*

The final key issue concerning mandatory consultation processes relates to the extent to which the views of local resource users have to be taken into account. Scenarios vary from rather vague obligations to consult to more stringent requirements to obtain the consent of local resource users.

In Mozambique, for instance, while investors are required to consult “local communities”, they are not legally required to obtain their consent. Ultimately, even if the community opposes the project, the state can still decide to allocate resource rights (e.g. forest concession) to a foreign investor (under the Forest and Wildlife Act 1999). Similarly, in Tanzania, local resource users can “make representations” to the Land Commissioner on transfers of land from villages to the central state. The Land Commissioner must “take [these representations] into account” but is not bound to follow them (section 4(5) of the Village Land Act 1999).

In relation to indigenous peoples, international law requires their consultation on the allocation of resource rights in their lands, and “free and informed consent” for their relocation (articles 15 and 16 of ILO Convention 169). These provisions are reflected in the domestic law provisions of some countries (for instance, outside the African context, under section 16 of the Philippine’s Mining Act 1995, which requires the “prior consent” of indigenous communities for mining operations in their ancestral lands). No such provisions exist in the legislation of the African countries on which this study focuses.

This issue has very major implications for the quality of the consultation process (which may become a mere “box-ticking” exercise if appropriate safeguards are not provided) and for the negotiating power of the parties involved in it. Everything else being equal, a “veto” power gives local resource users substantially greater negotiating power, and is likely to enable them to extract more advantageous benefit-sharing conditions than would otherwise be possible. On the other hand, an absolute veto power may be difficult to operate, as it would offer local resource users the basis for “holding out” and it may prevent the implementation of projects that would be in the public interest. This calls for combining tight consultation requirements with robust safeguards in compulsory takings of local resource rights (see chapter 3.3).

### *To sum up*

Mandatory consultation processes can enable local resource users to have greater control over the resources on which they depend. However, experience with this tool, for instance in Ghana and Mozambique, has produced mixed results. This is partly due to extra-legal factors, such as intra-community inequalities and lack of local capacity. But it is also due to shortcomings in the design of mandatory consultation processes. Legal issues affecting such design include requirements on who is to be consulted, on the object, scope and timing of the consultation, and on the extent to which the views expressed by consulted stakeholders must be taken on board. Legal reform on these aspects (e.g. extending the application of consultation requirements from owners alone to other resource users) can increase the empowering potential of this tool.

### **3.2.3. Negotiated benefit-sharing arrangements**

A second type of legal tools relates to benefit-sharing arrangements negotiated between foreign investors and local resource users. This tool is closely linked to the previous one – negotiated benefit-sharing arrangements usually constitute the outcome of a local consultation process. This section briefly explores issues concerning benefit-sharing arrangements negotiated between local holders of resource rights and incoming foreign investors. It does not cover, on the other hand, other types of benefit-sharing mechanisms – such as “internal resource allocation” systems, whereby a share of the revenues (e.g. taxation, royalties) received by the central state is allocated to local government bodies or other entities having jurisdiction or rights over the area in which the investment project takes place (e.g. under sections 3 and 8 of Ghana’s Office of the Administrator of Stool Land Act 1994).

Experience with legally backed, negotiated benefit-sharing arrangement has been developed in some African countries – for instance in Ghana (see the “Social Responsibility Agreements” negotiated under forestry and mining legislation) and in Mozambique (under the Land Act and the Forest and Wildlife Act).<sup>45</sup> Again, such experience has so far produced mixed results. From a legal point of view, several factors (beyond those discussed above in relation to consultation processes) are likely to have bearing on the practical operation of this tool:

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45. On Social Responsibility Agreements in the forestry sector of Ghana, see Mayers and Vermeulen (2002).

- The extent to which the conclusion of benefit-sharing arrangements is required by legislation. Requirements embodied in legislation are usually vague. Ghana's Timber Resources Management Act 1997 requires investors applying for a Timber Utilisation Contract to make "proposals to assist in addressing social needs of the communities who have interest in the applicant's proposed area of operations" (section 3(3)(e)); although implementing regulations require that such proposals be based on an agreement negotiated with local stakeholders (section 13). Similarly, in Mozambique, legislation is silent about benefit-sharing agreements: the Land Act 1997 and the Forest and Wildlife Act 1999 require consultation with local communities (section 13(3) and 17(2), respectively), which suggests that some form of agreement is reached at the end of the consultation process; but no provision is made on the nature and legal value of this agreement.
- Who concludes the benefit-sharing agreement on behalf of local resource users. This is key to preventing capture of benefits by local elites. In Mozambique, "local communities" are established as legal entities by the Land Act (see above, chapter 3.1). The implementing regulations of the Land Act require community consultation reports to be signed by at least three and up to nine representatives (article 27). In some cases, these nine representatives have de facto evolved into a sort of standing committee responsible for land management decisions (CTC Consulting, 2003). This has no basis in the law, under which the nine representatives are merely responsible for signing documents on behalf of all community members, not for taking decisions (CTC Consulting, 2003). This (mis-)application of the law may pave the way to abuse and elite capture.
- The legal value of the benefit-sharing agreement, including its relationship with the natural resource concession to which it relates. Although benefit-sharing agreements (or proposals based on them, in the case of Ghana) are to be annexed to the investor's application for the allocation of natural resource rights, their legal value is unclear in both Ghana and Mozambique. In particular, it is not clear whether the investor's non-compliance with the benefit-sharing agreement can be sanctioned by the host state with interference with the investor's resource exploitation rights (suspending or even terminating them). In Mozambique, evidence suggests that benefit-sharing agreements are

usually not formalised in the way required for them to have validity in court (Tanner and Baleira, 2006); that they tend to be vaguely worded (for instance embodying generic promises to create employment) and not to have any measurable indicators and timeframes for delivery (which makes enforcement difficult; Tanner and Baleira, 2006); and that non-compliance with the benefit-sharing agreement is quite common and is not treated as a justification for sanctions concerning the forest concession (Johnstone *et al*, 2004; Durang and Tanner, 2004). These factors undermine the legal value of benefit-sharing agreements.<sup>46</sup>

- The extent to which the benefit-sharing arrangement is established as an ongoing process rather than as a one-off exercise. Resource right allocations to investors are usually for rather long terms, possibly spanning several decades. On the other hand, in both Ghana and Mozambique, the negotiation of benefit-sharing agreements is regulated as a one-off exercise. No mechanisms for systematically monitoring and reviewing benefits and benefit-sharing is established. In many cases, this problem is exacerbated by the content of the benefit-sharing agreements themselves – which often emphasise one-off compensation and small amounts of money rather than long-term revenue flows pegged to the income generated by the investment project. For instance, two reviews of benefit-sharing agreements in Mozambique found that many of these emphasise elements like financial compensation and the construction of schools and clinics (Norfolk, 2004; Tanner and Baleira, 2006).
- The extent to which there exist monitoring institutions with the legal authority and the capacity to monitor compliance and to sanction non-compliance. Both Mozambican and Ghanaian legislation are silent on this issue.

Besides these legal issues, extra-legal aspects importantly affect the outcome of benefit-sharing negotiations and arrangements. By their very nature, these outcomes are shaped by differences in negotiating power,

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46. This issue is illustrated by the unreported Cameroonian case *Chief S.B. Oben and Others v. Mukete Plantations LTD* (1994), summarised in Egbe (2001a). The case involves non-compliance by a logging company with the terms of a benefit-sharing agreement signed in 1979 with a local community. The agreement provided for the construction of infrastructure like health centres and roads. Based on this agreement, the company obtained a concession from the government. However, ten years after the conclusion of the agreement, implementation had not yet started. The community sued the company, and was awarded a small amount of damages (equivalent to some 1,500 GBP).

which are in turn rooted in differences in resources, skills and influence. Negotiations between foreign investors and local resource users tend to be affected by the important power asymmetries between the two negotiating parties (see Table 3 above). This is even more problematic where government officials facilitating the negotiation side with the investor, as a result of government policy or individual attitude (see above).

To sum up, negotiated benefit-sharing arrangements can provide a tool to enable local resource users to benefit from investment projects implemented on lands in which they have an interest – but their operation is affected by both legal and extra-legal factors. As for legal factors, reform to tighten legal requirements making benefit-sharing arrangements a condition for the allocation of resource rights to foreign investors, and to strengthen the legal value of benefit-sharing agreements and related monitoring and sanctioning mechanisms can increase the empowering potential of this tool.

### **3.3. TOOLS TO MINIMISE AND COMPENSATE NEGATIVE IMPACTS ON LOCAL RESOURCE RIGHTS**

#### **3.3.1. Introduction**

Large-scale investment projects may be associated with the taking or compression of local resource rights, and with environmental pollution and damage to property (e.g. soil and water pollution). Therefore, another set of legal tools to secure local resource rights concerns tightening requirements for minimising, mitigating and compensating land takings and environmental damage suffered by local resource users. This includes requiring a social impact assessment before approving the investment project; tightening rules on compensation for taking of property; and establishing effective remedies for damage to property (from injunctions to compensation). In this area, access to courts to challenge government action or to seek redress for damage suffered is particularly important – as exemplified by the Botswana case *Sesana, Setlhobogwa and Others v. Attorney General* (see below).

#### **3.3.2. Social impact assessment**

“Social Impact Assessment” (SIA) aims to assess the likely impacts of a proposed project on local resource rights *before* the project is approved, and to design strategies that can help minimise and/or mitigate these impacts.

SIAs first emerged in the US in the 1970s, and have since been applied to developing country contexts – particularly as part of the requirements of the World Bank and of other funding agencies. SIA has developed in association with, and often within the broader context of Environmental Impact Assessment (EIA; in some cases, assessments of both environmental and social impacts are termed “Environmental and Social Impact Assessment”). However, while there has been growing experience with and expertise in EIA, SIA methodologies remain less established (Barrow, 2000) – although the past few years have witnessed growing experience with this tool.

SIAs generally involve the identification of the actors potentially affected by the proposed project; the formulation of alternative project designs; the determination of their respective potential impacts on the identified actors, and of the magnitude of such impacts; the analysis of trade-offs; the design of mitigation measures; monitoring during project implementation; and ex-



post evaluation (Barrow, 2000). Loss of and damage to property are typically considered within the scope of SIAs.

From a legal point of view, a key point is whether an SIA is required by law, and in what form. In the US, the development of SIA was fostered by the requirement in the National Environmental Policy Act 1969 to assess the likely impacts of proposed projects, including in their physical and socio-economic aspects (Barrow, 2000). Legal requirements to conduct an SIA may cover two aspects:

- Content: requiring an assessment of the social impacts of the proposed projects;
- Process: requiring that the assessment be carried out in consultation with affected populations.

SIA-related consultation requirements may overlap with broader local consultation processes concerning not just the likely impacts of proposed investment projects but also their terms and conditions (on these consultation processes, see above, chapter 3.2.2).

While social impact assessments of large-scale investment projects are often undertaken in practice, including in order to comply with the policies of lending institutions involved in the project, domestic legislation specifically requiring and regulating SIAs is not very developed in much of Africa.

That said, since the 1992 Rio Conference on Environment and Development, several African countries have adopted framework legislation on environmental protection (e.g. Mozambique's Environment Act 1997, Ghana's Environmental Protection Agency Act 1994, Cameroon's Framework Law on Environmental Protection 1998, Senegal's Environment Code 2001). Under this legislation, an EIA is usually required for proposed projects that may have negative impacts on the environment (e.g. article L48 of Senegal's Code; article 16 of Mozambique's Act). And, some countries have streamlined environmental protection provisions in sectoral legislation. For instance, under Mali's Mining Code 1999, investors applying for an "exploitation permit" must undertake an EIA (article 118). An EIA is also required for petroleum operations under Cameroon's Petroleum Code 1999 (article 83).

In some cases, these EIA provisions specifically require SIA elements. This may include both “content” provisions (on social impact) and (more commonly) “process” provisions (on local consultation). Senegal’s Environment Code provides for a public hearing and for public participation in the EIA process (articles L52 and 53). While the Code itself only refers to environmental aspects, Decree 282 of 2001 implementing it explicitly includes impacts on property rights (article R39).

More commonly, SIA requirements within broader EIA processes are spelt out in implementing regulations. For instance, while the EIA provisions in Cameroon’s Framework Law on Environment Protection fall short of extending to SIA aspects, the 2005 Decree adopted to implement it requires consultation of local groups as part of the EIA process. Similarly, Mozambique’s Decree 45 of 2004 contains detailed provisions on public participation in the EIA process (article 14).

However, despite the existence of these provisions, legal requirements for SIAs remain rare and weak. First, while the above provisions set process-related requirements, they do not explicitly prescribe assessment of “social” (rather than “environmental”) impacts. In these cases, much depends on the scope that government agencies, the investor and others (e.g. lenders) decide to set for the EIA. Broadening the scope of legal requirements for SIAs would enable to better minimise and mitigate negative impacts on local resource rights.

Second, even process-related requirements seem rather weak. In the examples mentioned above, they are established in the implementing regulations rather than in legislation, and can therefore be more easily modified by the government. And, such requirements tend to be rather vague. For the consultation exercise to be meaningful, legal requirements on quality standards are needed. For instance, “appropriate opportunity” for comments from members of the public and an “appropriate period” to consider these comments are required by the (non-binding) 1987 UNEP Goals and Principles of Environmental Impact Assessment (a Decision of the UNEP Governing Council; Pring and Noé, 2002). Without these safeguards, SIAs risk becoming standardised box-ticking exercises that do not generate a solid understanding of local contexts and of likely impacts on them; and that do not adequately feed into the investor’s risk-assessment and decision-making processes.

In addition, although few lessons from recent experience with SIAs in large-scale investment projects are publicly available and there is a clear need for further work in this area, the available literature on early SIA exercises suggests that weak methodologies, inadequate baseline research and lack of understanding of complex local (“customary”) resource tenure systems have led to disappointing results in many past SIAs. For instance, there have been reports that the number of affected people has been substantially underestimated in several cases (Cernea, 1997; WCD, 2000). In the Ruzizi Hydroelectric Project (Democratic Republic of Congo, Rwanda and Burundi), the “less than 200 people” that were expected to be displaced by the project ended up being 20,000 (Cernea, 1997). While the focus of assessment exercises has often been on displacement, other negative impacts on local resource rights (e.g. loss of seasonal access to grazing land) were overlooked in many cases (Cernea, 1997). And, in assessing the extent of loss of land rights, the focus has often been on cultivated land. Under many “customary” systems, this is only a fraction of the land held by local resource users – part of the land being left fallow for regeneration purposes. In resettlement schemes, this has resulted in considerable reductions in cultivable land per family (e.g., on the Nangbeto Dam in Togo, Cernea, 1997).

Some recent SIAs have developed much more sophisticated ways for dealing with social impacts, including by paying greater attention to minimising and compensating negative impacts on “customary” resource rights that are not legally protected (for instance, with regard to the Environmental Management Plan developed for the Chad-Cameroon pipeline project). Involvement of lending institutions like the World Bank has been instrumental to improvements in SIA standards. Given the rapid development of this area of law and practice, there is a need for more in-depth research on more recent approaches to SIAs and on their outcomes.

A final challenge for the effectiveness of SIA processes in minimising negative impacts on local resource rights relates to the extent to which government agencies have economic, human and other resources to ensure compliance with applicable legislation on standards. This aspect varies significantly across countries but tends to be problematic across Africa.

Tighter legal requirements on SIAs can strengthen local resource rights not only by increasing pressure to minimise and mitigate negative impacts on these rights, but also by paving the way for judicial review proceedings. Indeed, EIA requirements have enabled civil society organisations to challenge proposed projects by requesting judicial review of compliance of EIAs with the legally prescribed processes.<sup>47</sup>

### **3.3.3. Safeguards and compensation for land takings**

Investment projects often entail, to a greater or lesser extent, the taking of land, whether permanently or temporarily (e.g. during construction works); and/or the compression of local resource rights through the creation of servitudes (e.g. “rights-of-way”) and/or through restrictions on resource use. Establishing safeguards in decisions concerning takings, and fair and effective compensation mechanisms for the loss or compression of rights is key to protecting local resource rights. Although the very aim of takings is to extinguish or otherwise compress local resource rights, integrating appropriate safeguards within such processes can make them an effective legal tool to protect local resource rights. The next few paragraphs tackle some of the key challenges that need to be addressed for this legal tool to work.

#### *The conditions for the legality of takings: public purpose and non-discrimination*

Under international human rights law and under most domestic constitutions, governments can only compress property rights if certain conditions are met: pursuance of a public purpose; and compliance with non-discrimination. For instance, the ACHPR states that the right to property can be encroached upon only “in the interest of public need or in the general interest of the community” (article 14). Public purpose and non-discrimination requirements restrict the ability of the government to compress local resource rights, and set criteria for challenging the legality of government action through judicial review and other processes.

In the context of foreign investment projects, the public purpose requirement is particularly relevant. This requirement is widely accepted to be met where takings of land are motivated for instance by the

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47. For an example outside the African context, see the case *BACONGO v. Department of the Environment and Belize Electric Company* – a judicial review proceeding brought by an environmental NGO, concerning the EIA for the Chalillo Dam in Belize, and decided by the Privy Council in London as the highest court of Belize.

construction of hospitals, schools or other public facilities. But whether commercial projects like mining operations should be considered “public purpose” initiatives raises questions. It is accepted that private-to-private (rather than private-to-state) transfers of resource rights may still be in the public interest if they respond to public purpose policy goals – such as ensuring a more equitable asset distribution (see for instance the ECHR case *James v. UK*).

Large-scale investment projects are often justified “in the name of development”, and in that sense an argument is usually made that such projects are for a public purpose (for instance, with regard to dams, which generate power for both industry and domestic consumption). But in purely commercial projects such as mining operations, such positive spillovers for the domestic industry and for society at large are less evident, while the profits generated by the project accrue to private operators (and to a lesser degree to the government through taxes and royalties).

This issue is particularly pressing given that in several jurisdictions private companies undertaking activities that are deemed to be in the public interest may initiate the process to take or otherwise compress land rights – subject to the approval of government authorities. For instance, Cameroon’s Law 96-14 of 1996 concerning the construction and operation of pipelines provides for the allocation of a land easement from the government to the pipeline operator; and enables the latter to temporarily occupy privately held land outside the easement area for construction and maintenance purposes, provided that compensation is paid and that government approval is obtained (article 33).

In practice, however, public purpose requirements offer very limited scrutiny of government action. In Africa and elsewhere, courts have tended to defer to governments in their definition of what public purpose is, and decisions striking down takings based on public purpose requirements alone are very rare. At most, courts have reviewed whether government measures are reasonable and proportionate to pursue the stated purpose.

To further reduce the possibility of contesting compliance with the public purpose requirement, specific legal devices have been used:

- First, legislation typically requires the government to “declare” (not to “demonstrate”) the existence of public purpose. This is the case, for instance, of Ghana’s Land (Statutory Wayleaves) Act. Similarly, in Chad, a decree of the Council of Ministers merely “declares” the public purpose of a proposed project (Law No. 25 of 1967, article 4).
- Second, legislation may explicitly recognise that commercial projects can meet the public purpose requirement. In Tanzania, for instance, the Village Land Act states that investment projects “of national interest” may be in the “public interest” for the purposes of expropriation provisions (section 4(2)). In some cases, contracts between the state and the foreign investor and even domestic legislation adopted to regulate the investment project explicitly state that such a project is in the public interest (e.g. article 27.1 of the COTCO – Cameroon contract for the Chad-Cameroon pipeline, and Cameroon’s Law 96-14 of 1996, relating to the same project).
- Third, the law may explicitly limit the possibility of scrutinising the public purpose adduced by the government. In Cameroon, for instance, the law admits complaints on expropriation only insofar as they relate to the amount of compensation – not to whether the expropriation is justified in the first place (section 14 of Law 85-09 of 1985).

Insofar as they weaken the strength of the public purpose requirement, these devices undermine the security of local resource rights. Law reform establishing robust and unqualified public purpose requirements and enabling judicial review of acts alleged to violate those requirements would contribute to strengthen expropriation processes as a tool to secure local resource rights.

### *What resource rights are to be compensated?*

Requirements to pay compensation for loss of resource rights also raise important issues. The first one concerns the type of rights and interests that are susceptible to be compensated – namely whether compensation should be restricted to loss of ownership alone (particularly land ownership), or whether it should be applied to cases where local resource users do not enjoy full ownership rights. In the latter case, what is to be compensated – is it the loss of rights and interests in using the land, or only the loss of assets produced through investment in/on the land (wells, fences, buildings, etc.)?

Legislation restricting compensation for land takings to private ownership rights is common throughout Africa. In these cases, lack of legal titles entails payment of compensation only for loss of assets other than land (“improvements” such as buildings, wells, fences or other). This is because the land taken is technically already owned by the state. In Cameroon, Law 85-09 of 1985 on expropriation clearly states that it only applies to private ownership – as opposed to use rights on state-managed lands (the “*domaine national*”) (section 2). Such use rights are taken through a different process (“*incorporation*”), which follows steps similar to the expropriation procedure but entails compensation only for improvements – not for the land itself (article 23 of Decree 76-166 of 1976).

The implications of norms restricting compensation for loss of land rights to registered ownership alone must be assessed in the light of the widespread lack of land titles across rural Africa. As mentioned above, in Africa only between 2% and 10% of the land has been registered (Deininger, 2003). In Cameroon, for instance, only about 3% of rural land is registered (Egbe, 2001b, citing data from 1995). This is due to geographical and economic inaccessibility of land registration agencies, as well as to cumbersome procedures. The result is that much of the land lost to investment projects is not compensated: local resource users are only compensated for the improvements that they have built on the land. In the case of fallow or unused land, they may not be compensated at all. They are thus deprived of their source of livelihoods without adequate compensation. This problem has been documented by the World Commission of Dams in relation to several dam projects (WCD, 2000; for a specific example on the Akosombo Dam in Ghana, see de Wet, 2000).

On the other hand, some African countries have adopted legislation that requires payment of compensation for takings of customary rights. In Mali, for instance, the Land Code 2000 (as amended in 2002) requires public purpose (“*utilité publique*”) and “fair” compensation for the taking of customary rights (article 43); and extends, with exceptions, the procedure established for expropriation of private property to the taking (“*purge*”) of customary rights (article 47).

In Tanzania, courts have required payment of compensation for loss of customary rights (*Attorney General v. Akonaay, Lohar and Another*); and,

under the Village Land Act, “customary rights of occupancy” are “in every respect of equal status and effect” to government-allocated land rights, and their expropriation requires payment of compensation (section 18). This is reinforced by section 4(6) of Tanzania’s Land Act, which states that all lawful land occupation, whether based on a “right of occupancy” or on customary tenure, is deemed as “property” (which attracts payment of compensation under the Constitution); and by section 8 of the Village Land Act Regulations, under which rights taken are compensated regardless of whether they are registered or not.

Outside the scope of law, the policies of lending institutions have no legal value as such but may have important repercussions. For example, World Bank Operational Policy 4.12 on “Involuntary Resettlement” (issued in 2001, revised in 2004, and replacing the earlier Operational Directive 4.30 on the same topic) applies to projects in which the IBRD and/or the IDA are involved. It specifically requires full compensation for people without legal title but with land claims “recognised by the law of the country” (para. 15). The application of this policy may entail that the conditions for resettlement are more generous than otherwise provided under the domestic legislation of the host state. For instance, in the Ghanaian part of the West African Gas Pipeline, World Bank involvement and the ensuing application of its resettlement policy entailed that the “Resettlement Action Plan” prepared for the project provided compensation not only for land ownership rights (as per Ghanaian legislation) but also for other legally backed use rights.

Reform to extend the safeguards of expropriation processes from ownership alone to a broader range of resource rights would increase the ability of such processes to protect local resource rights.

*What type of interference triggers payment of compensation?*

Outright expropriation triggers payment of compensation under most African constitutions and laws. Lesser forms of interference may also have substantial impacts on local resource users, however. These include restrictions on land use (e.g. bans on tree planting on land restored after the construction of the Chad-Cameroon pipeline; see article 27.8 of the COTCO-Cameroon contract, enacted into Cameroon’s domestic legislation through Law 97-16 of 1997); and the establishment of servitudes such as the “right-of-way” for the



construction, operation and maintenance of public infrastructure (e.g. under Ghana's Land (Statutory Wayleaves) Act 1963).

In these cases, while local resource users formally retain their resource rights, these are considerably compressed. Lack of compensation in these instances would result in loss of livelihood sources. This is a major problem in many compensation schemes – although some countries have taken steps to address this. Under Ghana's Lands (Statutory Wayleaves) Act, for instance, any person who suffers loss as a result of action undertaken under the “wayleave” is entitled to compensation (section 6(1)).

Similarly, Mali's Mining Code 1999, in regulating the establishment of mining servitudes on land held by third parties, requires payment of compensation for compression of ownership, occupation, customary and other rights (article 60). And, if the establishment of such servitudes makes “normal” use of these rights “impossible”, the right-holder has the right to demand a full (and duly compensated) expropriation (article 60).

In Tanzania, compensation is due for transfers of land from “village land” (managed by the village councils) to “general land” (managed by the central government; section 4(8) of the Village Land Act). Such transfers do not entail any transfer of ownership (which remains vested in the president on behalf of the nation), but rather a change in the legal regime applicable to the land. They are typically effected in order to enable land allocations to foreign investors by central government agencies.

### *What standard of compensation?*

Another set of questions relates to the way in which and the criteria according to which affected property is valued (“valuation”); and to the standards determining the relationship between that value and the amount of compensation (standard of compensation – in theory, ranging from zero to full value).

While international law contains a range of formulae for the standard of compensation relating to takings of foreign investors' assets (the increasingly used formula being the so-called “Hull formula” of “prompt, adequate and effective compensation”; see above, chapter 2.2), it is much less developed on standards applicable (not to foreigners but) to nationals.<sup>48</sup> The UDHR

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48. That international law compensation standards developed in relation to foreign investors do not apply to nationals was confirmed in the ECHR cases *James v. UK* and *Lithgow v. UK* – see above, chapter 2.2.

prohibits “arbitrary” deprivations of property, and thereby implicitly requires payment of compensation for takings; but is silent on the standards applicable to compensation (article 17). The ACHPR merely states that the right to property can only be encroached upon in the public interest and according to the law – but contains no provisions on the duty to pay compensation nor on the standard of compensation (article 14).

In many countries, national constitutions and laws embody valuation standards (e.g. “market value” under Tanzania's Village Land Act Regulations, sections 9-10) and compensation standards (such as “fair” and “equitable” compensation under Mali's Mining Code and Land Code; “full and fair” compensation under Tanzania's Village Land Act, section 18(1)(i)). In some cases, legislation may provide more specific guidance. Cameroon's Law 85-09 of 1985 requires that compensation be related to the “direct, immediate and verifiable damage caused by the dispossession”, including land, crops, buildings and “any other type of development” (section 7). In Ghana, the Land (Statutory Wayleaves) Act requires that, if use through “wayleave” leads to benefits for the landholders, this is to be taken into account in determining compensation.

These standards of compensation raise two practical issues. First, legal standards are bound to be crystallised in rather vague formulae (e.g. “fair” or “equitable” compensation). In most cases, what these formulae mean in practice is not immediately evident. A key issue is whether compensation must be equal to the market value of the property taken, or whether it may be less than that. But apart from these basic choices of legal policy, much depends on the institutions and processes for determining how much an affected right holder is to receive.

Second, even the more concrete benchmarks that are sometimes attached to those formulae may be problematic in practice – particularly in contexts characterised by weak government capacity to update them and to collect data that is important for valuation purposes. For instance, compensation rates for loss of crops in Cameroon are embodied in a decree dating back to 1981, and do not reflect current market values (Egbe, 2001b). Evidence from Ghana suggests that in some cases where government officials have attempted to establish “full market value” as a benchmark for compensation, values may be artificially low because few buyers and sellers

declare the price paid for land in contractual documentation. Rather, they tend to refer to much lower figures – not least for tax reasons. This has negative effects on official market prices as recorded by government agencies – and therefore on compensation levels.

Outside the scope of the law, lenders' policies may also have practical implications on this issue. Where World Bank funding is involved, World Bank Operational Policy 4.12 requires that the livelihoods of affected persons should be at least restored, in real terms, to pre-resettlement levels (para. 2). It provides both for prompt and effective compensation at full replacement cost for losses of assets, either in cash or in kind (through provision of alternative land); and, "where necessary", for support after displacement and development assistance on top of compensation (paras. 6-13). This may result in the investment project applying more generous standards than those provided for by the domestic law of the host state.

#### *Compensation in cash or in kind?*

Domestic legislation usually provides for compensation to be paid in cash – similarly to what typically happens in Western countries. However, in many parts of rural Africa, cash is not a very effective form of compensation. Lack of banking facilities, lack of well functioning land markets (necessary to use cash to buy alternative land), misuse of cash by some family members (cash often being handed out to male household heads, who may use it without consulting other family members), and other factors entail that cash compensation is often not enough to restore local livelihoods to pre-resettlement levels (WCD, 2000; Cernea, 1997).

As Cernea (1997) points out, a distinction exists between compensating for loss of assets, and devising mechanisms to restore wellbeing at least to pre-resettlement levels. While cash compensation may achieve the former, it may not necessarily achieve the latter.

When cash compensation is paid, standards of valuation and compensation are particularly important. Evidence suggests that in several cases compensation was not enough to enable affected resource users to buy land of a similar nature to the land they lost (e.g. on the Kiabere dam in Kenya, WCD, 2000).

In-kind compensation may include the provision of alternative land and/or

the implementation of micro-projects such as the construction of clinics, schools, wells or other facilities. In some countries, legislation allows this option. For instance, Ghana's Land (Statutory Wayleaves) Act (as amended in 2000) enables payment of compensation through "suitable alternative land". In Cameroon, compensation for expropriation may be paid in cash or in kind, including through provision of alternative land (sections 3 and 8 of Law 85-09 of 1985). And, Tanzania's Village Land Act Regulations allow a range of compensation forms, including cash, alternative land, "regular supplies of grains" for specified periods, and other forms as may be agreed. This may enable greater flexibility in compensation schemes, so as to tailor these to the specific needs of affected local resource users.

In other cases, in-kind compensation is paid by foreign investors as a "supplement" to statutory compensation – possibly to meet higher World Bank or other compensation standards. Indeed, where World Bank policies apply, Operational Policy 4.12 also enables combinations of cash and/or in-kind compensation.

In-kind compensation also raises issues, however, including in relation to the quality of the alternative land provided (in terms of soil fertility, access to market and services, etc.), and to possible tensions that may arise between resettled and pre-existing groups.

### *Compensation to whom?*

In much of rural Africa, local resource rights are held by groups and individuals through diverse blends of individual to collective rights. This raises issues as to who should receive compensation – ranging from the individual to the household up to the lineage or clan. These issues must be addressed on a case-by-case basis in light of the specific structure and distribution of rights.

In some cases, legislation allows this. In Tanzania, for instance, where land is transferred from village-managed land to land managed by central government agencies, compensation is paid to the village as a whole for loss of communal land, and to villagers for loss of their rights of occupancy (Village Land Act Regulations, section 8).

Collective forms of compensation are also faced with the challenge of addressing the distribution of compensation benefits within the group. In

many cases, group membership is complex and fluid. For instance, should compensation be paid to the autochthonous groups that first cleared the land, or to the “incomers” that have used it for generations on the basis of informal arrangements with the autochthons – or to both? Field studies have also documented how more powerful group members (often, customary chiefs) may collude with government officials (responsible for determining who should receive how much in compensation) and incoming investors, settling for lower compensation but at the same time securing exclusive control over it to the detriment of other group members.

### *What institutions and processes?*

Establishing effective and transparent institutions and processes for handling land takings is another key area. This includes the procedure through which local resource users are informed of the proposed taking and are given the opportunity to make representations and objections; the process for making decisions about the taking, while properly considering the representations and objections received; the mechanism for determining the amount of compensation; and grievance procedures for those who feel wronged by decisions concerning the taking and/or the amount of compensation.

The determination of compensation is usually done by government bodies (e.g. in Ghana, by the Valuation Boards, attached to the Land Commission; in Cameroon, by government Valuation and Verification Commissions, under Law 85-09 of 1985). The process requires minimum rule of law and transparency standards, objective criteria and parameters limiting the discretion of valuers, provision of adequate information to affected persons, and so on. In practice, evidence suggests that there are problems in all these areas. The result is that land value determinations by valuation boards are often lower than market values.

Sequencing is also crucial – particularly whether the law requires payment of compensation (or at least determination of its amount) *before* the execution of the taking. After the taking has occurred, local resource users may be in a much weaker position vis-à-vis government agencies; valuation levels and payment timeframes may suffer as a result. This was an issue for instance in the Botswana case *Sesana, Sethhobogwa and Others v. Attorney General*, where local resource users were relocated before the amount of compensation was clarified – let alone paid.

## **BOX 7. THE SAN OF BOTSWANA: COMBINING COURT LITIGATION WITH ADVOCACY**

In 2006, the High Court of Botswana decided a landmark case brought by a group of San (also known as Basarwa or Bushmen) who were relocated by the government from the Central Kalahari Game Reserve in 2002. Although the San had lived as hunter-gatherers on that land from time immemorial and enjoyed resource rights under their customary law, the land was legally owned by the state, and no formal taking of property occurred. Rather, the government decided to terminate the provision of vital services such as water, food rations and healthcare in the reserve; to withdraw the “special game licenses” that had exempted the San from the legal prohibition to hunt in the reserve; and to prevent the San from entering the reserve without a permit. As a result of these measures, the livelihoods of the San were under threat, and many relocated outside the reserve. Compensation for loss of huts and other assets was promised but not quantified nor paid. Although a mining site existed within the reserve and out-of-court allegations were made that the relocation was motivated by the need to make land available for diamond mining, the site had already been abandoned as uneconomic, and there was no evidence that it played any role in the relocation.

The court found that although the land was owned by the state, the San were lawfully occupying it, and that the San were forcibly deprived of this possession without their consent. Government measures withdrawing special game licenses and restricting entry in the reserve were deemed unlawful and unconstitutional.

The strategy pursued by the San to challenge the relocation was manifold. It entailed establishing collective associations for negotiations with government authorities, establishing alliances with international campaigning organisations such as Survival International, and engaging with the media in Botswana and abroad (several articles featured for instance in the UK-based Guardian and on the BBC web site). Court litigation was therefore used as part of a broader strategy, and only after the escalation triggered by the relocation. Each of these elements had slightly different emphasis. The alleged role of diamond mining was for instance emphasised in media campaigns, as it provided a useful rallying cry to gather support for the cause; but was deliberately kept out of the court case, possibly due to the lack of evidence to back up that allegation. It may have been important for the court case in an indirect way, however, as international support was needed to fund litigation costs and keep the case going. The complementarity between these different strategies was confirmed by the very outcome of the court case – which, in practice, was to refer the parties back to the negotiating table, but with the starting position that the San had a right to stay in the reserve and that government measures to the contrary were illegal.

Source: *Sesana, Setlhobogwa and Others v. Attorney General*, Judgement.

In the area of takings, grievance procedures are particularly important. This is because the government plays two roles. On the one hand, it decides on takings and foots the compensation bill (although in some jurisdictions compensation is determined by the government but paid by the investor); on the other, through the valuation process, it determines how much that bill is. This conflict of interest is further exacerbated where the state holds an equity participation in the investment project, and thus has a vested interest in the profitability of such project.

Effective judicial review processes are therefore key to prevent and remedy abuse. This includes complaints on the decision to expropriate; on the amount of compensation and/or on the quality of in-kind compensation; on who should be entitled to the compensation; on delays in the payment of compensation; and on other aspects.

Legislation usually does enable affected persons to request courts to review government action. Legal restrictions may exist, however. In Cameroon, disputes on the amount of compensation can be brought before the administration first, and, if the complainant is not satisfied, before courts (section 12 of Law 85-09 of 1985). However, disputes can only concern the amount of compensation – not the validity of the expropriation itself; and complaints on the amount cannot halt the expropriation process (section 14 of Law 85-09 of 1985). Judicial review is also constrained by extra-legal factors, as access to courts remains very problematic in much of rural Africa. This is due to lack of resources and legal literacy, to economic, geographical and linguistic inaccessibility of courts, to lack of trust in the judiciary and in the legal system, and other factors.

If World Bank funding is involved, affected persons may request the establishment of an “Inspection Panel” to assess complaints and propose recommendations. While not a judicial process, this can lead to change in project design and implementation due to the influence that the World Bank may have. Access to this procedure for local resource users in rural Africa is still problematic, however, although NGOs have filed petitions on behalf of affected persons (e.g. in the Chad-Cameroon pipeline project and in the Bulyanhulu mining project in Tanzania). Similarly, where the project involves commercial banks that have signed up to the “Equator Principles”, these are to provide a “grievance mechanism” to enable affected persons to

raise issues about the project's social and environmental performance (principle 6 of the 2006 Equator Principles). However, the principles remain vague as to the minimum requirements that such grievance mechanisms must meet, and stop short of asking for a mechanism ensuring independence from the investor.

### *To sum up*

Tightening rules on taking or compression of local resource rights is an important legal tool to strengthen these rights within the context of foreign investment projects. This entails embodying in the law robust and unqualified public purpose and non-discrimination requirements, as well as requirements for payment of compensation for both takings and lesser forms of loss of rights; attaching payment of compensation not only to loss of ownership but also to impairment of other types of resource rights such as use rights based on “customary” norms; and establishing clear and fair standards of valuation and compensation, and fair and transparent expropriation procedures, including grievance mechanisms. Integrating these elements would make expropriation processes – which are by their very nature aimed at abolishing or compressing local resource rights – an effective legal tool to protect those rights.

### **3.3.4. Legal remedies for damage to property: injunctions, restoration and compensation**

Foreign investment projects may also cause damage to the property of local resources users, for instance through pollution or other damage caused by construction activities. A further set of legal tools relates therefore to remedies for damage to property. These include injunctions to stop damaging activities; and, after damage has occurred, “*restitutio in integrum*” (restoration of the damaged property to pre-damage state) and compensation. This type of compensation differs conceptually from the compensation associated with takings. In the case of takings, payment of compensation is part of the taking process, and is usually a condition for its legality. In the case of damage to property, on the other hand, compensation intervenes after a wrongful act has occurred, and constitutes a legal remedy to that act.

Injunctions, restoration and compensation are linked to the human right to an “effective remedy” for violations of rights or freedoms, stated in the



UDHR (article 8) and in the ICCPR (article 2(3)). With regard to indigenous peoples, ILO Convention 169 requires “fair compensation for damages” (article 15(2)) and compensation for “any loss or injury” (article 16(5)). That environmental pollution may constitute a violation of human rights as diverse as the right to private home, the right to dispose of natural resources, the right to food, and others, was clarified by the European Court of Human Rights in *Lopez Ostra v. Spain* and by the African Commission on Human and Peoples’ Rights in *SERAC v. Nigeria* – which specifically concerns foreign investment projects in the natural resource sector in Africa (see above, section 2.2.2).

The terms and conditions concerning legal remedies for damage to property resulting from foreign investment projects are determined by national legislation – particularly the law of torts and civil procedure. A key issue is whether remedies are only available to owners (i.e. to those having a registered title for their land), or whether they also benefit resource users not having full ownership rights. In Mali, for instance, the Mining Code 1999 requires holders of mining titles to repair all damage caused to the property of holders of land titles, occupation titles and customary rights (articles 60 and 63).

Contracts between the foreign investor and the host state may also contain relevant provisions – though these usually refer back to the domestic legislation of the host state. For instance, the 2003 International Project Agreement for the West African Gas Pipeline (WAGP) requires the investor to pay to affected “land owners and lawful occupiers of land” “fair compensation” for damaged caused, in compliance with relevant domestic legislation (article 21.9). Similarly, the COTCO-Cameroon contract for the Chad-Cameroon pipeline requires COTCO to compensate affected persons for damage suffered as a result of project activities (article 17).

The vast and growing case law on oil litigation in Nigeria provides insights on the problems affecting remedies for damage to property. A review of some 70 Nigerian court cases concerning oil spills and other types of damage (Frynas, 1999) documented a series of legal hurdles, including:

- The reluctance of courts to grant injunctions to stop polluting activities, on grounds concerning the importance of such activities for employment and revenue generation (e.g. *Irou v. Shell-BP*, quoted by Frynas, 1999);

- Tight rules on statutes of limitation, whereby lawsuits can only be brought within 12 months from the damage, compared to the time it takes to overcome the lack of funds and of legal awareness of affected persons (e.g. *Eboigbe v. NNPC*, quoted in Frynas, 1999);
- Problems concerning evidence, particularly the difficulty of proving causation between activity and damage (e.g. loss of soil fertility; *Shell v. Otoko* and *Ogiale v. Shell*, quoted in Frynas, 1999); and, where strict liability does not apply, the difficulty of proving negligence on the part of the oil company (*Seismograph Service v. Mark*, referred to in Frynas, 1999);
- Issues concerning standing (i.e. the ability to sue), particularly the principle that a community cannot sue jointly for damage suffered by individual community members (e.g. *Horsfall v. Shell-BP*, quoted by Frynas, 1999).

However, that review also documented encouraging recent developments, including a judgement providing for better compensation standards for damage to property (*Shell v. Farah*, quoted by Frynas, 1999). And, it documented a substantial increase in oil litigation after 1998 – which may suggest that persons that suffer damage as a result of oil operations are more willing and able to pursue oil companies for compensation.

These legal constraints (standing, burden of proof, statutes of limitation, limited availability of injunctions, low levels of compensation) are relevant, to different degrees, in much of Africa. Law reform addressing them would sharpen the effectiveness of damage-to-property remedies as a tool to strengthen local resource rights in foreign investment projects.

In addition to legal constraints, non-legal factors typically also constrain the ability of affected persons to access courts to seek relief – including lack of resources (with legal aid rarely being available for this type of litigation); low levels of legal literacy; geographical, economic and linguistic inaccessibility of courts; lack of trust in the judiciary; lack of independence of the judiciary; and other factors. Bridging these barriers requires vibrant several society organisations to provide legal services to local resource users.

## BOX 8. TRANSNATIONAL TORT LITIGATION

A strategy that may be used to overcome some of the legal constraints concerning domestic litigation (lack of legal aid, standing issues, lack of judicial independence, low levels of compensation, etc.) is to bring a lawsuit (not against the local subsidiary before domestic courts, but) against the parent company in its home country (transnational litigation). The effectiveness of this strategy depends on the law in force in the home country.

In the UK, the possibility of such a strategy was opened by the *Spiliada* case, in which the pre-existing “*forum non conveniens*” doctrine (whereby courts should refuse to hear a case if they are satisfied that the courts of another country are a more appropriate forum) was qualified by an exception – where the court feels that “substantial justice will not be done in the alternative forum”. This exception was applied in *Connelly* and in *Lubbe v. Cape* – both concerning lawsuits to parent companies for damage caused by their subsidiaries abroad. In both cases, lack of legal aid in the host country would have meant that substantial justice could not be done (on these cases, see Muchlinski, 2001; and Ward, 2001).

In the US, transnational lawsuits have been brought under the Alien Tort Claims Act (ATCA) of 1789, which gives US courts jurisdiction over civil tort actions brought by foreigners for acts “committed in violation of the law of nations” – even if these acts occurred abroad. In the *Filartiga* case, a US court held that it had jurisdiction to hear cases concerning violations of international (human rights) law. Since then, a number of lawsuits have been brought in the US, concerning primarily human rights violations (see e.g. *Doe v. UNOCAL*) but also, more rarely, environmental torts (*Aguinda v. Texaco* – in which, however, the court dismissed a lawsuit concerning oil pollution committed by a US-controlled company in Ecuador).

While the approaches followed by UK and US law differ in various respects (e.g., application of ordinary tort law in the UK vs need to link the lawsuit to a violation of international law in the US), they do, potentially, open the door to litigation for damage to property caused by foreign investment projects. However, important constraints exist, from both a legal and an extra-legal point of view – which explains the very limited number of successful cases brought so far.

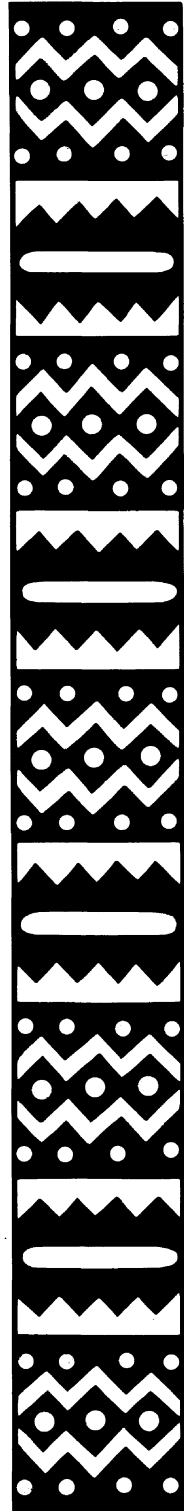
From a legal point of view, a first challenge is meeting the test to establish home country jurisdiction (e.g., in the UK, the two-pronged *Spiliada* test). This may be more difficult in the US than in the UK – as plaintiffs would be required to show that damage to property violated a norm of international law. Beyond the jurisdiction issue, a key challenge is the “corporate veil” – legally, the parent company and the subsidiary are separate entities. In order

to hold the parent company responsible for the acts of its subsidiary, the plaintiffs would have to prove that the parent company played an active role in the day-to-day management of the subsidiary (see e.g., for the UK, *Lubbe v. Cape*). This may not be easy.

From an extra-legal perspective, even assuming that legal aid available in the home country is able to cover legal costs, very substantial transaction costs (e.g. relating to contacting lawyers in the home country) and legal awareness problems severely constrain the feasibility of this legal avenue in most cases.



## IV. CONCLUSION



## 4.1. TO SUM UP

This study has developed a conceptual framework for efforts to increase local resource control within the context of foreign investment projects in Africa. It has done so through the analysis of power relations and legal frameworks characterising foreign investment in Africa, and of experience with using legal processes to secure local resource rights in five focus countries.

Part II of the study analysed asymmetries in power relations as well as in the legal protection of resource rights at international, national and local levels. It found that, overall, the law tends to accord greater protection to some interests (foreign investment) than to others (local resource users). International law as it applies to Africa accords stronger protection to the property rights of foreign investors than to local resource rights (see Table 4). Domestic legislation varies substantially across countries but tends to give the central state substantial control over land and valuable resources, to provide safeguards for foreign investors' property rights, and to grant limited and insecure resource rights to local resource users – although some African countries have recently taken steps to secure local resource rights. Local (“customary” but continually readapted) resource tenure systems commonly applied in much of rural Africa tend to give primacy to local groups vis-à-vis newcomers (including foreign investors); but they are usually overpowered by domestic legislation where valuable resources are at stake. These asymmetries in the legal protection of resource rights broadly reflect asymmetries in power relations between foreign investors, the host state and local resource users.

Addressing asymmetries in legal entitlements requires strengthening the protection of local resource rights. Foreign investors do need secure property rights, as these affect risks and returns of their investment. So do local resource users. The case made here is not that foreign investors enjoy too much protection of their resource rights; but that local resource users enjoy too little. This calls for measures to secure resource rights for all resource users, both local and foreign; and for innovative, tailored legal tools to address the specific tenure security needs of less powerful actors – namely, of local resource users affected by foreign investment projects.

Part III of the study analysed recent innovation with such legal tools. These include tools for vesting resource rights with local groups; for minimising and compensating negative impacts on those rights; and for building local consultation and benefit sharing into project design and implementation.

By their very nature, these legal tools require some anchorage in the legislation and/or case law. Legislators and judges therefore play a key role in shaping them. At the same time, the way these tools work in practice depends on the ability of individuals and groups to use them to their advantage. In many cases, local resource users, possibly supported by legal services organisations, have used available legal tools creatively and in ways not fully anticipated by legislators.

Given the widespread lack of legal awareness and the other important constraints on legal access in much of rural Africa, legislative measures must be accompanied by sustained investment in building local capacity to engage with the legal system. This includes developing and implementing para-legal tools to help local groups use more effectively the opportunities offered by the law. A range of innovative approaches to do this have been developed, and there is a need to document them and exchange experience. Despite the importance of these aspects, however, para-legal tools have only been touched on very briefly in this study. They will be tackled in a more systematic way in the next stage of the “Legal tools” project (see section 4.3).

Overall, the legal tools analysed here are less than perfect solutions in terms of both design and implementation. They tend to reveal a mix of bold innovation (in devising ways to protect local resource rights) and caution (in qualifying that protection, sometimes to the extent that they undermine it). But they nonetheless provide a useful legal basis for empowerment strategies. Ways to sharpen these tools have been discussed in this study.

Tools to devolve greater resource rights to “communities” (legally constructed as private entities or as local government bodies) give local users greater control over resources. However, such devolution has in most cases fallen short of transferring land ownership (with devolved rights mostly relating to use and management), is typically qualified (with the central state often retaining the power to withdraw or curtail devolved rights), and has been even more limited in the case of valuable resources located on or below the land.



Reform to strengthen the content of local resource rights (from precarious to unconditioned, long-term use rights through to ownership), to link strengthening of land rights to greater control over valuable resources (from timber to minerals), to establish accessible processes for documenting local resource rights, and to legally protect resource rights irrespective of documentation can increase the effectiveness of these tools.

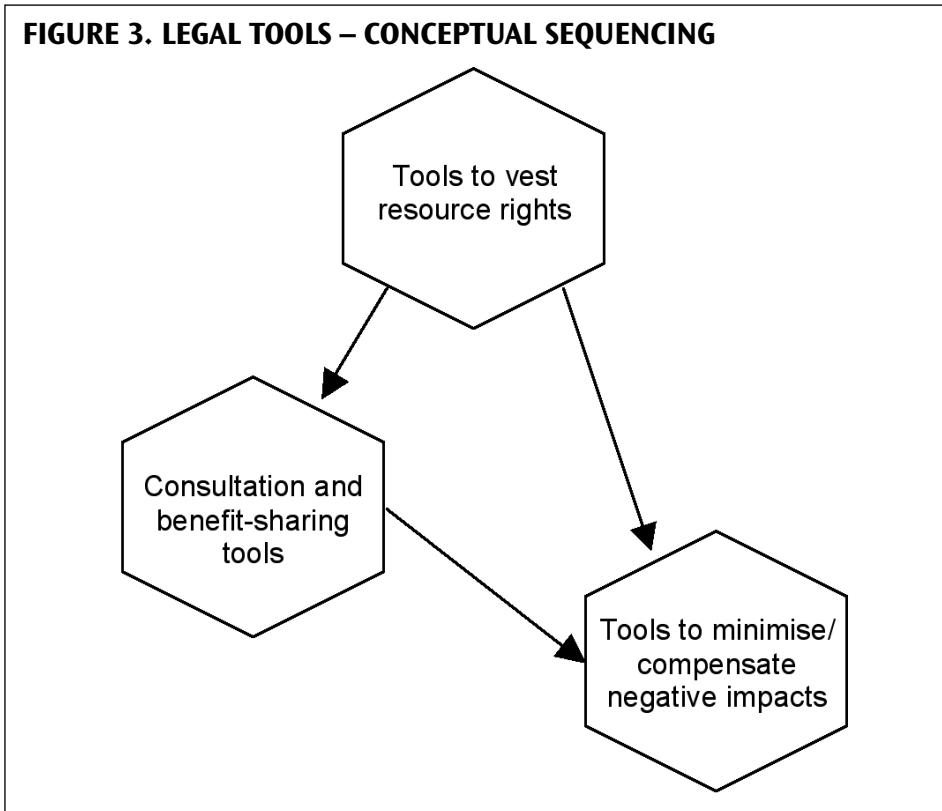
In the area of local consultation and benefit sharing, innovative legislation in some countries requires investors to consult local resource users, and provides a framework for such users to negotiate benefit-sharing agreements with incoming investors. Yet, conceptual limitations (e.g. with consultation being viewed as a one-off exercise, while investment projects may last several decades), legal ambiguities (e.g. as to the legal value of benefit-sharing agreements) and practical constraints (e.g. as to major disparities in negotiating power, and as to risks of elite capture within local “communities”) all affect the materialisation of the benefits that this legislation could bring.

Reform to tighten legal requirements on who is to be consulted, on the object, scope, quality and timing of the consultation, and on the extent to which the views expressed by consulted stakeholders must be taken on board; to make benefit-sharing arrangements a condition for the allocation of resource rights to foreign investors; and to strengthen the legal value of benefit-sharing agreements and of related monitoring and sanctioning mechanisms can increase the effectiveness of these tools.

Tools to minimise and compensate the negative impacts of investment projects on local resource rights (from takings to pollution) have also been developed, including social impact assessment, safeguards concerning takings of property, and remedies for damage to property (injunctions, restoration and compensation). However, experience with social impact assessment remains limited (both in law and in practice); full compensation for loss or compression of land rights is not yet a legal requirement in some countries; and legal and extra-legal factors affect the ability of local resource users to obtain redress for damage to property.

Tightening legal requirements for social impact assessments; establishing robust and justiciable public purpose requirements for takings; requiring compensation not only for loss of ownership but also for impairment of

**FIGURE 3. LEGAL TOOLS – CONCEPTUAL SEQUENCING**



other types of resource rights (such as use rights based on “customary” norms); establishing clear and fair standards of valuation and compensation, and fair and transparent procedures, including grievance mechanisms; and removing legal constraints to damage-to-property remedies (e.g. standing, burden of proof, limited availability of injunctions) would increase the effectiveness of these tools.

Conceptually, a sequencing exists between these three sets of legal tools: vesting resource rights with local groups is a precondition to consultation, benefit-sharing and compensation requirements; compulsory taking of local resource rights is possible either as default or after failure of consultation/negotiation exercises; and so on.

This study has emphasised the diversity of the legal tools that can be used to secure local resource rights and empower local resource users. Court litigation more easily captures the attention of the media and of the public

at large, and may be a useful mechanism of last resort in some cases. But it is far from being the main form of legal avenue. Nor is use of legal processes necessarily a confrontational exercise – again, despite perceptions to the contrary. Some have contrasted legal processes as characterised by confrontation with political processes as characterised by negotiation; but legal entitlements are more often used to reinforce negotiation strategies than to bring lawsuits. Some of the legal tools examined here are inherently centred on negotiation.

## **4.2. FROM LEGAL TOOLS TO LEGAL EMPOWERMENT**

In much of the developing world, groups negatively affected by investment projects have fought to protect their resource rights through social mobilisation and/or legal action. Social mobilisation entails building political power through collective action, and negotiating political deals with government and non-government actors. Legal action pursues respect for fundamental human rights enshrined in international treaties and national constitutions, may entail use of courts, and usually relies on expert advice from public interest law firms or other legal services organisations.

Legal action and social mobilisation are viewed by some as alternative strategies. To a certain extent, a disconnection exists between activists involved in social movements (that tend to emphasise power relations, collective action and political processes) and human rights lawyers (that tend to emphasise “apolitical” enforcement of individual rights through legal processes). Yet this study has shown that the two strategies can be and often are mutually reinforcing. Not only because “rights” language has been used to further political ends; but also, more fundamentally, because legal tools may be used to address power asymmetries. Using the law as a tool for empowerment is at the heart of the concept of “legal empowerment”.

While some have recently used the term “legal empowerment” to describe work to formalise the property rights of “the poor” and improve their access to credit and other economic opportunities, this report has defined it with regard to using legal entitlements and processes to tackle power asymmetries and help disadvantaged groups exert greater control over the resources on which they depend – building on a concept first developed by Golub (2005; see above, chapters 1.2 and 2.1.2). While some of the debate on the formalisation of property rights has tended to focus on individual land rights, this study has focused on group rights and collective action, and on the linkages between rights over land and control over valuable resources located on or below it.

With regard to this notion of legal empowerment, this study has developed a conceptual framework for exploring the relationship between law and power within the context of foreign investment projects in Africa; and

analysed the legal tools that have been used in some African countries to increase local resource control and strengthen the negotiating power of local resource users. More empirical research is needed better to understand how these tools work in practice, and what difference they make to local resource users. This need is being addressed by the in-country research activities underway within the context of the “Legal tools” project (see Box 1 above and section 4.3 below).

At this stage, a hypothesis can be formulated, to be revisited in the light of the findings of in-country research: that the legal tools examined in this study, combined with appropriate para-legal tools, can help local resource users have greater control over decisions and processes affecting their lives – particularly with regard to incoming investment projects. At a conceptual level, this hypothesis is supported by the following analysis.

In the absence of these legal tools, the state would be legally empowered to withdraw precarious use rights from local resource users without (adequate) compensation, and to allocate resources to foreign investors. Where these tools are enshrined in the law, local resource users would enjoy legally protected rights, and foreign investors would have to negotiate with local users access to resources and benefit sharing.

It is well-known that the law is often not complied with, particularly where major power asymmetries exist between those who stand to benefit and those who stand to lose from it; and that differences in negotiating power (originating from differences in wealth, political influence, skills, etc.) skew the outcome of negotiations induced by the law (see above, chapter 2.2.1 and Table 3).

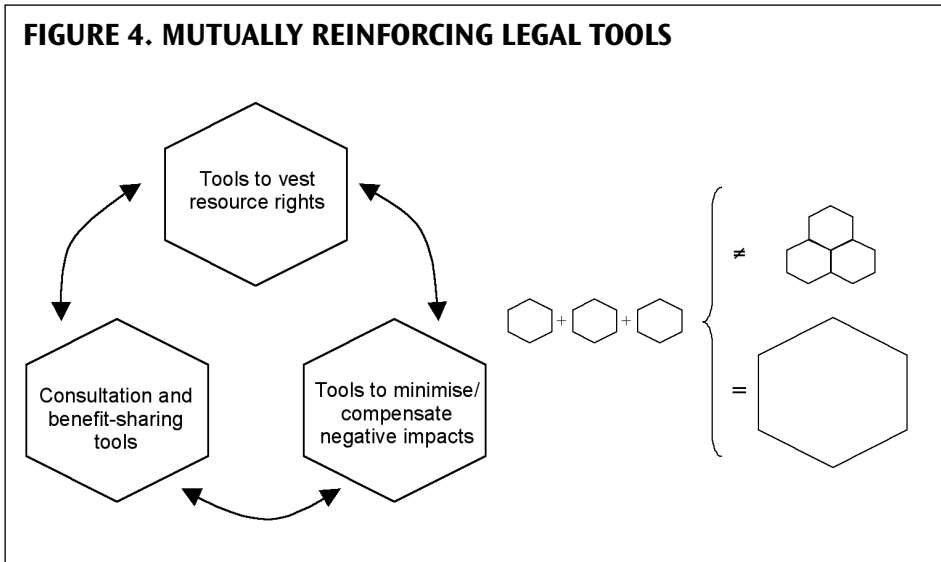
Yet, while the law must come to terms with existing power relations, legally defined rights and adequate capacity to enforce them can themselves be a source of power. In particular, the legal tools analysed here present significant “empowering” potential. Within the conceptual framework visualised in Figure 1 above, they aim to address asymmetries in legal entitlements, including both their substantive protection and available remedies/procedures; and are to be accompanied by para-legal tools that strengthen local resource users’ “capacity to claim” those entitlements. This empowering potential has two dimensions.

First, each of the legal tools analysed here may be used to challenge asymmetries in power and in law between local resource users, the host state and foreign investors. They may be used to redefine the negotiation arena – in other words, to open up new spaces for negotiation. For example, new legal requirements for mandatory consultation can transform the decision-making process from “closed/uninvited” to “invited” (in the sense described in section 2.1.1). They may also provide entitlements that can be used as a source of negotiating power. If they are not vested with secure resource rights, local groups would have little to bargain with in their negotiations with foreign investors and the central state. On the other hand, secure resource rights may give them an asset to be used in those negotiations. In this, detail is key. With regard to land takings, for instance, what matters to the negotiating power of local resource users is not only the general principle that compensation be paid; but also the detailed rules on what types of rights and interferences be compensated, who is to determine the amount of compensation, and according to what standards and processes.

Secondly, different legal tools may be used in a mutually reinforcing way. Where several of these tools are available, their cumulative effect on power relations is likely to be more than the sum of that ascribable to each individual tool. For instance, requirements for the negotiation of benefit-sharing arrangements are likely to be more effective where complemented by tools vesting clear and secure rights with local resource users (as more secure rights tend to strengthen the negotiating power of local users); and by tools ensuring adequate compensation standards and processes (as the threat of uncompensated expropriation if a deal is not reached would undermine the negotiating power of local resource users). In other words, although the three sets of tools are conceptually sequential (see Figure 3), a sequentially successive tool (e.g. concerning compensation for land takings) may influence the practical operation and outcome of a sequentially earlier tool (e.g. negotiation of benefit-sharing agreements; see Figure 4).

Legal empowerment also relates to power relations between legal services organisations and their clients/beneficiaries (“power in the law”, according to the classification developed by Tuori, 1997; see above, section 2.1.2). Some have argued that legal processes are inherently disempowering because they remove control from the beneficiaries to the professionals

**FIGURE 4. MUTUALLY REINFORCING LEGAL TOOLS**



through use of complex language and procedures. While this may be the case in many instances, much depends on what type of legal processes are used and how. Where emphasis is on building local capacity among beneficiaries to engage with legal processes, rather than on pursuing legal avenues on their behalf but without their full involvement, empowerment is a more likely outcome than disempowerment. Building local capacity does not necessarily require hiring professional lawyers: it can be done (perhaps even more effectively) through training of community trainers and use of para-legal tools – particularly those tools emphasising “demystifying the law” and making it accessible to illiterate people (e.g., on “literacy for empowerment” and “legal literacy camps”, see above, Box 3).

On the other hand, legal and para-legal tools do not address power asymmetries rooted in economic, social, cultural and political relations – the left-hand side of Figure 1. This exposes the limitations of what legal and para-legal tools alone can achieve. It also highlights the possible tension between legal principles and extralegal factors.

International human rights treaties and most national constitutions state the principle of equal protection before the law. This means that legal entitlements must be protected regardless of the power exercised by their holder. On paper, this principle differentiates legal from political processes, as in the latter the extent to which competing interests are taken into

account is shaped by power relations between their holders. However, the principle of equal protection before the law is in practice constrained by extralegal factors. Differences in power and resources may result in different interests enjoying different degrees of legal protection, and in protection granted in theory not being translated into practice.

Therefore, the effectiveness of using legal and para-legal tools as a means for empowerment is likely to be inversely proportional to the scale of the power asymmetries: the greater the asymmetries, the more difficult it is to redress them through legal processes (or through other processes, for that matter); the lesser the asymmetries, the less likely it is that they can significantly affect the application of the law, and the more likely that legal processes can be used to redress them.

The effectiveness of legal and para-legal tools is also likely to be linked to the relative importance of the different sources of power represented in Figure 1. Where differences in power are mainly derived from social, economic, cultural and political factors (see Table 3 above), using legal and para-legal tools is unlikely to be enough: they can only help if combined with other strategies that address those factors (e.g. social mobilisation).

These considerations suggest that legal empowerment is a complex and non-linear process. Local groups may use a range of legal and para-legal tools to strengthen their negotiating power and have greater control over their lives. This entails pursuing the formal operation of the law (e.g. community land registration, litigation); and/or undertaking negotiations in the shadow of the law – where existing or advocated legal entitlements are used as a source of negotiating power and as a lever to induce change in the behaviour of other negotiating parties. Outcomes depend on legal entitlements and negotiating power, and on the use that different stakeholders make of their entitlements and power.

Local groups may feel that cooperation with the central state and foreign investors gives them greater benefits than confrontation to assert their rights and tough negotiating positions. Internal divisions within local groups, possibly exacerbated by buying-offs from outsiders, may undermine the exercise of legal entitlements. Foreign investors may support local empowerment efforts, for instance because they feel that cooperation with local groups reduces non-commercial project risks; or may oppose those



efforts through recourse to administrative or judicial authorities and through other means. As a result of these forces, legal empowerment may entail temporary successes and setbacks, and final outcomes may partly differ from those originally planned.

These hypotheses concerning the extent to which and the conditions under which legal (and para-legal) tools can help increase local resource control will be tested on the ground through research and capacity building work undertaken in the next phases of the “Legal tools” project (see section 4.3 below).

The contrast between the high aspirations enshrined in many laws and their often disappointing implementation and outcomes has led many to be sceptical about the usefulness of legal tools. This partly originates from the frustration of excessive expectations – the illusion that merely adopting a law can change society with a pen stroke. Instead, social change is inevitably a complex and slow process. Legislative efforts must be accompanied by work to build local capacity to translate legislation into reality. This is even more so where the law challenges entrenched power asymmetries rather than legitimising them. Even when a constitution or a law is not fully implemented, its adoption is not in vain. The very fact that norms are discussed and adopted, and that certain principles and values are enshrined in the “social contract” governing society contributes to the long-term process of social change.

### 4.3. WHAT NEXT?

This study has developed the conceptual framework and identified key issues to be tackled by the “Legal tools for community empowerment” project (see Box 1 above). It was undertaken during the scoping phase of the project, which aimed to build a platform of knowledge and partnerships to pave the way to project activities. The project is now in its pilot phase, which was launched at a partners’ inception workshop held in London on 14-15 September 2006.

In the pilot phase, in-country work has started in four African countries – Ghana, Mali, Mozambique and Senegal. In-country activities entail combinations of action research, capacity building and policy engagement, consistently with the overall approach followed by the programme. Differences in the country contexts and in partners’ priorities are reflected in diverse combinations of the three activities. Among other things, the pilot phase will produce a set of country reports on innovative legal tools available in the four countries, on their implementation and outcomes, and on ways to sharpen them.

In the longer-term, the project will pursue the following strategies:

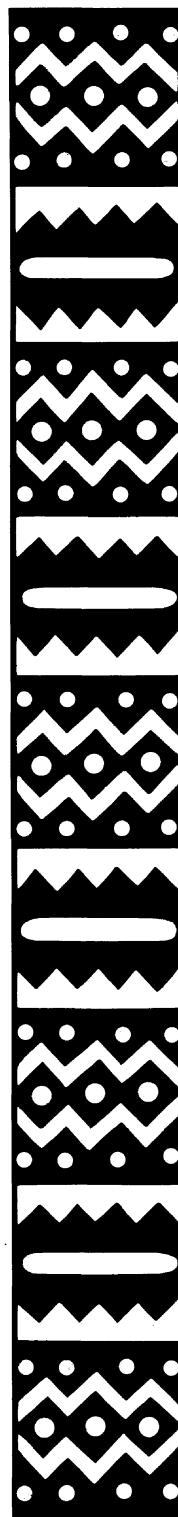
- Identifying innovative legal tools to secure local resource rights, developing ways to sharpen these tools, and engaging with policy processes to change legal frameworks as needed.
- Developing, testing and implementing legal literacy training and other para-legal tools to provide legal assistance to local groups, targeting selected sites while developing innovative approaches that can be replicated elsewhere.
- Facilitating cross-country exchange of experience and wider lesson sharing to enable project participants to learn from each other, and others to learn from the legal and para-legal tools developed by the project.

For updates on the next phases of the “Legal tools” project, keep an eye on our web site at:

<http://www.iied.org/NR/drylands/themes/legalempowerment.html>



## V. ANNEXES



## 5.1. GLOSSARY OF KEY LEGAL TERMS

**Binding:** that “imposes legal obligations or duties upon a person” (Stewart, 2006).

**Case:** an action or suit at law.

**Case law:** “law established by following judicial decisions given in earlier cases” (Stewart, 2006).

**Civil law:** family of legal systems, based on Roman law, spread in Continental Europe, Latin America and Francophone Africa.

**Common law:** family of legal systems originally influenced by English law, spread in Anglophone countries.

**Compensation:** “a monetary payment for loss or damage” (Stewart, 2006).

**Court:** “an authority having powers to adjudicate in civil, criminal, military, or ecclesiastical matters; the judge or judges having such authority” (Stewart, 2006).

**Easement:** “a servitude; a right enjoyed by an owner of land over land of another such as right of way, of light, of support, or to a flow of air or water” (Bone, 2001).

**Expropriation:** “compulsorily depriving a person of his property by the state” (Bone, 2001).

**Human rights:** the fundamental rights and freedoms to which all human beings are entitled.

**Injunction:** a court order to do or refrain from doing something.

**Lawsuit:** “a proceeding in a court of law brought by one party against another” (Stewart, 2006).

**Land registration:** “the official recording of legally recognised interests in land” (FIG, 1991, quoted in FAO, 2003).

**Lease:** “a grant of the exclusive possession of property to last for a term of

years or periodic tenancy, usually with the reservation of a rent” (Bone, 2001).

**Legal aid:** “the scheme which gives to persons whose disposable income and capital fall within the limits prescribed from time to time, advice, assistance, and/or representation in legal proceedings” (Bone, 2001).

**Legislation:** “the rules of the lawgiver, Acts of Parliament” (Stewart, 2006).

**Litigation:** “the putting of a dispute before a court or tribunal” (Stewart, 2006).

**Mise en valeur:** in several Francophone African countries, the requirement that land be put to “productive use”, usually as a condition for the legal protection of land rights.

**Negligence:** “the tort or delict of being careless in breach of a duty to take care” (Stewart, 2006).

**Ownership:** “the right to the exclusive enjoyment of a thing” (Bone, 2001, based on a formulation by Austin).

**Precedent:** “previously decided case” (Stewart, 2006).

**Remedy:** “the means whereby breach of a right is prevented, or redress is given” (Bone, 2001).

**Restitutio in integrum:** (1) “the restoration of the parties to their original position” (Bone, 2001); (2) “putting things back the way they were” (Stewart, 2006).

**Right:** “an interest recognized and protected by the law” (Bone, 2001).

**Right of way:** (1) “the right of passing over land of another” (Bone, 2001); (2) “a right enjoyed by a person...to pass over another’s land subject to such restrictions and conditions as are specified” (Stewart, 2006).

**Servitude:** see “easement”.

**Standard of proof:** “in all legal proceedings it is necessary for the party bringing the action to establish the facts upon which the case is reliant. This

is the burden of proof. The level of proof required of the standard of proof, differs according to the proceedings” (Bone, 2001).

**Standing (*locus standi*):** “the right to be heard in court or other proceedings” (Bone, 2001).

**Strict liability:** “in tort and delict, liability without proof of fault, i.e. that the mere happening of a proscribed event incurs liability but always subject to certain defence” (Stewart, 2006).

**Treaty:** “an agreement between the governments of two (bilateral treaty) or more States (multilateral treaty)” (Bone, 2001).

## 5.2. REFERENCES

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# Legal empowerment for local resource control

**Securing local resource rights within  
foreign investment projects in Africa**

Lorenzo Cotula

Across rural Africa, most people depend on natural resources such as land, water and forests for their livelihoods. Natural resources are also an important sector for large-scale investment, for instance in the agribusiness, forestry, tourism, mining and petroleum industries. Overlaps between these resource claims raise the challenge of maximising the benefits of investment projects to local resource users, and of minimising costs.

Secure local resource rights are key to doing this. Where these rights are weak, investment projects may undermine resource access for local groups – for instance through uncompensated expropriation or environmental pollution. Weakness of local resource rights may also undermine the position of local groups in their negotiations with incoming investors; and therefore limit their ability to benefit from investment projects.

Appropriate legal arrangements accompanied by adequate capacity-building activities can help local resource users in Africa have greater control over the natural resources on which they depend. This study draws lessons from experience with developing and implementing such arrangements and activities. It was prepared for the “Legal tools for community empowerment” project – a collaborative project to empower local resource users in Africa, funded by the Dutch Ministry of Foreign Affairs (DGIS) and by the UK Department for International Development (DFID).

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