

Legal tools for citizen empowerment

Getting a better deal
from natural resource investment in Africa



Highlights and lessons learned (2006-2009)

Lorenzo Cotula

2009



Signpost to an open-pit mine in the Sikasso region, Mali

“We now know that we are also sons of this country, and that we have rights to claim”. Like many others in the southern savannah of Mali, this farmer is losing land and suffering pollution as goldmining concerns muscle in. But “legal caravans” offering legal literacy training are now helping him and his fellow villagers learn to better exercise their rights.

The caravans are just one of the activities of the “Legal tools for citizen empowerment” programme, an initiative that through action research, capacity building, exchange of experience and policy advocacy strengthens local voice and benefit in natural resource investment in Africa.¹

There is still little systematic evidence linking greater legal awareness to better governance and livelihoods. This calls for empirical research and effective monitoring and evaluation (M&E) in operational programmes. Two and a half years into its pilot phase,

1. “Legal tools” is coordinated by IIED and implemented in partnership with the Centre for Public Interest Law (CEPIL), in Ghana; the Groupe d’Etude et de Recherche en Sociologie et Droit Appliqué (GERSDA), in Mali; Centro Terra Viva (CTV), in Mozambique; Innovation Environnement et Developpement (IED Afrique), in Senegal; and the Foundation for International Environmental Law and Development (FIELD). I would like to thank all the “Legal tools” partners for a collaboration from which I am learning a lot and that I am enjoying personally and professionally. Thanks particularly to Dominic Ayine, Moussa Djiré, Bara Guèye, Yahya Kane, Amadou Keita, Samanta Remane and Alda Salomao. Thanks also to IIED colleagues most directly involved with this work, particularly Linda Siegele, Sonja Vermeulen and Emma Wilson.

“Legal tools” is too young to offer answers. Yet the programme is starting to generate a body of ideas, approaches and partnerships, which could be usefully shared.

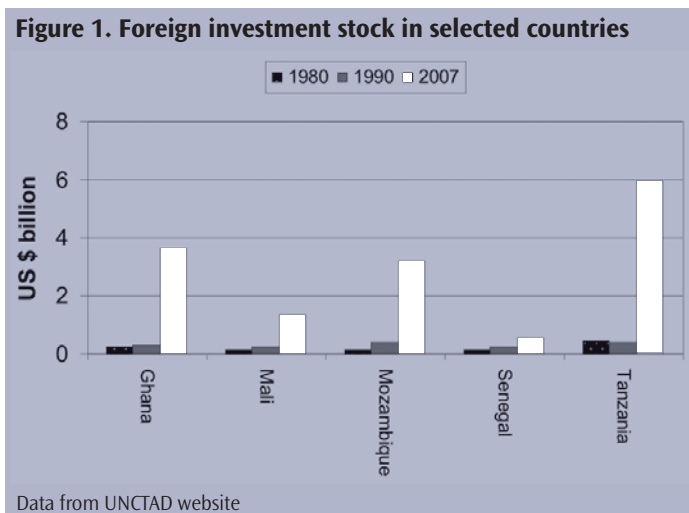
This note takes stock of preliminary lessons from our ongoing work, embodies a framework for our next steps and provides a basis for linking up with interested people.

The context: Increasing investment flows to Africa

In many parts of Africa, economic liberalisation, the globalisation of transport and communications, and global demand for food, energy and commodities are fostering private investment in natural resource projects – including extractive industries and agriculture for food and fuel.

Over the past decade, foreign direct investment (FDI) in Africa has significantly increased. In 2007, FDI to sub-Saharan Africa amounted to nearly \$34 billion, a new record level – up from the records of about \$22 billion in 2006 and \$17 billion in 2005 (UNCTAD, 2008). The distribution of FDI flows and stocks is highly uneven, but countries like Ghana, Mali, Mozambique, Senegal and Tanzania, which received limited foreign investment until the early 1990s, now host more sizeable stocks of foreign investment (Figure 1).

Natural resources are at the heart of these processes. Interest in Africa’s petroleum and minerals, one of the main drivers of FDI to the continent (UNCTAD, 2008),



has grown as a result of fluctuations in global commodity prices and Western efforts to diversify supplies – as exemplified by recent large-scale projects like the Chad-Cameroon oil development and pipeline project. Africa's fertile land increasingly appeals to richer countries eager to secure their food or fuel supplies.

The recent financial crisis and economic downturn may slow investment flows by affecting capital availability, global commodity demand and attitudes to risk. But, in the longer term, the structural factors underpinning increased investment are likely to stay.

In fact, food price hikes in 2008 prompted a new wave of FDI in African agriculture. Over the past 12 months, large-scale acquisitions of farmland by foreign investors have been widely reported in the international press, while development agencies like the UN Food and Agriculture Organization (FAO), the UN International Fund for Agricultural Development (IFAD) and the World Bank have all launched research initiatives to better understand these processes.²

Increased investment can bring large-scale benefits (GDP growth, government revenues) and improve living standards. But it also raises challenges. In much of rural Africa, people depend on natural resources for their livelihoods. As outside interest in previously marginal areas increases and as governments or markets make land and resources available to prospecting investors, disadvantaged groups are losing out.

In the Massingir district of Mozambique, for example, a large-scale biofuel project has exacerbated land scarcity by using land promised to communities being resettled from a new tourism-oriented natural park, with knock-on effects on neighbouring communities (Nhantumbo and Salomao, forthcoming).

2. IIED is working with these agencies better to understand trends and drivers, land tenure and contractual arrangements, and impacts on land access for rural people in recipient countries. Specifically, we are undertaking a scoping study on large-scale land acquisitions for government-promoted agricultural investment, in collaboration with FAO and IFAD; six country studies to quantify large-scale land acquisitions, together with in-country partners and as part of a collaborative effort with the World Bank and FAO; and research on the land access implications of the spread of biofuels, including a scoping study with FAO (Cotula et al, 2008) and country studies in Mozambique and Tanzania (with Centro Terra Viva and the Tanzania Natural Resources Forum, respectively). The International Land Coalition and the French Cooperation are also carrying out research on these topics.



Access to justice is problematic in much of Africa

On Senegal's coast, booming tourism and supporting government projects – such as a new international airport and a 150,000-hectare “special economic zone” – are swallowing up land once allocated to rural communities (Kane, 2008). In neighbouring Mali, villagers in the communes of Sanso and Gouaniaka have lost land to mining activities (Keita et al, 2008).

Local people are often made vague promises of community projects and jobs as a trade off. Yet while loss of land is permanent, job opportunities can decrease as projects progress towards less labour-intensive phases. Promised community projects do not always materialise as hoped. Local participation in investment decisions and benefits must be maximised, if increased investment is to translate into real improvements in people's lives.

Up by law: Legal empowerment as a strategy for change

Effective use of legal levers can help people in Africa have greater voice and benefit – for instance, through more secure land rights, through tighter consultation and benefit-sharing requirements, through decentralisation and freedom of information legislation, and through structuring investor-state contracts to maximise the investment's contribution to local livelihoods.

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Box 1. Busting myths about the law

- Law includes not only state legislation or court cases, but also local (“customary” but continuously evolving) resource tenure systems. Some legal empowerment programmes in Africa have developed pragmatic and effective ways of working with both state law and customary systems (see for example Maru, 2006, on a paralegals programme in Sierra Leone).
- Using the law does not necessarily mean involving costly professional lawyers — paralegals and community legal literacy trainers are increasing practising in many African countries, including Cameroon (Nguiffo and Djeukam, 2008), Mali (Ba, 2008), Mozambique (Tanner and Serra, 2008) and Sierra Leone (Koroma, 2008).
- Although legal processes are often perceived as “confrontational”, and while litigation has its place (e.g. Mndeme, 2008), most of the work of the legal profession involves diverse activities such as providing legal advice, helping draft contracts and other legal acts, and supporting private negotiations or interactions with government. Litigation and negotiation can also coexist, with the relative strength of legal claims affecting the parties’ negotiating position.

Local people tend to have little negotiating power: they are often not aware of their rights, do not know how to navigate legal procedures, and lack the confidence, resources, information and social relations needed to use rights and procedures. Co-option of local elites by outside interests can further undermine the position of locals, while age, gender, wealth, status and other factors shape differences in local interests, negotiating power and impacts.

As a result, opportunities for maximising local voice and benefit are being missed. For example, in Mozambique, there is a rather vague legal requirement that investors “consult” local people before obtaining natural resource rights. This is often fulfilled through a brief meeting between investors and local elites where community lands are exchanged for one-off compensation and vague (and therefore unenforceable) promises of jobs or facilities.

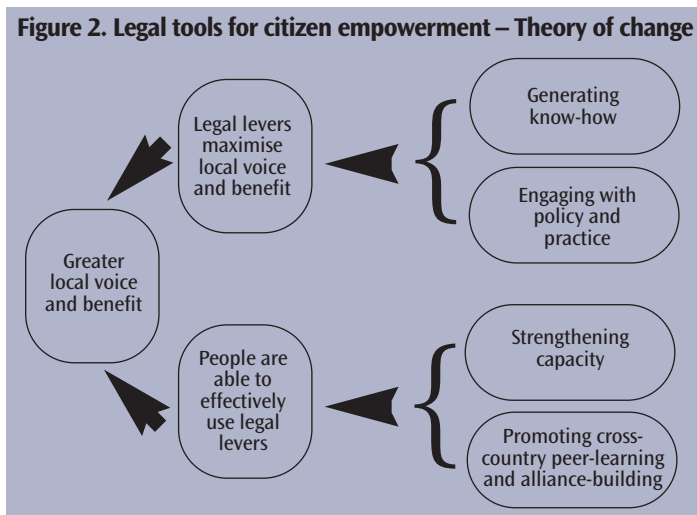
The ability of different people to make the most of these legal levers is shaped by power asymmetries, which are determined in turn by differentiated access to assets, knowhow, expert advice or social relations. But appropriate design and effective use of legal levers can themselves shift negotiating power – as legal claims create “bargaining endowments” for use in negotiations “in the shadow of the law” (Mnookin and Kornhauser, 1979).

For example, negotiating power between government and investors may be affected if a party knows it would lose its case should the matter go to arbitration (Wälde, 2008). Similarly, negotiations between local landholders and incoming investors might look different if landholders could veto investors’ access to their land.

In recent years, a wave of law reforms in several African countries has, on paper, increased opportunities for local participation in investment decisions and benefits. But such legislation is still undermined by inadequate political will, and limited capacity in government and courts undermines its implementation. While civil society helps hold governments to account, it often lacks resources and legal expertise.



Not just state law: In Mali, informal “manure contracts” between herders and farmers regulate grazing on post-harvest fields



The “Legal tools” programme – overview and approach

“Legal tools” is a response to this context. Started in late 2006 and currently in its pilot phase (2006-2009), it seeks to maximise local voice and benefit in natural resource investment.

The programme is coordinated by IIED and involves the Foundation for International Environmental Law and Development (FIELD) as well as core partners in Ghana (Centre for Public Interest Law – CEPIL), Mali (Groupe d’Etude et de Recherche en Sociologie et Droit Appliqué – GERSDA), Mozambique (Centro Terra Viva – CTV), and Senegal (Innovation Environnement et Developpement – IED Afrique). Additional collaborations have been developed in the core countries, Tanzania and internationally (e.g. with FAO).

The approach underpinning “Legal tools” involves:

- placing emphasis on “pushing the boundaries” of *existing* law, while also promoting reform on strategic levers;
- working locally, nationally and internationally to use the multiple levers that strengthen local voice and benefit – for example, building local capacity is crucial but key decisions are taken in negotiations between government and investors, so working “upstream” is also important;
- recognising that law is only part of the story, and combining legal work with acknowledgment of politics and power relations, investment in capacity building, and tactics for policy influence;
- using the legal levers as the entry point, and promoting cross-fertilisation across sectors;

- emphasising innovation and learning rather than large-scale implementation.

The pilot phase of “Legal tools” involves four interlinked activities, which are discussed in greater detail in the next sections:

- generating know-how on using legal levers to maximise local voice and benefit;
- strengthening capacity to use these levers;
- sharing lessons from innovation;
- engaging with policy and practice (Figure 2).

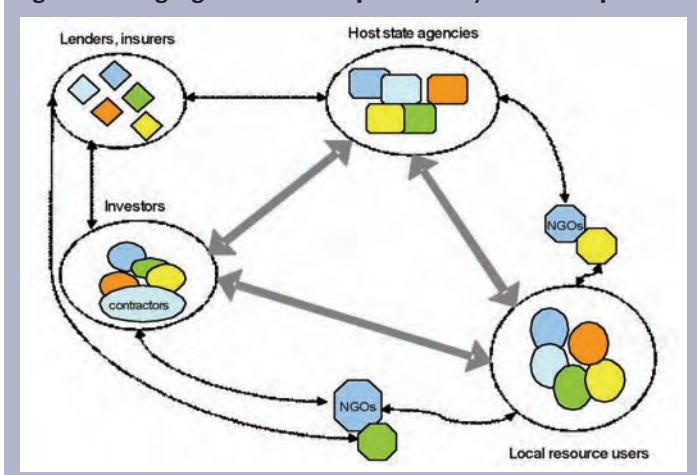
Highlights and lessons learned so far

1. Generating knowhow

A main priority for the pilot phase has been identifying key legal levers that can be used to maximise local voice and benefit, and disseminating knowhow through reports, briefing notes and peer-reviewed publications. This work has generated insights into legal levers concerning three key interlinked relationships – between investors, government and local people (Figure 3). This section outlines a few insights generated by “Legal tools” research.

First, in relationships between government and local people, safeguards for local land rights within compulsory takings can provide a lever against arbitrary dispossession. In most “Legal tools” core countries, much if not all the land is held by the state – with the exception of Ghana. Inaccessible registration procedures make it difficult for rural people to acquire land ownership where this is allowed (on Mali, Djiré, 2007), and most people only have use rights.

Figure 3. Using legal levers to shape three key relationships





In much of rural Africa, very little land has been registered

Vaguely defined productive use requirements, legislative gaps, legal provisions that assume private investment as being for a public purpose, and compensation limited to loss of improvements like crops and trees (thus excluding loss of land) all undermine the legal entitlements and negotiating position of local people (Cotula, 2007a; Keita et al, 2008).

But legal hooks exist that are not used to their full potential. The internationally recognised human right to food requires that, at a minimum, land takings be offset by alternative assets to ensure the same level of food security (Cotula, 2008a; Djiré, 2008; Tenga, 2008). Freedom of information legislation can strengthen local voices in decision-making (Siegele, 2008). Legislation in Mali, Mozambique and Tanzania protects customary land rights and requires compensation and due process for their taking (Cotula, 2007a; Keita et al, 2008).

In Senegal, land management is devolved to local governments; and while the central government can still withdraw land and allocate it to investors, more effective use could be made of existing local government powers. In these contexts, the devil is in the detail (broad statements of principle must be backed by specific norms and processes) and in implementation (without support the law remains on paper).

Second, in relationships between investors and local people, effective community-investor partnerships may increase local voice and benefit – ranging from financial transfers (such as in land lease schemes) or community projects, through to joint ventures involving collaboration in economic activities.

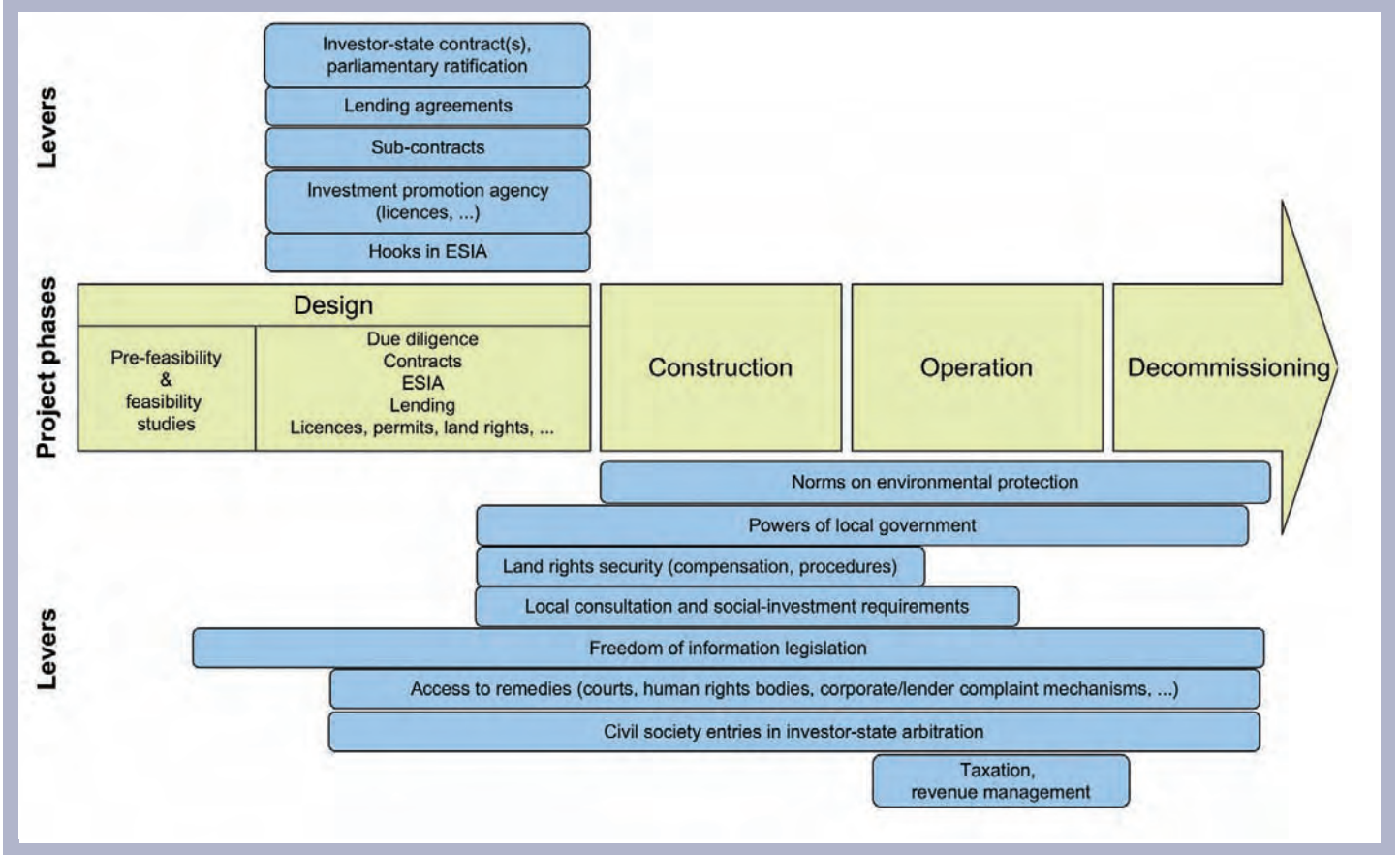
For example, Ghana's Social Responsibility Agreements (SRAs) in forestry regulate the transfer of up to 5% of royalties into community development projects. Ghanaian law makes SRAs a condition of the granting of timber rights, providing a useful legal hook for community-investor negotiations. But SRAs involve a relatively small share of project revenues, and do not offer local participation or capacity building in forest business. Benefit capture by local elites, vague provisions and lack of monitoring capacity tend to affect the implementation of SRAs (Ayine, 2008).

In Mozambique, a legal requirement that investors consult local people before obtaining resource rights usually makes little difference; but support from legal services organisations is leading to joint ventures in tourism where communities provide land and investors provide capital, know-how and marketing (Norfolk and Tanner, 2007).

The attitude of government and investors is key to developing effective partnerships. Clear legal requirements can also help. In Mali, some mining companies are supporting community development projects around mining sites, but a lack of legal requirements undermines local negotiating power and creates a breeding ground for mismanagement and benefit capture by elites within communities.³

3. As highlighted by a recent embezzlement trial: *Ministère Public c. Samba Mariko, Chô Mariko et Sirakorontji Mariko*, Justice de Paix ACE de Bougouni, 26 June 2008.

Figure 4. Legal levers to increase local voice and benefit



On the other hand, too detailed regulation can be a constraint: while in Ghana detailed rules cap benefits to 5% of royalties, in Mozambique vaguer requirements for community consultation allow pushing the boundaries through joint ventures with local groups.

Negotiating power affects negotiations, so external support and proper preparation are needed to address major power imbalances between locals and investors, including through supporting collective action, facilitating access to key information (knowing that information is power), and strengthening negotiation skills.

Support and preparation are also needed to ensure that local leaders are both representative of, and accountable to, their communities. Development agencies providing this support need both business acumen and an understanding of private sector concerns. Secure local land rights can also provide leverage in negotiations, while the threat of uncompensated land taking would undermine them.

Third, contracts between governments and investors are usually negotiated behind closed doors, and are not accessible to the public. This opacity denies local people a say, and fosters deals that are not in the public interest. Freedom of information legislation (in Mali, for example) and parliamentary approval of contracts (as in Ghana) could enable greater transparency; but effects so far have been limited (Ayine et al, 2006; Keita et al, 2008), and a fundamental rethink of negotiation processes is needed.

Getting the content of investor-state contracts right is key because they define social and environmental standards, benefits to local livelihoods (e.g. via “local content” requirements) and dispute settlement. They may also regulate land takings.

In addition, governments can contractually commit themselves to compensating investors for losses caused by regulatory change – under so-called “stabilisation clauses”. These commitments are motivated by concerns that arbitrary government action may undermine the investment.

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But if not properly designed they may also constrain action to raise social and environmental standards, for instance with regard to land takings. Given the usually long duration of investment projects and the often low social and environmental standards at inception, this is a major concern. Better practice to learn from includes limiting the scope of stabilisation clauses to arbitrary state action alone, and applying these clauses in an “evolutionary” manner (Cotula, 2008b).

Civil society involvement in investor-state arbitrations can also increase public scrutiny and consideration of non-commercial interests (Mann, 2005).

Figure 4 visually represents the range of legal levers that may be used to increase local voice and benefit, using the example of an oil pipeline.

2. *Strengthening capacity*

A lack of capacity at local and national levels means many of the legal levers discussed above are not used



Use of visuals and participatory debate as a tool for legal literacy training

to their full potential. To address this challenge, “Legal tools” is developing, testing and implementing replicable capacity-building tools and methods to help local groups, national civil society and governments make better use of legal levers.

This work is still at an early stage. It includes developing and testing legal literacy training for people affected by investment projects in Ghana, Mali and Senegal, ranging from legal literacy camps in mining areas (Mali) to shorter, more focused training for forest communities in Ghana. Training covers land rights, decentralisation, benefit-sharing opportunities and/or other key levers, depending on the country context; but also practical skills like negotiation tactics (in Ghana, for instance).

Although it is still early days, trained community members are acquiring skills and confidence to have their voice heard – as the quote opening this note testifies. Legal literacy training materials are now being finalised in Ghana and Senegal (CEPIL, forthcoming; IED Afrique, forthcoming), and tested in Mali.

Developing capacity-building tools and methods takes time and effort, particularly to repackage complex legal information in a format that can be understood by a local audience with high illiteracy rates. Use of visuals, cartoons, photos and participatory tools can be very helpful, and promoting debate among participants about fundamental questions like “what is law?” (in Mali, for example) can produce thought-provoking results.

Effective M&E is needed to document effects on (i) local capacity and legal awareness, (ii) actual use of rights, and, ultimately, (iii) local livelihoods (e.g. via better deals with incoming investors). M&E enables project activities to be reoriented as needed, and generates lessons for wider dissemination. A rigorous M&E system for “Legal tools” is being developed together with a team of MSc students from the London School of Economics, and will be implemented as the programme moves from piloting to scaling up.

Overall, investing in legal literacy training can be linked to positive “outcomes” – such as greater legal



In Mali, “legal caravans” are legal literacy camps for communities affected by mining (November 2008)

awareness. But actual “impacts” on people’s lives are bound to take much longer, and will require a critical mass of trained people as well as support beyond training (in negotiations with government or investors, for example). In Mozambique, for instance, “Legal tools” has supported the emergence of representative community-based organisations in Zavala district, and produced a guide to accompanying local people in the implementation of community consultation processes (Remane, forthcoming).

As social differentiation shapes relations within local groups and between these and outside players, handling local differences (such as who participates and how) is a key challenge for training, broader support and M&E.

While local support can help people get a better deal from government or investors, addressing investor-government relations requires working at a different level. Governments must be able to negotiate investment contracts that maximise local benefit,

while parliament, civil society and the media must be able to scrutinise these negotiations.

To strengthen capacity at these levels, we have developed a set of training notes on investment contracts, treaties and arbitration (Cotula, 2007b), and we are now starting training on this basis. In Ghana, CEPIL and IIED organised training on oil and gas contracts for government, parliamentarians, media and civil society, paving the way to further work in this area.



Management committee members, Muhate community, Zavala district, Mozambique (September 2008)



A lesson-sharing workshop in Ghana brought together practitioners from different parts of Africa

Finally, making a difference also requires working with the lawyers that advise governments and investors. To do this, we are feeding insights from our investment contracts work into specialist publications (Cotula, 2008b), and into academic teaching at centres of excellence that train the “lawyers of tomorrow” (such as Dundee University’s Centre for Energy, Petroleum and Mining Law and Policy).

3. Promoting learning and alliances across countries

“Legal tools” is not alone in developing ways to help disadvantaged groups use legal rights and processes. In many parts of Africa, legal services organisations are innovating with community-based paralegals programmes, legal assistance in negotiations with government or the private sector, or legal representation and strategic use of public interest litigation.

Knowing that learning from peers can increase effectiveness on the ground, “Legal tools” facilitates exchange of experience among these innovators.

Together with FAO and the University of Ghana law faculty, we ran a lesson-sharing workshop on securing local land rights, bringing together some 25 practitioners from 13 African countries (Accra, March 2008).

A collection of capacity-building tools and methods developed in a range of contexts was published for a wider audience (Cotula and Mathieu, Eds, 2008).

In addition, together with Ford Foundation and CTV, we held a sub-regional lesson-sharing event on environmental justice with practitioners from Southern and Eastern Africa, covering issues like securing land rights and establishing community-investor partnerships (Maputo, September 2008). Finally, to promote wider lesson learning, we are setting up a website with “Legal tools” outputs and links to web resources.

4. Engaging with policy and practice

The fourth main area of activity concerns promoting change in strategic legal levers at national and international levels. Internationally, in 2008 we fed insights into events like the Organisation of Economic Co-operation and Development (OECD) Investment Forum and a multi-stakeholder consultation on stabilisation clauses and human rights convened by the International Finance Corporation (IFC) and the Special Representative of the UN Secretary-General on business and human rights.

Policy advocacy is also underway in the core countries, for instance through a national workshop on community-investor partnerships and follow-up engagement in Ghana, and a forthcoming multi-stakeholder event on mining in Mali. Some of our capacity-building work outlined above also aims to change policy and practice – for instance, with regard to international training and specialist publications on investment contracts.

Of the four strands of work, policy engagement is at the earliest stage, partly because we first wanted to develop a critical mass of knowledge, capacity and partnerships to draw on as we advocate for reform.



Legal literacy training for forest communities in Ghana, February 2009

Our early policy steps have taught us that it is crucial to work at different levels from local to international; that alliances and concerted action create opportunities and increase leverage; and that commercial operators are prepared to listen if approached with a balanced, evidence-based message and pragmatic, commercially savvy proposals for change.

Next steps

The issues “Legal tools” tackles are very complex, its goals very ambitious. Over the past two and a half years, the ongoing pilot phase has only begun to scratch the surface.

In moving forward, we will continue to focus on key levers like land rights, community-investor partnerships and investor-state contracts. But while continuing to generate knowledge, we expect to progressively shift emphasis on strengthening capacity, building partnerships and engaging with policy.

Most importantly, we recognise that these issues and goals cannot be tackled by isolated initiatives, and that alliances and dialogue are paramount. We very much see the dissemination of this note as a step towards link up.

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Contact us

Lorenzo Cotula is Senior Researcher in Law and Sustainable Development at the International Institute for Environment and Development (IIED), based in the UK (lorenzo.cotula@iied.org)



3 Endsleigh Street
London WC1H 0DD, UK
Tel: +44 (0)20 7388 2117
Fax: +44 (0)20 7388 2826
Email: info@iied.org
Website: www.iied.org