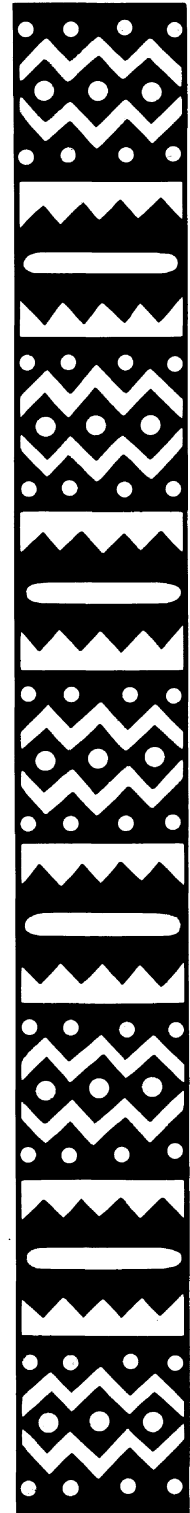


# **Legal empowerment for local resource control**

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

Lorenzo Cotula



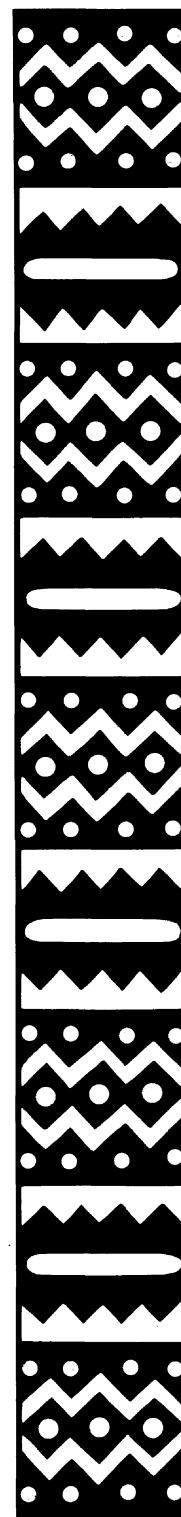
## EXECUTIVE SUMMARY

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.