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TRANSPARENCY AND SOCIAL RESPONSIBILITY IN THE MANAGEMENT OF NATURAL RESOURCES IN FRANCOPHONE AFRICA SALY 1-3 JUNE 2010

INTRODUCTORY PRESENTATION TO THE CONCEPTUAL AND LEGAL FRAMEWORK OF THE MANAGEMENT OF NATURAL RESOURCES

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INTRODUCTION

In conformance with the structure of the workshop document, the elements of the conceptual and legal framework for the governance of natural resources bring to mind a certain number of questions;

What should one understand by the governance of natural resources;

What are the challenges, the principles to establish procedures for follow-up/monitoring and evaluation of governance?

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In essence, this introductory presentation will address all the issues, including those planned for the second day to share experiences and during the third day for the definition of a lobbying strategy and dissemination of tools. In other words, everything that can contribute to transparency and social responsibility (all stakeholders) in the governance of natural resources must be addressed in conceptual and legal terms (however brief)

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Reading the scoping document reveals that it addresses almost all the ideas that could feed into the content of an introductory presentation, for as much as it allows one to state that it covers almost all the ideas which could feed into the content of an introductory presentation, for just as much as this relates to the context and justification and the format itself of the workshop itself.

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Flowing from the above, the legal framework and conceptual focus of this introductory presentation must therefore conform to the framework document and not depart too much from it with the exception of giving appropriate illustrations which can stimulate discussions in plenary or in the workshops

The main following main thrusts could constitute the outline of this introductory presentation.

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1. Analysis of the concept of the governance of natural resources

To understand this concept well, it is important to make a distinction between governance and management of natural resources

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1. Presentation of the concept of governance

2.

The legal and institutional framework for the management of natural resources is often wrongly or rightly likened to the notion of governance. In reality, as its name suggests, the legal and institutional framework defines the shape and institutional structure of the legal and institutional framework applicable to natural resources both on the national as well as the international and community levels.

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As for the concept of governance itself, it is wider and includes the process of implementation and control of activities relating to the use and exploitation of natural resources within the perspective of sustainability.

One could ask oneself here what the role and place of African customary rights is in the governance of natural resources.

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2 Distinction between governance and management of natural resources

The management of natural resources, often opposed to the other concept of the conservation of natural resources, focuses on their use, and development as an economic asset

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11 Identification of the natural resources that need governance

The idea is to identify the scope of the natural resources subject to governance.

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The idea of **management** is therefore more restrictive than the **governance** which is wider in scope because, in addition to managing the long-term interests in the strict sense of the word, it focuses on putting the emphasis on stakeholder accountability.

In practice, this distinction between management, conservation and governance is very theoretical with regard to natural resources. It is often a case of six of one and half a dozen of the other.

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1 Land resources

The first of all the natural resources remains land. Fixed by nature and sometimes by destination, land resources are the support and foundation of all the other natural biological and fossil fuel resources. As a result they are primarily concerned with governance. Land use, private and state land and territorial disputes are the main manifestations of this.

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2 Fossil resources

These resources are mainly mining, oil and gas resources. They are dependent on the governance system of the sub-stratum and remain the property of the State which ensures their management according to criteria that are not always transparent.

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3 Biological resources

Biological resources are made up of land, marine and river resources. These include forest resources, wildlife, marine and river fish resources. In most cases, these are renewable resources.

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4 Water resources

These include surface and groundwater (watercourses, rivers, lakes, ponds, streams and the water table and underground lakes). The main feature of these resources is their governance by the State, which removes any possibility of the transfer of knowledge to local communities.

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5. Renewable and Non Renewable Resources

A distinction may also be made between renewable and non-renewable resources in principal to focus on solar and wind resources. As such one could consider all the fossil resources as non-renewable resources (oil, mines, gas, peat).

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Unlike other categories of natural resources. If necessary, this presentation may also focus on the potential hierarchy which may exist for natural resources in the context of governance.

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111 The issues of governance in Senegal arising from legal Acts and provisions.

These issues are numerous: political, financial, economic, ecological, social, traditional and cultural issues etc. The different issues are reflected in the various legal provisions of the regulations. In this presentation it will not be a question of recounting the background to this but rather to remember them for discussion in the eventual working groups.

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The issues illustrate the way in which the law is used for the purposes of conservation, land grabbing or the diversion of natural resources, sometimes on behalf of the general and public interest. It is especially in the presentation of the issues of governance that conflicts in the management of natural resources can be addressed. It may be interesting to examine the manner in which laws and regulations address the issue of transparency in land and mining transactions as well as the distribution of revenue.

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Most often, in fact, the conditions for granting concessions to private investors provide for/should provide for the terms and conditions for the compensation of local people when they are resettled or their land is expropriated. On these issues, the legislation provides for the possibility of appeal.

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When considering the role played by local communities in the allocation of land or mining resources, we note that is stronger in matters relating to land than in mining because of the predominance of the State in the second case.

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1. Legislation relating to water and sanitation

In Senegal the Water Code is still governed by Act 81-13 of 4 March 1981. The reform process has not yet led to a harmonized version of the new Water Code. Since 2008, this includes, Act 2008-59 of 24 September 2008 on the organisation of the civil service for drinking water and the purifying of domestic water usage.

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Pursuant to the objectives of PEPAM (Millenium Programme for Potable Water and Sanitation) water and sanitation are inextricably linked in terms of management and governance. The distinctive characteristic of the water resources sector is State controlled in a field where no transfer of power is granted to local authorities. Water is considered as forming part of the public domain as in the case of fossil fuel resources. Thus, the access to water in arid environments is a source of many conflicts in local areas.

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2. Land rights legislation

Since 1964, Act 64-46 of 17 June 1964 sets the general legal framework for national land ownership in Senegal. The law creates urban areas, areas of open land, classified areas and frontier areas. The latter have almost all been transferred into the three other areas of the national domain. Only the State may register land in the national domain as private domain. The State retains lands in the national domain for the national, economic and social development of the nation.

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The private domain of the State constitutes the public domain (natural and artificial) governed by Act 76-66 of 2 July 1976 on the Code of State domain. The process of taking over the land today represents the main issue in the area of land rights.

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In the rush for land in developing countries, international institutions like the World Bank attempt to offer solutions, including strategic investments for sustainable land management. These solutions have not yet produced the intended results. See especially the IIED's file entitled "Land Grab or Development Opportunity?", IIED briefing, September 2009, 6 pages. See also the bibliography indicated.

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3. Mining and petroleum legislation

Mining and petroleum resources are strategic resources. Thus for example the Senegalese Mining Code (governed by Act 2003-36 of 24 November 2003, and its decree of implementation 2004-647 of 17 May 2004)

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establishes the legal requirements for the management and exploitation of mineral resources. It is the same for the petroleum code governed by Act 98-05 of 8 January 1998 and which establishes the legal framework for the national petroleum resources. It is the sector where governance is less clear, because the State owns the resources beneath the sub-soil and manages these alone. Note that in the mining area, West African Community law (UEMOA – West African Economic and Monetary Union - and CEDEAO – Economic Community of West African States ECOWAS) is in a ferment over the discussion on mining codes. UEMOA has adopted one.

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4. Legislation on Forestry and Fauna

Currently, Act 98-03 of 8 January 1998 and its Bill 98-164 of 20 February 1998 constitute the Forestry Code of Senegal. Important reform is in the process of being finalized to adapt these texts which are so important for Forestry policy. The code on hunting and the protection of fauna is governed by Act 86-04 of 24 January 1986 and the Bill of 86-844 of 14 July 1986.

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The governance of forestry resources and wildlife in turn gives rise to numerous shortcomings despite the entry into force of the transfer of powers to local authorities since January 1, 1997.

5.Legislation relating to marine and inland fisheries

Act 98-32 of 14 April 1998 is the code of maritime fishing. It is supplemented by Bill 98-498 of 10 June 1998 laying down the terms of law enforcement.

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As in the case of mineral resources and petroleum, marine fisheries are not the subject of a transfer of competence to local authorities. The Senegalese government alone manages the said resources by signing agreements with partners including the European Union. The controversial issue of biological recovery is often raised.

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As for mainland fishing, this is the poor relation of fisheries governance. Act 63-40 of 10 June 1963 regulates fishing in inland waters and the Bill of application 65-557 of 19 July 1965 sets out the terms of application. These two texts are among the oldest still in force in the field of natural resources. Their review has been slow to materialize.

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6 Laws on decentralisation

The texts on decentralisation adopted on 22 March 1996 and 27 December of the same year came into force from 1 January 1997 with regard to the environment and natural resources:

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- Act 96-07 of 22 March 1996 transfers powers to local authorities in the field of the environment and natural resource management;
- Bill 96-1134 of 27 December 1996 establishes the terms of application of the law for the transfer of competences in the field of the environment and natural resource management.

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IV Analysis of the legal principles of natural resource governance

The legal and constitutional principles support the governance of natural resources. These principles should be vigorously remembered to the extent that they apply to all natural resources.

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The same applies to the Initiative for Transparency in the Extractive Industries (EITI). This initiative dates from 2002. It establishes an international norm for companies to make known how much they pay and governments to divulge their revenues.

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3.5 billion people live in countries that are rich in petroleum gas and minerals. With good governance, the exploitation of these resources can generate important revenues to promote growth and diminish poverty. However, since the governance is weak, this can lead to poverty, corruption and conflict. The Initiative for Transparency in the Extractive Industries (EITI) aims to strengthen governance while improving transparency and responsibility in the extractive industries sector

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The Initiative for Transparency in the Extractive Industries (EITI) ensures better governance in the countries rich in resources with regard to the audit and full publication of payments made by companies and the revenues received by governments emanating from petroleum, gas and minerals

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EITI is a coalition of governments, companies, civil society groups, investors and international organisations. In 2005, EITI led a prolonged and exhaustive consulting initiative to chart the future of the initiative. This was carried out by the International Consulting Group (GIC)

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EITI uses a robust but flexible methodology which ensures the maintenance of a global standard in the different countries concerned. The Executive Board of EITI and the International Secretariat ensure this methodology. However, each country must develop its own implementation model.

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1. The constitutional principles

Constitutional legislation is increasingly setting the fundamental principles of governance for natural resources and the environment.

In Senegal, the preamble to the constitution of 22 January 2001 calls this to mind:

“The sovereign people of Senegal affirm their adherence to transparency in the conduct and governance of public affairs as well as the principle of governance”

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Articles 8, 15, and 102 of the constitution also declare certain rights and fundamental principles:

Article 8 of the constitution recognizes for all citizens the right to a healthy environment, freedom of enterprise, the right to health and the right to many-sided information

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Article 15 paragraph 2 recognises the rights of possession and landownership for men and women under the conditions determined by the law.

Article 102 defines the principle of free administration for local authorities; “The local authorities constitute the institutional framework for the participation of citizens in the management of public affairs. They are freely administered by elected assemblies.

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In all cases, constitutional principles and rights must be complemented by other legal instruments which are equally important

2. Principles, declarations charters and agreements

The idea is to show that in addition to the constitutional principles, numerous other principles, declarations, charters and agreements are translated into the governance procedures for natural resources.

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We especially include the principle of corporate social responsibility (RSE) for which the frame which follows gives an illustration for Senegal.

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According to Philippe BARRY, the RSE's ambition for Senegal which is shared by several public and private partners is to encourage more investment by businesses in Senegal and from elsewhere to invest in the social and environmental domain within the framework of their social responsibility policies.

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On this subject, it is important to remember the definition of the RSE:

“Corporate citizenship or company responsibility is a commitment to respect a suite of principles which goes beyond the simple application of legal provisions. It is a question of a process of improvement within the framework of which companies integrate, in a voluntary, systematic and coherent manner, social, environmental and economic considerations in their management and do this in consultation with stakeholders and interested parties”

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The main activities of RSE in Senegal

- Spreading the concept of corporate citizenship through the realization of responsibilities which fall on each role player in the company with regard to the level of construction and development in Senegal
 - The necessity for involvement and greater commitment to the issues linked to the Millennium Goals for Development (MDG)
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Although this awareness project is immense, despite an adverse economic and financial context, one notices that leaders and business executives are starting to adopt the spirit of CSR and that their organisations are beginning to initiate activities of patronage and sustainable development without compromising their profitability

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From now on it is up to governments to take ownership of this instrument of good governance, CSR, in order to make it a real catalyst for development. Even if a willingness to popularise CSR was announced by the President of the Republic, Mr Abdoulaye WADE during the last Summit for the French Speaking World in October 2008...

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It is still the case that civil service officials are not sufficiently aware of or trained in the concept of CSR and at the moment, there are no institutional, legal, or tax incentives to encourage companies and promoters to invest more in the social or environmental areas

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Civil society for its part, is an integral part of the process of transparency and governance. The mechanisms for the participation of civil society organisations are through the many NGOs working in the developing countries. Among these role players, in Senegal can be included the Civil Society Forum, CONGAD amongst others. In the international and sub regional arenas, amongst others Transparency International and COPAGEN.

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However, the main difficulty of these civil society organisations lies in their institutional visibility i.e. their legal and political adhesions. Most are in reality just intermediaries for political parties for whom they disseminate political messages. It is therefore important to channel their energies in a way which is effective for the image of the organisations.

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V Elements of the strategy to implement governance: example of local agreements

Among these strategies, it would be appropriate to approach corporate social responsibility in West Africa with the tools proposed for the private sector, the technique of local agreements.

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This technique consists of legal innovation by offering innovative and agreed solutions: this is the case of local agreements for which there seems to be unanimous support among the GRN (? No mention on Google) roleplayers despite the legal controversies which arise more from dogma than administrative efficiency

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1. The problems of local agreements

Today, local agreements are legal instruments adapted for a flexible and consensual management of natural resources. However, at the same time, they stir up an original legal controversy which is related to their rank in the hierarchy of traditional legal sources for the rule of law. It is very fortunate that this controversy does not undermine their effectiveness on the ground.

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2. The efficacy of local agreements

In parallel with the legal texts of modern law (laws, regulations, classic contracts) local agreements are from now on accepted in the framework of positive law. In Senegal, the law project relating the review of the Forestry Code takes into account these provisions. After they are drafted and signed by the parties concerned they are endorsed by the State representative in the local community.

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V1 Proposal for monitoring/feedback on governance

This is the part that is the most difficult because it is a question of putting in place the instruments of partnership and the dissemination of the mechanisms of governance:

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1 Implementing the instruments of partnership

This will include information about governance and the techniques for the dissemination of this information, as well as training sessions. In reality, this part has more to do with advocacy and lobbying. It is far from being achieved.

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2. Dissemination of the mechanisms of governance

This is a question of the participation of citizens and the freedom of speech which is given to them. The strategies used influence policy. Among the tools of citizen control can be included enquiries on tracking public expenditure, leave granted to citizens to question the government and companies, and social audits amongst others.

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V11 Conclusions and Recommendations

As conclusions to this introductory presentation, one could make the following remarks;

- It is clear that merely adopting the legal texts does not suffice for the good application of the principles of the governance of natural resources
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- In addition it is clear that what is most lacking is ethics in everyday behaviours in both public sector and private sector stakeholders.
 - The principle of corporate social responsibility, although theoretically it is accepted by all the stakeholders is still struggling to take its rightful place within the framework of governance.
 - The principle of corporate social responsibility should be harmonized with other principles like territorial and technical decentralization
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- Respect for customary law and traditional practices as well as the acceleration of the practice of local agreements could lead to avenues for reflexion in the medium and long-term to the great benefit of the governance of natural resources.
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With these remarks one could not conclude without proposing some avenues for further study in three areas which we believe are essential:

- The reform and harmonization of legislation applicable to natural resources must be undertaken and co-ordinated. EITI and RSE must be strongly emphasised through these reforms

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- The identification and clarification of the status of the different stakeholders interceding in transparency and governance and in particular the very controversial notion of civil society must be specified
- Finally the promotion of equity of access and benefit derived from natural resources must be brought into play.

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