USAID FROM THE AMERICAN PEOPLE | SPEED For a Better Business Environment

THE LEGAL FRAMEWORK AND INVEST MENT

HOW TO IMPROVE MOZAMBICAN LAND LEGISLATION

THE LEGAL FRAMEWORK AND INVESTMENT

HOW TO IMPROVE MOZAMBICAN LAND LEGISLATION

Program Title: Feed the Future - Building Capacity for African Agricultural Transformation (Africa Lead II)

Sponsoring USAID Office:	**USAID Bureau of Food Security**
Contract Number:	**AID-OAA-A13-00085**
Contractor:	**DAI**
Date of Publication:	**October 2015**
Authors:	**Christopher Tanner**
	Taciana Peão Lopes
	André Cristiano

ACKNOWLEDGMENTS

The authors of this study would like to thank the collaboration of all stakeholders, including representatives of government institutions, CTA, private sector, interviewed development partners, and participants in the public seminar, which greatly contributed to the reflections contained in this report.

A special word of appreciation is directed to Dr. Carlos Sierra and Dr. Sheila Meneses for their outstanding contribution to this work.

CONTENTS

ABBREVIATIONS

CTA	Confederation of Economic Associations of Mozambique
DFID	Department for International Development (UK Government)
DUAT	*Direito de Uso e Aproveitamente de Terra* (Land Use and Benefit Right)
CFJJ	Centre for Legal and Judicial Training (of the Ministry of Justice)
FAO	Food and Agricultural Organisation of the United Nations
FCT	*Forum de Consulta sobre as Terras* (Consultative Forum on Land)
GoM	Government of Mozambique
iTC	*Inciativa de Terras Comunitárias* (Community Land Initiative)
LOT	*Lei de Ordenamento Territorial* (Physical Planning Law)
LT	*Lei de Terra* (Land Law)
MITADER	Ministry of Land, Environment and Rural Development
DINAGECA	National Directorate for Geography and Cadastre (pre-DNTF)
DNPDR	National Directorate for Promoting Rural Development
DNTF	National Directorate for Land and Forests
PDUT	*Plano Distrital de Uso da Terra* (District Land Use Plan)
PNT	*Política Nacional de Terras (de 1995)* National Land Policy
PRAI	Principles for Responsible Agricultural Investment
RLT	*Regulamento da Lei de Terra* (Land Law Regulations)
RSU	*Regulamento do Solo Urbano* (Regulations for Urban Land)
SPEED	Support Programme for Economic and Enterprise Development
SPGC	Provincial Services for Geography and Cadastre
USA	United States of America

USAID	United States Agency for International Development
VGGT	FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
WB	World Bank
ZIT	*Zonas de Interesse Turístico* (Tourism Interest Zones)

EXECUTIVE SUMMARY

The ultimate objective of the report is to encourage greater and more productive investment on land, including finding ways to make land access easier for private investors. After a full review of the land and other relevant laws, the report identifies problems with the existing legal framework and proposes 'options and recommendations for improving the existing legal instruments with a view to streamlining administrative procedures for easy access to land (DUATs) and to promote investments on land' .

Responding also to opinions expressed regarding the suitability of the present policy and legal framework for land in Mozambique today – the policy and law date from the mid-1990s – the report opens with an assessment of the current context in which the framework is being used. While accepting that many changes have taken place since the time, shortly after the end of the Civil War in 1992, when the present 1997 Land Law was developed and approved, the assessment concludes that in broad strategic terms, the approach and social objectives of the framework are still highly relevant to present day conditions. These are summed up as follows:

- A majority population of smallholder subsistence farmers with unregistered and vulnerable land rights
- A majority of the population still absolutely poor, badly educated, and not sharing in the gains of the last 15-20 years
- A high dependency on land for livelihoods, principally through local, customary and informal land access and management systems
- An increasing demand for land by private sector investors, national and international
- A Government betting even more strongly on private sector investment – in land and in other areas of the economy – to generate growth
- Government assumptions that investment-led agrarian growth will 'trickle down' to the poor, with over-confident assumptions about creating jobs to alleviate poverty
- A very weak land administration virtually unchanged since the mid-1990s –serving the needs of an urban-based minority wanting land for leisure and investment needs

The report also finds that the present policy and legal framework is very much in line with international best practice as manifested in the 2012 FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT), and the 2014 Principles for Responsible Agricultural Investment (PRAI). Major change is therefore not recommended. However, changes are needed in certain areas to address the economic imperatives of modern Mozambique. Two key 'land issues' are identified in this context:

- Expanding the areas farmed by small farmers who have access to unused land, and improving the productivity of small farm agriculture
- Getting much more of the available land into production (arable, livestock, forestry, etc) – promoting land access for private investors to use under- or unused land

The first of these is addressed by laws, regulations and other factors that give investors the confidence to use either their own reserves or to seek loans and other inputs, to expand production and adopt new techniques to improve productivity. The second involves allocating land to those who can best use it. In the absence of a land market – the Constitution holds that all land belongs to the State and cannot be transacted or mortgaged or onerously transferred in any other way – other mechanisms have to be developed to ensure that the value of investments made in land can be transacted, facilitating a process of capital growth and accumulation, and re-investment.

The review therefore proceeds to list several areas in the laws and regulations where there are constraints and legal issues which require clarification or adjustment.

The question of tenure security as the condition for *certainty* and *security* is adequately provided for: although land cannot be private property, the State leasehold 'right to use and benefit from land' (or DUAT, to use the Portuguese acronym) does offer a secure horizon of 50 years, with the right to renew. There are issues surrounding the 'start-up' period that need to be resolved, and these are discussed in more detail in the main report. But broadly speaking the legal framework, *if properly applied*, offers investors ample security and time to invest, recover their costs, and make money.

The question of transferring the DUAT when investments are transacted is considerably more complex, and this is where the focus of attention must lie. The report identifies two principal contexts where transfer can or should be easily undertaken, if land is to serve its function as a creator of wealth and driver of economic development:

- Transfer of land to a third party when investments made on the land are bought, sold, mortgaged, etc, with the DUAT passing to the new owner of the assets

– Transfer of land to a third party who then uses the land for his or her own purposes, with the DUAT remaining with its original holder (in other words, forms of rental and partnership involving land)

The report examines each of these in detail and makes clear recommendations. In the case of the former, it proposes that the way in which DUAT transfers are handled in urban areas when investments are sold, is applied to the sale of investments in rural areas. At present a rural investment can be sold but the buyer must then ask the State to grant him or her a new DUAT over the land that in principle accompanies the investment; this is not legally guaranteed, and the subsequent administrative process can also be cumbersome and may hold up the transaction so badly that it never effectively takes place. In urban areas when a building is sold, the DUAT over the land on which it stands passes automatically to the purchaser, with a much simpler administrative process free of discretionary uncertainties.

The question of land rentals has always been subject to a *de facto* political veto. With roots in post-Independence fears of a new rentier capitalist class re-emerging, the idea of rentals has been off-limits even at the time when the present law was being developed. The 1997 Law and its regulations does however include the possibility of 'ceding use' to a third party while retaining the DUAT (*cessão de exploração*). In the last 2-3 years, this issue has been the subject of debate at the government's Consultative Land Forum, and in fact a new Decree has been drafted to regulate how this kind of transfer of use to a third party is done. The report finds that it is certainly time to openly address this for what it is – a form of land rental – and deal with this in a way that allows rentals to play their role as an important means of resource allocation in a market economy. The legal review has established that the new Decree is in fact unconstitutional, and this is explained in the report. The proposal is to revisit the whole issue of 'transfer of use' and rentals and reach a new policy consensus, before re-drafting the Decree.

A third key question identified and which is also at the heart of the two already discussed above, is the definition of what constitutes 'an investment'. At present the legal term 'improvements' (*benfeitorias*) is used, and this has a clear definition in the Land Law regulations:

all expenses incurred in the preservation or improvement of land. Improvements are classified as necessary, useful or as amenities. Necessary improvements are those whose purpose is to prevent loss, destruction or deterioration of the land. Useful improvements are those that are not essential to the preservation of the land, but increase its value. Amenities are improvements that are neither essential for the preservation of the land nor increase its value, but are purely for the enjoyment of the improver[1].

The need to revisit this definition and be much clearer about what it means – including expanding it to encompass a wider range of investment scenarios – was strongly called for by a senior legal professional in the public meeting held to discuss the initial findings of the consultant team. Indeed this weakness in the law has long been recognised, especially in the context of rural communities and others who may want to give up their land to a third party (through the legally prescribed mechanism of consultation and agreement followed by issue of a new DUAT), but where there is no recognised 'improvement' on the land. These entities are then excluded from any possibility of being able to realise the value of their investments on their land, and are instead limited to accepting a bureaucratically-imposed compensation payment for the loss of standing crops, and any housing and ancillary infrastructure that is on the land in question.

In the urban context as well this issue is at the root of what is effectively a land market using loopholes in the law. Thus the definition of 'improvement' is stretched by all concerned to include simply erecting a wall around a piece of land, or placing rocks and other markers to indicate how a piece of land has been 'parcelled out' for future housing or other infrastructure development. Strictly speaking it is always the *benfeitoria* that is being sold; when the *benfeitoria* is just a crudely built brick wall around an otherwise untouched piece of land, the legality of the transaction is stretched to breaking point.

The report therefore proposes that this question also be thoroughly debated and new regulations developed to introduce clarity, and to widen the definition to allow for a far wider range of 'improvements' to be transacted, which in turn then triggers the process for DUAT transfer as proposed above. Reference is made in this context to other country legislation which has successfully done this in a similar 'land belongs to the State' setting, with particular reference to what local farmers can 'sell' as improvements to and on their land (this is the case of Ethiopia).

The fourth area of much debate and concern is the question of what is called here 'negotiated access to already occupied land'. This is the question of 'community consultations', which is one of the key features

[1] This English version is from Frey, Adrian (2004): Land Law Legislation. Maputo, MozLegal Ltd., with sponsors including the then National Directorate for Geography and Cadastre (DINAGECA)

of the 1997 Land Law and the principal practical guarantee of local land rights (DUATs) acquired by customary occupation. Critics rightfully say that the law and regulations are very short on detail about how consultations should be carried out, who represents the community, and what their legal effects are. The report strongly reasserts the need to maintain this important and innovative instrument, but also underlines the need to address the concerns being raised. It notes that the call to legislate on how the community is 'represented and acts', formally included as Article 30 of the 1997 Land Law, has never in fact been carried out. Instead, a series of interpretations based in local government laws and new decrees emanating from the Consultative Forum on Land have attempted in a piecemeal fashion to deal with the issue. The report calls for the Article 30 requirement to be responded to in full, preceded by a proper debate on the subject which draws principally on the experience of those who have been doing consultations in recent years, and especially civil society organisations supporting communities through this apparently simple but in practice complex process. It also calls for the recent Decree to be reviewed in the areas where it introduces new participants with approving powers into the consultation process (Local District Assemblies) in contradiction to what already appears in the superior Land Law.

A fifth major issue identified is the unconstitutionality of the existing Urban Land Regulations, formally approved in 2006 and which came into effect six months afterwards. The formulation of these regulations effectively allows a form of land sale through the auctioning of sub-divided plots of land within approved urban plans, and perhaps more importantly in terms of rights and social impacts, effectively annuls the acquired rights of most of the urban poor who live in unplanned and largely unregistered housing around the edges of all Mozambique's towns and cities. The report proposes solutions for both of these problems, firstly by reference again to the question of what constitutes an improvement and demanding that any new definition be firmly applied and respected; and secondly by calling for the withdrawal of any reference to rights acquired by occupation being invalid if the occupation does not correspond to an approved urban plan.

The report then goes on to identify a series of other less contentious issues that require clarification through new regulations or decrees, without the need for any change to the underlying law. These include questions such as:

- Resettlement – aligning the new Resettlement Law with present procedures for community consultations and the mapping of acquired rights (delimitation and community land use plans)
- Physical planning – the need to implement this important legislation fully, as a facilitating condition for the DUAT transfer proposals above to be feasible and implemented within clear planning and change-of-use parameters
- Compensation rules – the need to establish a common set of basic principles drawing upon what exists in several laws, and develop internally consistent sub-sets of regulations and procedures for

specific contexts such as large-scale agro-forestry projects (private sector land acquisitions), resettlement because of public projects, mining and petroleum exploration and extraction implying resettlement

- Land taxation – also required to complement and facilitate the DUAT transfer proposals and to stimulate the re-allocation of land and resizing of existing concessions, to those better able to use the land, either through DUAT transfers or through rental arrangements of various kinds
- Environmental Law – clarify the public consultation mechanisms (distinct from community consultations over DUAT transfers), and clarify *when ESIAs* need to be carried (logically these must precede the issuance of provisional DUATs, and not when the DUAT is being made definitive)
- Tourism Law – the declaration of Tourism Interest Zones does not imply that existing DUATs need to be brought with tourism regime legislation, nor should new private DUATs be subject to this requirement (the TIZs are *planning instruments* to avoid inappropriate projects in tourism areas)
- Dealing with the Legal Property Registry – this is in the Ministry of Justice and carries out a critical function when it comes to using a DUAT Title for raising credit or in some other business context, but has always been, and still is, excluded from programmes to 'improve land administration' (thus remaining a serious constraint to investment in Mozambique)

In Conclusion, the report summarises all the points made above, and calls for them to be addressed in the context of the Consultative Forum on Land as the logical and correct mechanism for reviewing and altering the existing legislation. In a section of Final Remarks however, it makes a clear call for any changes to be made with great care. Firstly, referring back to the context assessment, it underlines that the *strategic formulation* of the present policy and legal framework remains relevant today and that the underlying social concerns addressed by the NLP and the 1997 Land Law require the rights-based, participatory and equity-enhancing approach that the framework provides. Any changes made should not weaken this approach or undermine the potential and force of the instruments developed, particularly the community consultation and the need to pre-identify existing acquired rights ahead of any investment scheme, be it public or private.

Secondly, the report notes that by far the largest focus of concern by investors relates to administrative inefficiency and even incompetence, rather than to legal constraints *per se.* It is clear from many sources in recent years that the public land administration is still seriously weak, almost ineffective at local level, and still only responds to the needs of a small, urban-based elite who are able to use and manipulate the system to suit their needs. Beyond this is the surrounding political-economy of the country with vastly unequal power relations between those close to power (at national and provincial levels), and those at local level whose land may now be legally protected by the 1997 Land Law, but are nonetheless very exposed to land-grabbing and 'elite capture' of their still largely unregistered rights over land and natural resources. Once again, changing the law to 'improve things' in this context makes little sense, if the administrative and

political context is not also addressed. The report notes that in this context two donor-funded projects are underway or soon to be implemented which will address some of these concerns.

Thirdly, and fundamentally, the question of both *security* and *certainty* require more than anything else the *rule of law.* It is apparent in all conversations and discussions about land governance in Mozambique that at the heart of many problems and difficulties with Land Law implementation is the willingness of key actors to set aside the legal framework and pursue their own objectives (be they 'official' in the national interest, or for personal gain). Unless this is addressed, then once again any change to the legal framework will be null and void, and it would be as well to carry on with what presently exists.

Finally, the report also notes that the new government has initiated what is the first real institutional reform in the 'land sector' since the 1995 NLP called for institutional reform as part of the implementation plan for the new policy (the first part of the plan was the revision of the Land Law, successfully carried out but then left to an unreformed and conservative land administration to implement).

With the creation of MITADER, Mozambique finally has the potential to fully implement its progressive and widely regarded 1997 Land Law. With the changes proposed above, to upgrade its *economic credentials while leaving its social purpose intact,* and a new institutional framework in place and benefitting from strong donor support (at national and *district* level), full implementation of the framework may now be possible. It is argued here that any major changes to the legislation should not be made until the options presented by this new situation have been fully explored and tested in practice. Only then will it be possible to tell if it is indeed 'un-implementable' and requires more substantive change.

INTRODUCTION

This report has been commissioned by the SPEED - Support Program for Economic and Enterprise Development – project in the context of its support to the CTA Private Sector Federation in Mozambique[2]. The ultimate objective of the report is to encourage greater and more productive investment on land, including finding ways to make land access easier for private investors. After a full review of the land and other relevant laws, the report identifies problems with the existing legal framework and proposes 'options and recommendations for improving the existing legal instruments with a view to streamlining administrative procedures for easy access to land (DUATs) and to promote investments on land'[3].

While the principal client is the CTC Federation of Private Enterprises, it is also intended that the findings and recommendations will be presented to the Government of Mozambique (GoM) and other stakeholders at the 8th Consultative Forum on Land (FCT) to be held in Beira in October 2015.

The review of the current legal framework included a comprehensive desk study of all the relevant laws and related publications, and interviews with stakeholders from Government, civil society, the private sector, academics and legal specialists. The findings and initial proposals were then developed into a Powerpoint presentation which was shown firstly to the CTA, and secondly to staff of the government land administration (still the National Directorate for Land and Forests (DNTF), but soon to become the National Directorate for Land within the new Ministry for Land, Environment and Rural Development, MITADER). Comments from these meetings were integrated into a new presentation at an open public meeting of national legal specialists, and representatives from the private sector and civil society.

The findings and proposals were also discussed at a meeting with a key donor supporting land interventions in Mozambique (the Netherlands[4]) and the World Bank. This meeting included a second presentation made by a small international team carrying out a functional analysis of DNTF, as it prepares for institutional

---

[2] a USAID project to improve the business environment through better trade and investment policies. SPEED's goal is to have more companies doing more business, resulting in increased trade and investment and a stronger competitive position

[3] Terms of Reference. These are provided in full in Annex.

[4] The Netherlands and Sweden support the multi-million USD GesTerra institutional development programme at the National Land and Forest Directorate. The Netherlands has also supported Land Law implementation and consolidation since the late 1990s, through FAO-implemented projects with Government and civil society partners.

reforms as part of the new MITADER 'super ministry'. This allowed the team to compare and align its findings with the likely outcomes of this review. The report that follows presents the final results of this interactive process of analysis and discussion[5]. The conclusions and recommendations are however the result of the analysis made by the consultant team and do not represent the position of any agency or individual consulted.

REPORT STRUCTURE AND CONTENT

The National Land Policy and the Land Law both date back to the mid-1990s. Opinions were expressed during meetings about the need for more radical change to bring the law into line with the changes that have taken place since it was approved. Other concerns were raised about the 1997 Land Law being 'beautiful but impossible to implement'. These are legitimate points and need to be examined before embarking on an approach that merely adjusts existing laws and regulations.

The report therefore begins with an assessment of the general relevance of the legal framework for land and natural resources in the context of Mozambique today. This assessment provides the backdrop against which to carry out this legal review. If the framework is still broadly appropriate, then adjustments to certain areas of the legal framework are sufficient to respond to the TORs; if it is not, then more profound policy change is required, implying fundamental legal changes – in effect a new Land Law. While the authors could comment on what might needed, making concrete recommendations without a policy review would not be possible. In fact the consultants find that the existing framework *is still broadly appropriate* for the present socio-structural context of Mozambique.

The next section of the report then lists the main problem areas identified by the review, and discusses each one in turn, with proposals for changing specific aspects of the current legal framework. These are presented in a straightforward format aimed at stakeholders and decision-makers. For the technical and academic basis of the discussion, the full legal review is included in Annex, together with a bibliography of other documents consulted.

[5] A final and more detailed version of the Powerpoint is available on the SPEED website.

The report ends with Conclusions and Final Comments. The Conclusions summarise the main findings and proposals, while the Final Comments place them in the wider context of other constraints on investment which the team considers to be a far greater constraint on investment than any specific feature of the legal framework. These are:

- the lack of confidence in the rule of law in Mozambique today, shared by all investors and those who would support them;
- the still generally complex challenge of 'doing business' in Mozambique;
- the extremely weak capacity of the public land administration to effectively implement *any* legal framework, no matter what changes are made.

The Final Comments also stress that the report comes at a time of unprecedented institutional change in 'the land sector'. The emergence of MITADER is the first major institutional change since the 1995 National Land Policy (NLP) called for institutional reform *as part of the NLP implementing strategy*[6]. The prospect of finally having land institutions able to implement the Land Law must be considered before rushing to change laws that may still be relevant, but have been 'un-implementable' due to political and institutional factors that are now changing.

[6] National Land Policy, Section B.

CONTEXT

Mozambique has changed a lot since the 1995 National Land Policy and 1997 Land Law were developed. Both instruments are still in place and have been widely praised at home and internationally. Yet many commentators feel that it is time for a change. The team heard remarks like 'it is a beautiful law but impossible to implement', and 'if it cannot be implemented we need a new law'. Difficulties faced by private investors looking for land and increasing numbers of land conflict are also cited as evidence that the law is not working as intended.

These points of view have merit and need to be addressed. If they are right, it is not enough to look at how bits of the law should be changed. A more radical policy review should be undertaken, before any legal changes are considered. However, it is important to first assess how much has changed since 1995, and whether or not the underlying strategy of the NLP is still relevant. If it is no longer relevant, changes beyond adjustments to regulations should be considered. If it is relevant, then any changes to be considered must respect the principles of the NLP and avoid undermining the gains achieved through the 1997 Land Law.

SOCIO-ECONOMIC CONTEXT

While an exhaustive review of Mozambique 'then and now' is beyond the TORs for this report, it is possible to lay out some key features of the country as was in in 1995/97 when the NLP and Land Law were, and as it is today.

The NLP and 1997 Law were developed at a key point in the history of Mozambique. The civil war was not long over, and a new multiparty Constitution and structural adjustment had set the stage for a new market economy. With peace in 1992 investment in rural areas was suddenly attractive, and private sector interest in the vast areas of 'unused' land quickly emerged. Yet millions of refugees and displaced people were also returning to the same 'unused' land, which they had been forced to leave by armed conflict and severe droughts. There was no urban employment, and neither the returnees nor the State had the means to get land back into production. Private investment would be essential to drive development.

A full policy review was therefore commissioned with a complex brief: secure local land rights (to safeguard rural livelihoods) and facilitate secure land access for investors. State ownership was then, and still is today, not open to debate. Working within this limitation yes still taking its lead from Constitutional guarantees of 'acquired rights', the major advance secured by the NLP is contained is found in the second of its seven principles:

> *"Guarantee access to and use of land to the population as well as to investors. In this context the customary rights of access and management of the resident rural populations are recognised [thus] promoting social and economic justice in the countryside".*

The resulting NLP was clear that investment should not prejudice existing land rights and should bring real benefits to local resident populations. The NLP also clearly provided for the shared use of land resources between existing smallholder communities and investors. Thus:

> *"the community can enter into partnerships in an investment, sharing profits and the benefits resulting from the investment"*

The complex challenge of managing these essentially opposing sets of land use is well summed up by the National Land Policy 'mission statement' of its core principles:

> *'Secure the rights of the Mozambican people over land and other natural resources, as well as promote investment and the sustainable and equitable use of these resources'*

This is a development agenda, designed to promote the well-being of the Mozambican people through a process of State-managed private investment in the countryside. It is not an agenda purely aimed at facilitating private sector access to land. Given the conditions that still exist in exist in Mozambique (see below), this essential qualification is still highly relevant.

With the NLP in place, an Interministerial Commission for the Revision of Land Legislation began developing a new land law, which was approved in October 1997. Implementing regulations were in place by the end of 2000 . The open and participatory way it was developed also gave the policy and legal framework strong legitimacy and sense of national ownership. It still has today, and any changes that are undertaken should strive to maintain it.

Evidently the country has changed since the mid-1990s. Massive injections of donor capital supported institutional and capacity development and the rebuilding of infrastructure and services. Macro-economic reforms continued. A strong market economy is now firmly in place with a financial sector that simply did not exist in 1995, and in recent years private sector investment has risen dramatically. Aside from the present political difficulties between the government and the RENAMO opposition, peace and relative

political stability have enabled Mozambicans of all kinds to respond to and benefit from new economic opportunities.

Economic and legal reforms in all the main sectors have clearly created a climate that attracts investors in spite of fears about risk and the difficulties of 'doing business' (Mozambique still ranks 127 out of 189 countries in the World Bank's annual report). Projects range from the 'mega' MOZAL Aluminium factory, to small and large investments in tourism, agriculture and forestry. The country will soon enjoy a huge GDP boost with coal, oil and gas projects.

Those close to power structures at national and provincial level have been able to access large areas of land. Most remain largely unused, as their 'owners' look for partnership opportunities with investors (this is one reason why some say the 1997 law has failed). These problems are part of the political-economy of the country however, and are not a result of the land legal framework. This is a reality that would influence any law, or undermine any changes to a progressive law that provides development guarantees for ordinary Mozambicans.

A new urban middle-class has also benefitted substantially from the opportunities that have emerged along the way. Many of these have also taken out land concessions, using the provisions of the 1997 law, carrying out community consultations and navigating their way through the arcane state bureaucracy. Difficulties here lie at the level of administration; they are eased by accessing the levers of power or circumventing the rules.

It is clear that the more progressive features of the 1997 law have not been fully respected and have not achieved their full potential. To underline the point, land concessions for new LPG investments in the north are to be annulled by the new government on the grounds that they have been mishandled and are illegal. With economic growth and surging demand for land still marginalising local rights in spite of the provisions of the NLP and 1997 law, it is easy to understand why 'land law doubters' argue that a new legal framework is needed.

However, high rates of economic growth, and a sophisticated urban sector with banks, hotels, restaurants and fine elite homes do not necessarily add up to the kind of change that would justify a radical change in policy. A closer look at recent evidence on poverty and other social indicators suggests that sociologically and structurally, the national landscape has not in fact changed a great deal since 1995. As then, its man features today are:

- A majority population of smallholder subsistence farmers with unregistered and vulnerable land rights

- A majority of the population still absolutely poor, badly educated, and not sharing in the gains of the last 15-20 years
- A high dependency on land for livelihoods, principally through local, customary and informal land access and management systems
- An increasing demand for land by private sector investors, national and international
- A Government betting even more strongly on private sector investment – in land and in other areas of the economy – to generate growth
- Government assumptions that investment-led agrarian growth will 'trickle down' to the poor, with over-confident assumptions about creating jobs to alleviate poverty
- A very weak land administration virtually unchanged since the mid-1990s –serving the needs of an urban-based minority wanting land for leisure and investment needs

Recent evidence shows that very little has 'trickled down' to the poor and disadvantaged. A national household survey in 2008-2009 showed that although the number of Mozambicans living in absolute poverty had fallen from 70 percent in 1997 to 54 per cent, the vast majority of the rural population still lives on less than US$1.25 a day and lacks basic essentials like safe water, health services and schools . Just escaping grinding poverty still means most people are desperately poor. With a small elite enjoying the benefits of growth, 'poverty reduction' has a long way to go. Moreover, over 70 percent of poor households live in rural areas and depend upon land for their livelihoods. Losing this land to promises of low paid and probably insecure jobs would leave them vulnerable to food insecurity and stuck in an even deeper poverty trap.

One thing however is very different today compared with 1995, and it is different because of the 1997 law. The acquired rights of thousands of poor rural households are now legally formalised and protected. This huge social advance has set Mozambique ahead of many African countries trying to reconcile 'customary rights' with investor needs. It is also now widely accepted that all investments have a 'land rights dimension'- anywhere where land is required for a project, local people are likely to be living there and using the land in some way. Because of the 1997 law, the occupation and use of land by local people gives them full legal rights over it. And the law *has* by 'worked'. All investors must now check to see if the land they want is 'free from occupation'. If it is not, they must negotiate 'terms of partnership' with local land rights holders. It is clear that many, if not most, consultations are poorly carried out, but they are carried out. The issue then is not to do away with this important protective instrument, but to make it work more effectively and with the proper levels of technical support and understanding of how it works.

The Government has perhaps been the least prepared to accept this 'at-a-stroke' recognition and formalisation of DUATs acquired by occupation, especially over areas it considers 'free from occupation' or underused. It defends the right of the State as constitutional owner to allocate land to whoever it wants, citing national interest grounds, and projecting a view of a country with abundant 'free land' to attract foreign investors.

There is little doubt in this context that this Land Law makes investment more difficult, if the alternative is to believe that the 'State as owner' should be able to freely allocate land to whoever it considers best able to use it. However, making investor access to land more 'difficult' - or at least more complex – makes Mozambique no different from most countries. Investors everywhere have to negotiate with those who already live on and work the land they want, particularly in countries where land is not State property. Having to negotiate with a land owner in the UK or the USA does not stop investment. Having to negotiate with the present occupants of land in Mozambique should not stop investment either. And it is the only way that the present occupants will gain substantially from the investment process and, if they are lucky, escape poverty.

The legal review in Annex shows clearly that the Land Law and regulations provide all parties with a strategy and instruments to deal with this situation. The central issue has been a failure by Government to grasp this challenge and use the law in the way it was designed to be used. Thus local rights in practical terms still remain vulnerable to 'capture', because the public land administration has dismally failed to ensure that these rights are now recorded in official cadastral archives; and investors are frustrated by conflicting official messages and a deep lack of competence and capacity in administrative terms.

In the context of a developing country like Mozambique, with a poor population largely dependent upon land for their survival, the existence of a legal framework which guarantees the right to land for all Mozambicans, secures local rights, and makes negotiated access to local land mandatory has huge social benefits. However, today, as in the mid-1990s, most local rights are not recorded and local land is still vulnerable to 'elite capture' or other forms of dispossession. This is even more the case for rural women, whose rights tend to come through husbands, fathers or uncles and who have little awareness of how to exercise their real legal rights in practice. Add surging demand for land driven by rapid economic growth to this landscape of still vulnerable land rights, and it is arguable that the core principles of the 1995 NLP are perhaps even more valid today than they were in 1995.

By extension, it is also likely that the core features of the 1997 Land Law still offer an appropriate response to at least the social challenge facing a government concerned to reduce absolute poverty and meet its constitutional obligation to 'create a society of social justice, which creates material and spiritual well-being and quality of life for all citizens' .

There is no doubt that contradictions exist, particularly on the economic side of the NLP and its implementing legal framework. The main objective of this report is to find these contradictions and suggest ways to address them. But the starting point for what follows is the brief context analysis above - the present policy and legal framework is strategically sound as an approach to dealing with the socio-structural challenges that still face the country. Care must therefore be taken to avoid changes that weaken a coherent and internally-consistent set of laws and regulations developed to implement a NLP which in most respects still appears to respond to the needs of the country and its people.

LAND AND THE ECONOMY

A central concern of the GoM is that Mozambique has abundant land resources which are massively underused. This 'underuse' is in two senses: the proportion of total land that is in use, and the low-technology/low productivity agriculture that predominates where land is being used. The country has an estimated land area of just under 79 million hectares (FAO 2012 estimate). Total arable land availability is commonly set at about 36 million hectares, but only a small proportion – about 4 million hectares – is under cultivation. Over 95 percent of agricultural production comes from 3.2 million smallholder farms. The average area of each of these farms – looking only at the land under cultivation – is about 1.2 hectares (or a total of 3.84 million hectares).

While large areas remain unproductive, it is also clear that things are happening in the countryside. According to the World Bank, Mozambique's agriculture competitiveness has increased steadily over the years and sector growth has been performing well – currently around 5.6 percent per annum. Given the very small private sector element in this picture, much of this improvement must come from the small family farm sector. It is also clear however that small farmers alone are not capable of bringing the huge areas of unused arable land into production. Small farmers returning to their land in the 1990s started from a very low base, and their capacity to expand area produced and improve productivity is still constrained by poor access to capital and a continuing use of low-level farm technologies.

For the World Bank, what is needed is 'private sector participation, public investment, and an enabling business environment'. Indeed, much more investment is needed at all levels if agriculture is to be 'an engine for achieving broad-based economic growth and accelerated poverty reduction sector growth'. In economic terms therefore the two key 'land issues' are:

- Expanding the areas farmed by small farmers who have access to unused land, and improving the productivity of small farm agriculture
- Getting much more of the available land into production (arable, livestock, forestry, etc) – promoting land access for private investors to use under- or unused land

All land users – small and large scale - require three things to invest in either increasing the area they use, or adopting new techniques, or both:

- **Certainty** that what is invested will produce a return (or at least acceptable level of risk)
- **Security** (tenure over the means of production, secure contracts, safe access to markets)
- **Predictability** (knowing what is likely to happen, being certain that the parameters of their businesses are unlikely to change much; regulations that are relatively stable)

These conditions in turn require:

- A regulatory environment that offers a dependable financial and marketing scenario (exchange rates, interest rates, freedom of movement, etc)
- A regulatory framework that provides secure tenure rights well into the future
- Public services that can provide reliable official documentation when needed
- The rule of law (legal guarantees of contract, defence of tenure rights, etc)
- State investments – notably public infrastructure such as roads, energy, markets

On the investment side – the first issue above – the wider legal framework must deliver on all of these counts, for small family farms, for middle-size entrepreneurial farmers, and for large scale commercial operations. In land terms the two central concerns are:

- **security of tenure** (how this is guaranteed, how long it lasts, what conditions apply to it that might restrict or undermine investment decisions)

- **documentation** (being able to get reliable documentation when needed – to raise bank loans, to prove tenure if land is under threat or when negotiating with someone else who wants your land).

To get more land into use by allocating it to those who may have more resources, the other central concern of a land governance framework is how get other people onto 'unused' land which is likely to be held ('possessed') already by someone else. This also requires an effective regulatory framework, guarantees of contract and the rule of law, and public services that are able to manage and record the resulting changes in an impartial and efficient manner.

The GoM sees land as a key driver of sector growth and competitiveness. In documentation for the new GoM agricultural programme for Mozambique, the World Bank lays out five thematic areas into which future agricultural reforms can be grouped. As well as the usual concerns with productivity enhancing inputs (seeds, irrigation etc) and credit and marketing support, these themes also include 'providing investment incentives for farmers and agribusinesses by enhancing socially responsible land tenure arrangements'. This is convenient way of putting the two issues together: security of tenure and contract is essential for the security and predictability that underpin investor confidence at all levels.

Getting other people onto land occupied by local communities and households is a question of resource allocation. Although Mozambique is a market economy, 'the market' is not available as a tool for ensuring the most rational allocation of land resources to those best able to use them. Constitutional provisions prohibit the sale and other forms of onerous alienation of land. Assuming that proposing constitutional change is beyond the brief of this report, it is therefore necessary to look at how effectively the present legal framework can respond to the difficult challenge of ensuring the best allocation of this key means of production.

Assuming that any new access to land is likely to involve land that is already occupied in some way, this question is not just about the State allocating 'its property' to the most capable firm or farmer, but is mostly about how the State manages the process of transferring existing or acquired land rights, to a third party (or in practical terms, from local people with customary or historical rights of use and benefit, to investors seeking new rights of use and benefit).

The issue of access – for both smallholders and new investors – has several dimensions, some of which are also important for creating and sustaining investor confidence:

- Ensuring that existing rights and production systems are not undermined by new private investment and are enhanced and reinforced by it in some way

- Having a land governance and administration system that is able to:
    - Guarantee secure land tenure rights for all land users
    - Administer these rights in an efficient and transparent manner
    - Facilitate and register changes in tenure arrangements, as land users of various kinds transfer or acquire land resources amongst themselves and with incoming investors

The work for this report has focused very much on these economic imperatives that must be part of what an effective land law does. As already suggested, the social imperatives dictate that the underlying strategy and approach of the current legal framework is still broadly in line with what Mozambique needs today. The challenge then is to how to address these economic needs without undermining the very real achievements of the NLP and 1997 Land Law in the area of protecting rights and creating a framework for negotiated access to land and its subsequent 'sustainable and equitable' use.

INSTITUTIONAL CONTEXT

This report is presented at a time of new opportunity for land governance in Mozambique. The new government of President Nyusi has taken the bold step of taking land out of the Ministry of Agriculture, and putting it together with environment and rural development in a new 'super Ministry' (MITADER). These changes offer the first real chance to properly implement the full package of legal instruments developed from 1997 onwards, free from the compartmentalised, conservative and hard-to-manage institutional arrangements that have so far held back effective implementation.

In the discussion of possible legal changes that follows, it is important to keep this point in mind. As indicated above, many of the apparent failures of the current legal framework can be attributed to the political-economy of the country and its extremely weak institutional capacity to implement a land administration that does more than just serve elite interests. The new institutional arrangements will hopefully facilitate a more effective implementation of the existing policy and legal framework. If so, let it work under new masters and see what happens – only then can it be fully judged on its merits and defects, and changes made.

There are clear signs, even before the new regime and MITADER that the National Directorate for Land and Forests was moving towards recognising its wider public responsibility. This will involve a shift from catering to the needs of a small number of land users – urban based interests seeking land to carry out their projects – towards administering land as an input to an integrated rural development process in which there are many stakeholders, including millions of small farmer households.

Along with this shift, the sector requires large scale investment in institutional reform and capacity building. There is ample evidence of deep systemic inefficiency, inaccurate record keeping and poor data collection in the field; local staff are poorly equipped and supported; there is a lack of clarity over procedures and little uniformity when it comes to certification and the documentation that is provided in different parts of the country. These are the things that frustrate investors of all types, as they wait years in some cases to obtain the documents they require to pursue their projects.

All this again adds up to the need for caution when recommending legal changes when in fact the real problems might lie elsewhere.

INTERNATIONAL CONTEXT

Before considering if and how the policy and legal framework should be modified, there are also important policy issues to consider at the level of international best practice and new guidelines on 'responsible agricultural investment'.

Mozambique is a committed member of the international community and as such has endorsed the 2012 FAO Voluntary Guidelines on the Responsible Governance of Tenure for Land, Fisheries and Forests (VGGT), and the Principles for Responsible Agricultural Investment (PRAI) approved by the Committee on World Food Security (CFS) at FAO in Rome in October 2014[7]. Mozambique is also a member of the G8-supported New Alliance for Nutrition and Food Security, in which it commits to improve land governance and create an enabling environment for responsible investment, in exchange for donor funding for new commercial-scale agricultural investment by international and national enterprises.

For the purposes of this report, the PRAI (derived largely from the over-arching principles of the VGGT) are the focus of attention. The ten Principles which 'responsible investors' are expected to adhere to are as follows:

[7] See FAO 2012 and CFS 2014 in Bibliography

1. Contribute to food security and nutrition
2. Contribute to sustainable inclusive economic development and the eradication of poverty
3. Foster gender equality and women's empowerment
4. Engage and empower youth
5. Respect tenure of land, fisheries and forests, and access to water
6. Conserve and sustainably manage natural resources, increase resilience, and reduce disaster risks
7. Respect cultural heritage and traditional knowledge, and support diversity and innovation
8. Promote safe and healthy agricultural and food systems
9. Incorporate inclusive and transparent governance structures, processes, and grievance mechanisms
10. Assess and address impacts and promote accountability

The USA is one of the major donor partners in the New Alliance programme, and in recently published USAID guidelines clearly espouses the broad strategy contained in the PRAI approach[8]. It is therefore assumed in this report that any analysis of the policy and legal framework, and any recommendations for change, should be framed taking the above set of principles into account.

The PRAI include a series of qualifying statements regarding how they should be applied. All stakeholders are encouraged to respect and work within these principles, including states, governments, civil society, investors, smallholders and communities. Significantly for the objectives of this report, 'business enterprises involved in agriculture and food systems…*should respect legitimate tenure rights in line with the VGGT, and may use a range of inclusive business models'*. And on the community side, 'Communities, indigenous peoples, those directly affected by investments, the most vulnerable, and those working in agriculture and food systems *are encouraged to actively engage and communicate with the other stakeholders in all aspects and stages of investments to promote awareness of and respect for their rights* as outlined in the Principles[9].

These remarks provide some clues as to how the issues identified above should be considered when analysing the policy and legal framework and recommending appropriate changes (if changes are required at all). In fact the policy and legal framework of Mozambique is well aligned already with both the VGGT and the PRAI. This is immediately clear in the list of principles in the 1995 National Land Policy which

[8] USAID (2015): Operational Guidelines for Responsible Land-based Investment. .
[9] PRAI, pages 25 and 26, emphasis added

preceded formulation of the still-in-force 1997 Land Law. While re-asserting that land will remain the property of the State, the NLP principles then include:

- Guarantee the access and use of land to the population as well as investors. In this context customary rights of access and management of land held by rural resident populations are recognised, promoting social and economic justice in the countryside
- Guarantee the right of access and use of land to women
- Promote national and foreign private investment without prejudicing the resident population and ensuring that benefits accrue to both the resident population and the national treasury
- [Promote] the active participation of nationals as partners in private enterprises
- Define the regulatory framework of basic orienting principles for the transfer of the DUAT, between citizens or national enterprises, where investments have been made on the land
- [Promote] the sustainable use of natural resources in a way that will guarantee the quality of life of present and future generations [followed by a list of special protection zones and biodiversity issues][10]

These principles are summed up in the mission statement of the NLP, which also reflects the vision of the VGGT and PRAI, and remains today a succinct and relevant blueprint for Mozambique as it faces the challenges listed above, in particular the question of how to get more investment on unused land, by both existing smallholder communities and new private investors:

'Secure the rights of the Mozambican people over land and other natural resources, as well as promote investment and the sustainable and equitable use of these resources'[11]

[10] National Land Policy, Section IV, Clauses 17 and 18. In Carlos Serra 2012: *Colectânea da Legislação sobre a Terra.* Matola, Centro de Formação Jurídica e Judiciária (CFJJ), 4th Edition.
[11] ibid

ISSUES TO BE ADDRESSED

INTRODUCTION

As already mentioned above, all land users – small and large scale - require three things to invest in either increasing the area they use, or adopting new techniques, or both:

- Certainty (or an acceptable level of risk) that what is invested will produce a return
- Security (tenure over the means of production, secure contracts, safe access to markets)
- Predictability (knowing what is likely to happen, being certain that the parameters of their businesses are unlikely to change much; regulations that are relatively stable)

Tenure security is an essential condition for all three. Any kind of investment on land, no matter how big or small requires secure and enforceable tenure rights over a sufficiently long period of time to invest, run the investment/project, and gain a return on the investment (profit and capital appreciation). If there is any kind of uncertainty surrounding tenure rights and what can be done with them, this will raise the risks associated with the investment and certainly constrain the overall volume of investment and its impact, especially when agricultural or other land-based investments are involved.

A second essential condition for an active investment process is the ability to make a profit not just on the activity being pursued, but to also at least recover the capital sum invested and if possible gain an acceptable return on this sum if and when activities cease and/or the investor wants to pass the investment on to a third party (for example, at retirement, due to illness, or simply to realize the return on the investment and use the capital elsewhere).

Security of tenure and the ability to transfer the investment (and thus the land on which is exists) through an efficient and transparent market mechanism are 'the big one' however, and are the principal focus of this report. The legal review which preceded the report finds that tenure security as the condition for certainty and security is adequately provided for in the current legal framework of Mozambique. Although land cannot be private property, the State-allocated 'right to use and benefit from land' (or DUAT, to use the Portuguese acronym) does offer a secure horizon of 50 years, with the right to renew. There are issues surrounding the 'start-up' period – during which the DUAT is 'provisional' (*provisório*) - that need to be resolved, and these are discussed in some detail below. But broadly speaking the legal framework, if properly applied, offers investors ample security and time to invest, recover their costs, and make money.

The question of transferring the DUAT is more complex. The Mozambican constitutional regime does not allow land to be bought and sold, mortgaged or otherwise alienated from the State as owner. Thus 'the land market' insofar as it can be said to exist, is in fact an 'investment market'. What is being transacted is what is *on the land,* private property which *can* be bought and sold and mortgaged. This in turn is the result of investments made over time by the present DUAT holders. It can also be argued that what is being transacted when undeveloped land is acquired is the *future investment* predicted in the accompanying business plan. Thus having an agreed investment plan approved by the relevant state authority might already constitute an investment (time and money to produce it and get it approved) – a legal 'thing' - and provides an indication of the values to be discussed between the present rights holders, and those who want to use their land for the investment project. The parties involved will – or should – have a clear idea of the potential or actual 'value added' that a specific piece of land will enable an investor to benefit from, as they sit down to discuss access using the various instruments provided by the 1997 Land Law and its regulations, and other related pieces of legislation approved since.

What is at stake here is not the marketability of land *per se,* but the marketability of what is done on, to and with the land. In other words, in a regime where land is not alienable, the significance of land is that it an essential condition for carrying out the business activity that is either being proposed or is already happening. And even though land is not private property and cannot be used as a guarantee, tenure security is essential for that business plan to succeed. This is why banks will still want to see evidence of a secure and legal DUAT before considering lending for a new project.

This notion that it is *the business, the investment,* that is the object of transactions that involve land, is the key to understanding how the market economy can work in a constitutional regime like Mozambique. Naturally, if an investment made on a piece of land is sold, and that investment is fixed on the land (it might even be rooted in it, such as a plantation), the right to use the land (DUAT) must also pass to the buyer – if not, it makes no sense to consider buying the investment and the market collapses.

The report identifies two principal ways in which transfers of use rights can or should happen to facilitate the market in investments, and thus allow land to have a role in creating wealth (capital) and as a driver of economic development (when the newly created capital is re-invested):

- Transfer of land to a third party when investments made on the land are bought, sold, mortgaged, etc, with the DUAT passing to the new owner of the assets
- Transfer of land to a third party who then uses the land for his or her own purposes, with the DUAT remaining with its original holder (in other words, forms of rental and partnership involving land)

It is clear in this context that another key issue is what precisely an 'investment' or 'improvement' on land is. The term 'improvement' or *benfeitoria* in Portuguese, refers to what is essentially the result of an

investment made on the land by the present DUAT holder. This improvement can be private property and can be bought and sold; it can also serve as a guarantee for bank loans and even mortgages, even in its projected form (the bank will lend to build a house, which will have value once completed).

This has given rise to a practice in urban areas especially where almost non-existent or rudimentary 'improvements' are made to a piece of land, and then sold for an elevated value. Where the *benfeitoria* is in practical terms almost non-existent – a rudimentary hut or a wall around the plot - it is really the land that is being transacted via the selling the improvements that exist upon it. The implicit illegality of this process is what lies behind much of the present concern about illegal urban land markets.

In rural areas the term *benfeitoria* also has great significance, and is used in a similar way to transact land on which improvements exist. These points are discussed in more detail below and proposals made that will both clarify what improvements are, and open up the 'investment market' in a way that will also allow farmers (communities and smallholders) to capture a more realistic value from the investor when they agree to cede land to him or her.

Several other issues impact on the efficiency and ease with which land is accessed and used, and these too certainly merit attention in the context of a package of measures to promote land-based investment in Mozambique. Other issues identified during the review include:

- Negotiated access to occupied land (community consultations)
- Urban Land Regulation
- Resettlement
- Territorial planning
- Compensation
- Tax system
- Environmental Law
- Specific technical issues
- Legal Property Registry

Each of these is discussed below in a 'Discussion' and 'Proposal' format which also draws out the practical implications of the present situation and what the proposals hope to achieve. Some of these issues are also directly relevant for how the main proposals on DUAT transfers and rentals will work in practice: the effective implementation of the Physical Planning Law (LOT), and the need for an effective land tax system that will encourage a more rational allocation of land and the resizing of presently unused land concessions. One key institutional element that merits urgent and substantial attention is also discussed: the

Conservatória do Registo Predial, or Legal Property Registry, which plays a key role in investment decision by banks and other financing institutions, yet which has long been left out of discussions about how make the law work better and in favour of greater investment.

ISSUES REQUIRING CHANGE OR CLARIFICATION

DUAT TRANSFERS

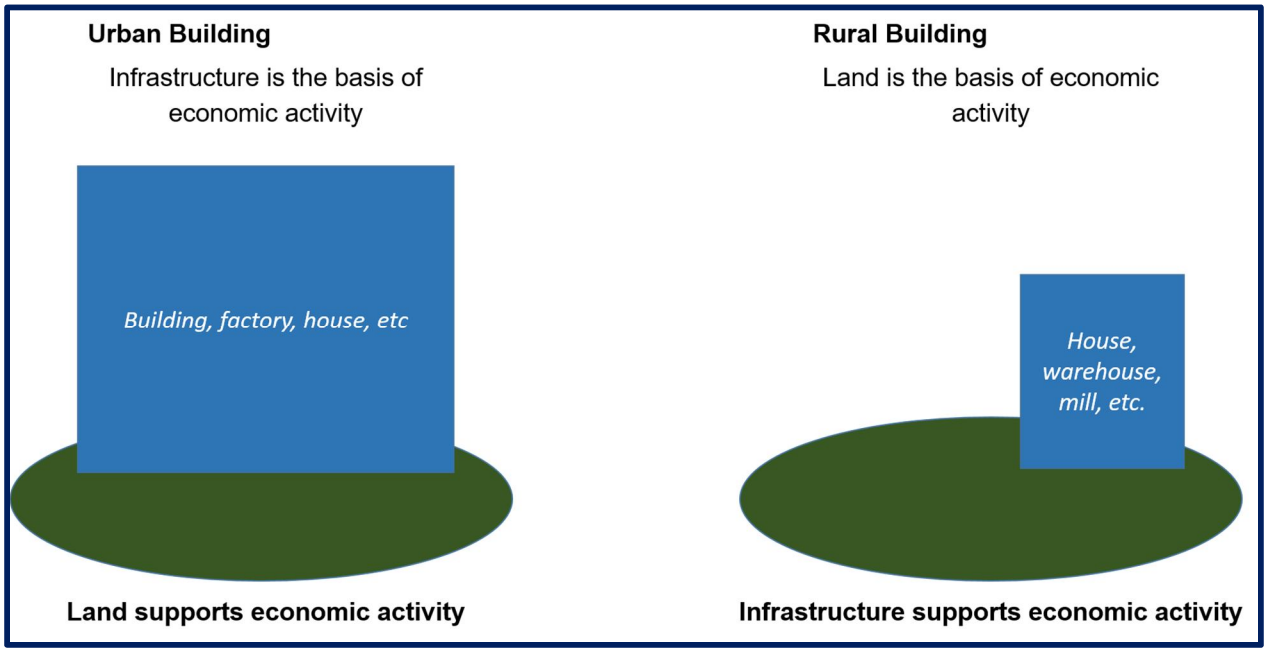
Discussion

The legal regime for the acquisition and transfer of land rights establishes a balance between state ownership of land, exercising of rights over the land by citizens and communities, public and private investment (both national and foreign) and promoting development.

The Law establishes a difference between the DUAT transfer regime, depending on whether these relate to urban buildings or to rural buildings. First and foremost, it is important to clarify that this distinction does not necessarily depend on the distinction between rural and urban spaces. According to the Land Law Regulations[12], delimited plots of land and their existing constructions with no economic autonomy and which depend mainly on the land itself for income are considered rural, while used for activities supporting the land use. Buildings located on land with adjacent grounds, where the source of income depends mainly on the existing buildings and not on the land itself, are considered urban (see Figure 1).

[12] Article 1 – Decree 66/98, of 8 December

FIGURA 1: MOZAMBIQUE – URBAN BUILDINGS AND RURAL BUILDINGS



As we have already stated, the DUAT transfer regime for urban buildings is different from that established for rural buildings. In the former case, the DUAT is transferred automatically to the buyer, with the transfer of the property (since private property can be transferred through a sale and purchase agreement). In other words, in practical terms the sale of infrastructure means that the land is transferred as part of the deal negotiated between the buyer and seller.

In the case of rural buildings, the effective transfer is conditioned to obtaining prior authorisation from the competent state authority. Someone who wishes to purchase the infrastructures - i.e., the private buildings constructed on the land - cannot automatically assume that the DUAT for the land will be acquired (which is the source of economic activity, the real object of the transaction).

The transfer of the building must be accompanied not only by proof of payment of taxes, but also by an exploitation/business plan[13]. The assumption is that the buyer (of the infrastructures, etc.) must continue with the same activity, although it is possible, considering the changes in the global market, for example, that continuing with the current activity ceases to be viable.

[13] Article 16 of the Land Law and articles 15 and 16 of the Land Law Regulation

Nonetheless, the transfer of rural buildings is shown to be an insecure mechanism vis-à-vis the stakeholders, since it is not always certain that their intended business will be approved (or authorised) in the precise terms they propose; and it is not always known whether the activity can be changed.

There are reported cases where the state entity intervenes, during the authorisation process, changing the object of the contract and reducing the extent of the DUAT. With no clear criteria to bind the state entity in the authorisation issuance process, the law is open to discretionary decisions, calling into question the principles of legal security and certainty.

In economic terms, this situation impacts negatively on the process of creating wealth and on the accumulation of capital through investment; it interferes in the investment adaptation process, used to seek better use of the land; and it makes any attempt to approach banks to obtain sources of investment for the purchase of infrastructures and expansion or alteration of current production difficult.

Proposal

The proposal to improve this situation has two main aspects:

- maximum reduction of the state entity's discretionary powers
- harmonize the DUAT transfer regimes, applying the regime of urban buildings to rural buildings.

Regarding discretionary powers, different opinions offered under the scope of the "Simplified Process" to obtain a DUAT should be understood as "formal approval", given by an administrative entity representing the State as the "owner" of the land, based on a technical evaluation conducted in terms of the law. Opinions should not, therefore, translate in an *ex nuovo* project evaluation, but rather be an administrative act, albeit underpinned by recommendations and guidance of the heads of the public land administration services. Thus, it is proposed that this issue be addressed by introducing adjustments to the different regulations.

In the case of harmonising the regimes, legislative alterations would need to be introduced in order for DUATs to be transferred automatically to the buyer upon purchase of rural buildings. The buyer would then be responsible for informing the competent authority of the transfer. In this way, the state entity could carry out the necessary inspection, *a posteriori*, to verify the level of compliance with the exploitation/business plan.

Automatic transfers of DUATs need to comply with two fundamental issues, to avoid misrepresenting the land legislation regime and align the use of the land in development projects: i) there should be no change in activity; ii) alignment of the activities with the territorial plan that exist for the area in question.

The Land Law Regulations could be reviewed to introduce new conditions so that the transfer of rural buildings would imply the automatic transfer of the DUAT, namely:

- if there is no significant change in land use, within the context of the zoning of the land in question (i.e., the project should comply with the local territorial and physical planning rules, following the LOT);
- if there is no conflict with the communities and other stakeholders; and
- if all taxes are paid and all other obligations are met.

Thus, we propose that the principle of maintaining the State's control, while owner of the land, should not be altered, although specific conditions should be introduced to automatically transfer the DUAT when there is a transfer of infrastructures. It must be highlighted that in both contexts - urban and rural - it is not the land that is being transacted, but rather "a plot of land as investment", in other words an **undertaking** comprising two essential parts: the infrastructures and standing crops, and the land required to support the activity. It is the **undertaking** that is being purchased, not the land in itself (the sale of which is not formally valid under Mozambican law, and where the transaction may be declared null at any time). In this sense, the effect of the investment is exactly the same, in economic terms, for both "rural buildings" and "urban buildings".

DEFINITION OF "IMPROVEMENTS"

Discussion

The need to review the concept of *improvements* was underscored during the Public Meeting to present this work. According to the law, improvements are considered private property and, therefore, may be transactioned and mortgaged. As was discussed above, in the case urban buildings, the DUAT for the land on which the sold improvement is located is transferred to the buyer, without the need for approval by the responsible state entity.

In this context, existing improvements could be used as a mechanism to "sell" the land, particularly in cases where the improvements are, in fact, minimal or precarious. This then gives rise to the whole discussion on the "land market", at least in urban areas.

However, this process can also occur in rural areas, although in this case the buyer of the "improvements" must apply to the State for a new DUAT for the land associated with the improvements; also, there is no legal guarantee that the application will be authorised. Therefore, there is a great level of uncertainty regarding the rural investment process, in terms of the accumulation of value for an undertaking based on

a specific plot of land, and uncertainty in relation to the recovery of this amount upon the purchase and sale of the improvements.

In fact, the concept of improvements offers a relatively simple way to answer the logic of a free market, without clashing with the principle of the land belonging to the State. It is important to be clear on what "improvement" means, so as to trigger the "automatic" transfer of the DUAT associated with it.

According to the RLT, improvements are considered to be ***all expenses*** *incurred to conserve or improve the land* [14]. However, the definition of "rural building" and of "urban building" does not mention improvements, but rather "constructions". In the RLT, a construction is a *building, wall, canal* ***or other works***[15] (our emphasis).

There are three types of improvements: necessary (to preserve the land); useful (to increase the value of the land); and amenities (for the enjoyment of the improver).

It must be possible, within this group of legal details and concepts, and together with a proposal to harmonise the DUAT transfer procedures in "urban" and "rural" areas, to find a clear and legally valid way to create an **investment** market (i.e., of value), without prejudicing the basic principle of the land belonging to the State.

In an agricultural context, the idea that "all expenditure" on land is considered to be "improvement", allows for the inclusion of all work and resources invested in a plot of land over the years. Any work of clearing the land, levelling, sowing, fertilizing, etc., is "expenditure" and is, therefore, an improvement. If it is possible to admit that such improvement may be a) transactioned, and b) the basis of an "urban building" classification, it would be possible to think of a purchase and sale process for both rural and urban investments, without the need for major administrative requirements in relation to DUATs.

In that which concerns compared experience, we can mention Ethiopia, for example, where land belongs to the State, and cannot be alienated. Although the sale of land is not legally permitted, it is implicit in more recent laws that the State is attempting to create a situation that favours a more dynamic and secure investment process. A key aspect is the basis for the calculation of compensations, when land is

[14] RLT, Article 1(1)
[15] Ibid. number 2

expropriated in the name of public interest. In the specific case of improvements, the compensation paid for "permanent improvements on the land, is equal to the value of the capital and labour invested"[16].

This treatment reflects the constitutional principle that "*Every Ethiopian shall have the full right to the immovable property he builds and to the* ***permanent improvements he brings about on the land by his labour or capital.*** *This right shall include the right to alienate, to bequeath, and, where the right of use expires, to remove his property, transfer his title, or claim compensation for it*"[17].

Proposal

There should be a stricter and clearer definition of the concept of improvements, which should be included in the RLT. At the same time, the use of the concept as a basis for a business transaction, where there is a plot of land associated with improvements, should be better specified in a review of the RLT. The focus would be on a reorganisation and revision of articles 15 and 16.

In this case, it is recommended that a more detailed legal discussion also be held on the distinction between "urban building" and "rural building", since these concepts date back to the colonial period and may not be as relevant in the XXI Century Mozambique; or, possibly, there may currently be a distinction that should take on other forms. What is important in this context is the location of the investment (in this case referring to "urban" and "rural"), and if the process for the purchase and sale of improvements on the land in question is compliant with the applicable zoning or territorial planning.

In the case of local communities, these changes would be very important, since it would allow them to negotiate with any investors interested in their land, based on the improvements made over the years. In this way, communities would have the opportunity to use negotiation to recover the real value of their investments in the land, demonstrated in the idea that they are negotiating an agricultural undertaking and not the land itself. This way, the process could genuinely fulfil the principle set out in the PNT, which stipulates that private investment must "guarantee benefits for the resident rural population".

[16] Federal Democratic Republic of Ethiopia. Proclamation No. 455/2005. Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation
[17] Federal Democratic Republic of Ethiopia, Constitution, Article 40, number 7.

CEDING USE”

Discussion

The debate on "ceding use" was reawakened in the context of the discussion of a draft decree aimed at regulating it. This is a matter which raises a number of arguments, particularly relating to the object of the contract, the subjects of the contract and the intended objectives of that legal concept.

Regarding the object, the first issue is to determine whether "ceding use" must apply to the activity carried out or to the land itself, in other words, on the DUAT *per se*. A recent legal opinion clarified that "reference to the contracts for "ceding use" immediately following the reference to the purchase and sale of infrastructures, buildings, improvements [...] must be interpreted and understood as meaning that the contracts for "ceding use", foreseen in article 15 of the Land Law Regulation, concern the infrastructures, buildings and improvements on the land and not the land *per se*"[18].

This is an interpretation more consistent not only with the concept of "ceding use", as intended in Mozambican civil legislation, but also with the constitutional rules that prohibit land from being sold, alienated, mortgaged or pledged, as well as with the philosophy underlying the land legislation: land, being the property of the State, must be occupied by whomever works it. Furthermore, note that pursuant to the Land Law Regulation, it is the contracts for "ceding use", entered into for the total or partial exploitation of rural or urban buildings that are subject to registration, without, obviously, having any reference to the land itself. However, it appears to be clear that the "decree" under discussion proposes that "ceding use" be applied to the DUAT, in other words, to the land.

The second issue concerns the issue of "ceding use", particularly for the assignor. Who can temporarily assign the exploitation? The communities? Natural and legal persons? According to the draft regulation under discussion, it appears that all DUAT holders can temporarily "cede" their rights, which raises some doubt as to the alignment of this draft with the rationale used to regulate "ceding use" in the terms presented to us up to now. The objective of "ceding use" is said to be to avoid having "idle land" in Mozambique, promoting partnerships between the communities and private investors. With this argument the entire discussion concerning rural development, namely the problem of access to credit and to markets, incentives for agriculture, valorisation of the rural workforce, availability of working resources, existence of communication channels and of effective information, etc., is totally ignored, and "ceding use" becomes

[18] Serra, ob. cit., p.632

the panacea for all problems. Furthermore, if the objective is to protect the communities, why not consider the adoption of a specific regime for the communities?

Moreover, it must be borne in mind that if the assignee introduces buildings or makes any type of improvement on land with a DUAT that does not belong to him or her, these cannot be registered in his or her name. This means that not even the hypothetical purpose of facilitating access to credit - by providing the buildings as collateral - would be achieved through the regime proposed in the "decree".

This leads us to the third and last issue: what legal and institutional mechanisms currently exist that allow partnerships between communities and private investors, with mutual advantages? How have these been used and what results have been achieved?

We believe that the answer to all of these questions may help us to better understand what is effectively intended by "ceding use" and to what extent the draft regulation addresses the problems of the communities.

Considering the proposal in question, it appears to us that "ceding use" is used to avoid a political discussion that, in our opinion, is unavoidable: do the constitutional principles and the philosophy of land legislation, as a whole, allow for land rentals? "Ceding use" is, thus, a veiled way of saying "rental".

Proposal

Our proposal is that the "decree" be revisited, so as to adapt it to the Constitution of the Republic and the guiding principles of the land legislation, namely, promotion of social justice, development and private investment. At the same time, in the context of the Consultative Forum on Land, open and constructive political discussions should be held on the issue of land rentals. It would only be appropriate to revisit the draft Decree once a consensual approach has been reached on this matter, to include other provisions on the policy decisions made, where necessary.

NEGOTIATED ACCESS TO OCCUPIED LAND

Discussion

"Negotiated access to occupied land" is another way of saying "community consultations". The purpose of the consultation is to achieve social justice in the field, since the PNT and the Land Law promote "national

and foreign private investment without harming the local population and guaranteeing benefits for them"[19]. Two concrete objectives appear in Article 13 of the Land Law and Article 27 of the Land Law Regulation, which reflect those principles in the PNT:

- Confirmation that the area [requested by the investor] is free and unoccupied (LT, Art 13)
- If there are any additional rights over this land, statement (in the opinion of the District Administrator) of the terms governing the partnership between the holders of DUATs acquired by occupation and the applicant (RLT, Article 27).

The idea of preparing an agreement between the investor and the holders of DUATs acquired by occupation is also contained in specific legislation for large-scale projects, more precisely, projects occupying more than 10 000 hectares of land:

> *'Pursuant to the Land Law and the respective Regulation, …. the Minutes of the Community Consultation ... [and] the Terms of partnership between the holders of DUATS acquired by occupation of the intended land and the investor, must be presented*[20]

Therefore, if correctly applied, the consultation mechanisms should result in the preparation of a contract between the communities and the investors, "promoting social justice" and guaranteeing an "equitable and sustainable" development process (quoting the PNT).

The analysis of the legal framework on this issue does not reveal anything that could lead us to the conclusion that the concept is inadequate. Quite to the contrary, we understand the mechanism to be a strategic regulator of the relationships between the private investor (who wants the land to invest) and the holders of DUATs by occupation. Therefore, the conclusion is that this innovative and progressive instrument should be maintained, assuming that there is good will among all stakeholders to act in accordance with the spirit of the PNT and the PRAI and FAO's VGGT.

However, it became evident from the interviews held within the scope of this work that there are many problems with the implementation of the "community consultation" mechanism. These problems are contributing to the emergence of a generalised opinion that it would be appropriate to review or even to exclude community consultations, which are seen as a limiting factor in the transfer of DUATs and, therefore, to the access to land by investors.

---

[19] 1995 National Land Policy, Part IV, paragraph 17.
[20] Resolution 70/2008 of 30th December, Part C, sub-paragraphs C and G

Firstly, from a legal perspective, article 30 of the Land Law, which aims to "establish the mechanisms of representation and of own actions of local communities, in that which concerns DUATs" has not yet been regulated. Over the years there have been several interventions addressing this topic, although in other contexts such as, for example, in the legislation that created the "Community Authorities" in the context of local State bodies[21]. More recently there was an attempt to detail the procedures of the consultations and to clarify issues such as who should pay for the process, in the context of the Consultative Forum on Land (FCT)[22].

These different diplomas were not able to overcome the difficulties and, in some cases, introduced even more difficulties of interpretation and implementation. For example, based on Decree 15/2000, public land management services began to conduct consultations solely with local community authorities[23]. One of the results of this approach is an increase in conflicts since, legally, the Community Authorities are not necessarily the representatives of the "local communities" in the context of the Land Law, and cannot represent the DUAT titleholders without being elected (or validly appointed) for this purpose.

There is also an attempt in the Technical Annex on the Delimitation of DUATs Acquired by Occupation to specify who should represent the local community holding a collective DUAT over a specific area. Thus, when signing the forms and the Minutes of the Consultation associated with the delimitation (which is a key instrument in the implementation of the Land Law, on the side of the community), "it is signed... by a minimum of three and a maximum of nine men and women from the community, *elected in public meetings*"[24].

There is also a clear indication, in the Land Law itself, on the issue of representation, considering that the community's DUAT "obeys the principles of co-ownership"[25]; and in the Land Law Regulation, where this aspect is clarified even further, as follows: "... the rules of community of property, established in articles 1403 and following of the Civil Code... are applied to the co-ownership of the DUAT"[26]. In this context, any decision on the goods and assets of the community requires the participation of all the co-owners, i.e., all of the adult men and women in the community (this is the figure defined in Article 1(1) of the Land Law, and not an abstract and uncertain concept, as is frequently commented).

---

[21] Decree 15/2000 of 20th June (Approves the forms of relationship between local State bodies and community authorities)

[22] Decree 43/2010 and Ministerial Diploma 158/2011

[23] National Director of Geography and Cadastre, Manica, National Land Meeting, author's notes

[24] Ministerial Diploma 29-A/2000, of 17th March. Technical Annex to the Land Law Regulation

[25] Land Law, Article 10, subparagraph 3.

[26] Land Law Regulation, Article 12, Co-ownership.

The two more recent decrees improved some aspects, particularly concerning the need for at least two meetings to be held, 30 days apart, in order to allow for a genuine *internal* consultation to take place between the community leadership and the community members. Moreover, there is a clear specification that the investor must pay all costs. However, the most recent Ministerial Diploma introduces the figure of a Locality and a Village Consultative Council in the process, giving members of the CC the power to sign the Minutes of the Consultation. It must be noted that, in this context, the members of the CC *are not members of the local community* involved in the consultation and, therefore, should not play a decisive role in the process. In this sense, the Ministerial Diploma introduces more problems in terms of clarifying and implementing the representation regime, backed by political motives to maintain the State's control over these processes, which should be democratic and decentralised.

Whenever land legislation is discussed in Mozambique, the key issue of determining "what a rural community is" crops up. Indeed, the law provides a very clear definition:

> *Group of families and natural persons, living in a territorial area at the level of locality or smaller, which aim to safeguard common interests through the protection of their housing areas, agricultural areas, whether cultivated or fallow, forests, sacred areas of cultural importance, pastures, water sources and areas for expansion*[27]

The problem here is that few people understand the basis of the definition and know how to identify this entity in a concrete context, in the field. Firstly, it is essential to understand that, in the Land Law, "local community" is something very specific, and not just a sociological expression. Thus, the basis of the concept explained in the Law is a vision of *the use of the land, understood based on the social, political and agro-ecological system used by the "group" to exploit the territory where it lives.* For this reason several resources are included in the definition, and not merely a reference to the current fields and farms belonging to the village and the resident families. Several studies conducted at the time of the policy discussion prior to the formulation of Law 19/97 clearly showed that the majority of the populations used - and still use - a series of natural resources to maintain their livelihood strategies. Therefore, "use of the land" has a meaning far beyond the measurement of the agricultural plots and other more visible uses.

Another aspect to highlight is that the concept of "local community", thus understood, is applicable to any cultural and agro-ecological context. It includes the local land and natural resources management structures as an integral part of the "group". In this way, the local community can respond to the

---

[27] Law 19/97, Article 1(1)

provisions of Article 24 of Law 19/97, which grants the community the rights and duties to manage the land and the natural resources within its territory.

Secondly, there is the issue of the delimitation of rights acquired by occupation, which responds to Article 9(3) of the RLT: "the areas covered by the DUAT acquired by occupation, according to customary practices, may be identified and recorded in the National Land Cadastre, *in accordance with the requirements to be defined in a Technical Annex*".

However, the delimitation prescribed in the Technical Annex to the RLT [28] responds to two requirements stipulated in the Land Law: a) to prove the community's DUAT acquired by occupation; and b) determine the boundaries of this DUAT. This process is carried out based on a participatory diagnosis involving all community members and members of neighbouring communities, to prove and agree on the boundaries between one community and another. The basis of the process is a systematic analysis of the above referred-to social, political and agro-ecological system. The result of this process, in each place and in each region, should respond to the specific local reality. In other words, a community in the north of Niassa Province will have a specific social and spatial aspect, and will include a much larger expanse of land when compared, for example, to a local community in a densely populated region closer to a city like Maputo.

There are projects like the Community Land Initiative, as well as a large number of delimitations already carried out, which underscore the importance of carrying out this process, not only for areas covered by DUATs acquired by occupation, but also to encourage an internal organisation of the community for local implementation of the Land Law. Once organised, and with clearly delimited boundaries registered in the Cadastre, it is much easier to organise and conduct a community consultation process, where interest is shown by an investor to use land within the boundaries of the local community.

Proposal

Firstly, we propose that the Decree and the most recent Ministerial Diploma be revisited, in order to clarify the role of the Consultative Council in the context of co-ownership of rights over the land.

Secondly, promote a legislative process that fully responds to Article 30 of the Land Law.

---

[28] Ministerial Diploma 29 – A/2000 of 17th March

Thirdly, to consider the possibility of strengthening Article 7 of the Technical Annex, making it mandatory for the "prior delimitation" process to be carried out in areas of significant economic interest, in order to "guarantee the respect for the peoples' rights" according to the PNT, and to facilitate the organisation of local communities, including the respective representation mechanisms[29].

Fourthly, to anticipate the investment and, using the lessons learned within the context of projects such as iTC, promote a systematic delimitation programme country-wide, including the formulation of Community Land Use Plans containing a prior indication of the areas that *the community members* consider "free for investment" or for other economic and social activities.

The meaning of the expression "free for investment" in this context is highlighted as something different from the expression "free from occupation", which appears in the Land Law. The consultation has, naturally, the initial function of ascertaining whether the area intended for occupation by the investor is "free from occupation". However, it is evident, when applying the concept of local community described above, that there are very few areas legitimately "free from occupation". Therefore, the objective of the consultation is, in fact, to obtain *negotiated access to the land intended for occupation by the investor.*

Properly implemented, this strategy is capable of producing partnership agreements and arrangements that can guarantee concrete benefits for community members, the co-titleholders of DUATs acquired by occupation.

In fifth place, in order to guarantee that this process is properly implemented, it would be necessary to prepare a Technical Annex or an official Guideline to guide all participants in the community consultation process.

Following the model adopted by the Inter-Ministerial Commission for the Revision of Land Legislation in 2000, this Annex should be accompanied by a user-friendly Manual for all stakeholders, i.e., technicians, communities, NGOs, operators, investors, lawyers, surveyors/topographers, district and municipal Administrations. The content should focus on the principles of the process, to avoid the imposition of a strict approach that could annul the flexible nature of the concept of local community. In other words, there are aspects of a consultation that may vary, depending on the cultural and agro-ecological context, as well as on demographics and specific contexts.

[29] Article 7 states that "[a delimitation of existing DUATs] is done as priority in the following cases: (a) where there is conflict on the use of the land and/or of the natural resources; (b) in the areas of local communities where the State and/or other investors intend to introduce new economic activities and/or development plans and projects".

URBAN LAND REGULATION

Discussion

The Urban Land Regulation (RSU), which was approved through Decree 60/2006, of 29th December, aims to regulate the Land Law in terms of the land use and benefit rights in cities and towns or in human settlements or organised population clusters by means of an urbanisation plan (article 2, RSU). This legal diploma created a kind of specific (parallel) regime for urban areas, breaking away from the Land Law and going beyond constitutional limits.

Although reaffirming the ownership of DUATs by local communities and bona fide occupants, the Urban Land Regulation is silent on the need for community consultation in the context of planning and occupation of urban land. A possible historical explanation is put forward by Carlos Serra[30], for who, the approval of the RSU before the approval of the Physical Planning Law (2007), impaired the articulation between the two legislative procedures.

Another of the equally critical aspects of the Urban Land Regulation (2006) is the provision of new modalities for the acquisition of DUATs, which go beyond the 2004 Constitution and the Land Law[31], namely: acceptance of the award, drawing lots/allotment[32], public auction, private negotiation and good faith occupation. Drawing lots[33], public auctions[34] and private negotiations are not included in the context of the Land Law, indicating a position in favour of broad and free transferability of the DUAT, including purchase and sale, as is mentioned by André Calengo[35].

---

[30] Serra, ob. cit., p.632

[31] In terms of article 26 of the *Urban Land Regulation* (2006), the allotment of parcels or plots of land located in basic urbanisation areas must be directed exclusively to national citizens, conditional to the 20% for low-income citizens.

[32] *"sorteio"*

[33] According to article 27 of the *Urban Land Regulation* (2006), public auctions addresses the award of DUATs to plots or parcels of land located in full or intermediate urbanisation areas intended for the construction of housing, commercial and service buildings.

[34] In light of article 28 of the *Urban Land Regulation* (2006), private negotiations are held between local State and Municipal bodies and project developers, for the award of DUATs for plots or parcels of land intended for housing, industry, farming and large-scale commercial projects.

[35] CALENGO, André Jaime (2007), *O Debate Actual sobre a Terra em Moçambique – Notas Introdutórias*, Presentation at the Conference to commemorate the 10th Anniversary of Land Law, held in Maputo from 17 to 19 October 2007, p.25

Also noted is that the rule to prove the DUAT for urban land, established by the regulatory legislator and which is based on the presentation of the respective title[36], does not expressly refer to other means of proof foreseen in the Land Law (testimonial proof, valuation, etc.), nor that the absence of a written title does not negatively affect the communities or bona fide occupants[37].

Proposal

In this case, we propose the revision of the Urban Land Regulation in order to align it with the Constitution, the Land Law and the Physical Planning Law, particularly in that which concerns urban planning, expropriation and resettlement of populations.

With reference to the issue of parcelling of land and subsequent allocation of land to those interested in it for construction purposes, the proposal is that the review of the RSU should be conducted in line with the discussion on the concept of improvements, leaving the possibility, for example, of handling the implantation of basic infrastructures as a "thing" which may be subsequently transacted by the investor (which can also be the state entity responsible for the parcelling of land). In this way, the "improvement" may be the object of a transaction in the "land market", with the DUAT being automatically transferred to the buyer of the asset (whether water or electricity, existing access routes, etc.).

RESETTLEMENT

Discussion

Resettlement is the displacement or transfer of the affected population from one point within the national territory to another, accompanied by the restoration or creation of conditions equal or superior to those they left behind. In short, it is a relocation process of the so-called "affected population", i.e., of the people who live in the area covered by a specific private or public activity susceptible of causing their displacement, observing the principle of social cohesion.

Decree 31/2012, of 8 August (Regulation on the process for Resettlement because of Economic Activities) establishes the basic principles of the process for resettlement because of private or public economic

[36] Cf. Article 40 and 41, no. 1, of the *Urban Land Regulation* (2006).
[37] Cf. Articles 13 and 15 of the *Land Law.*

activities, carried out by national or foreign natural or legal persons, aimed at improving the quality of life of all citizens and protecting the environment.

The District Government is responsible for approving resettlement plans, which must be preceded by a favourable opinion by the sector responsible for physical planning (now, the Ministry of Land, Environment and Rural Development), after hearing the agriculture, local administration, and public works and housing sectors [38]

Meanwhile, it is the activity proponent's responsibility to prepare and implement the resettlement plan, and to pay for all expenses incurred with the process.

It is important to remember that the approval of the resettlement plan is preceded by the issuance of the environmental licence and, pursuant to article 15 of the Resettlement Regulation, this must be an integral part of the Environmental Evaluation Process.

In terms of this regulation, public participation is indispensable in all resettlement processes, in order to guarantee that the rights of the communities are not affected and that, notwithstanding the resettlement, they improve their living conditions.

The acknowledgement of past disparities in resettlement processes, potentially causing conflicts, led to the approval of a technical directive, through Ministerial Diploma 156/2014, of 29 September, relative to the process for the preparation and implementation of resettlement plans. Thus, the Directive attempts to harmonise the underlying principles and procedures of those processes, putting into operation the rules and procedures defined in the Regulation on the Resettlement because of Economic Activities, aligning it with the Regulation on the Environmental Impact Evaluation Process (approved by Decree 45/2004) and with the Directive on the Process of Expropriation for Physical Planning Purposes (approved by Ministerial Diploma 181/2010).

Thus, the Directive reaffirms:

- the composition and the duties of the Technical Follow-up and Supervision Commission (as we saw, the Regulation of the Technical Commission was approved);
- the Rights of the affected population (compensation payment, information, participation);
- process for the preparation of resettlement plans, referring to Decree 31/2012;
- content of the resettlement plans;

[38] Articles 9 and 11, subparagraph b) of the Regulation on the Process of Resettlement because of Economic Activities.

- consultation process and recording of the respective meetings;
- process for the implementation of the resettlement plan; and
- monitoring and inspection of the implementation.

In essence, the Directive condenses the regimes established in the different diplomas on Resettlement. An important note is that the Directive provides guidance for intervention, in the case of involuntary resettlements[39]. As a rule, involuntary resettlement occurs when there is expropriation in public interest or utility. For these cases, the law foresees that compensations and claims are paid to those who have rights, both over the land and over any other assets existing within the expropriated area, prior to expropriation.

However, there are several examples in Mozambique of private projects endorsed by the State, in which investors' interventions are not based on any formal expropriation of DUATs, but which imply the transfer of the DUAT(s) acquired by occupation in the area intended for investment. Very often these are projects with State support, and are justified as falling within the context of "national development" and, in reality, the resident populations do not have the option to refuse - in other words, involuntary change, implying the resettlement of populations, taking them away from their homes and from their agricultural areas and areas of worship, etc.

Strictly speaking, in these situations, if there is no intervention by a public administrative entity, the resettlement should take place following a negotiation process between the people/communities and the investors. In other words, it is a process very similar to, or even the same as the community consultation. The negotiation processes are thus used to determine what each party is entitled to. The people and the communities must freely accept and participate in the conditions of the business.

Proposal

We feel that the law should establish minimum standards and criteria that should be observed in resettlement processes (involuntary and "voluntary"), aligned with the rules established for cases of expropriation. The law already provides an important starting point, stating that in the case of resettlement, the same or better living conditions must be put in place for the affected population.

[39] Ibidem

Acknowledging that the acquisition of land, or of rights over the land, related to the pursuit of economic activities may have negative impacts on the communities and on the people using the land, the IFC (International Finance Corporation) [40] adopted guiding principles and published guidelines for projects involving resettlement (physical displacement or simply loss of sources or means of livelihood)[41].

The first stage in the resettlement plan guidelines is always the mapping of occupied land, use of land, existing rights, etc., in the project area. This sets the basis on which to begin negotiations regarding compensation payments, in other words, a baseline of the existing population entitled to support is established (avoiding the subsequent inclusion of other people), in addition to the basis for a plan, suited to the area where the affected populations will be resettled.

Once again, this process is very similar to the delimitation process, which, in the Technical Annex to the RLT, "is priority...in the areas belonging to local communities where the State and/or other investors intend to launch new economic activities and/or development projects and plans"[42].

The principles in question are applied exclusively to cases of involuntary resettlement, i.e., when affected people or communities do not have, from a legal perspective, the right to prevent the acquisition of land or to apply restrictions to its use. However, the formulation of the Annex in fact includes both situations: public "development" projects (which imply some form of resettlement process) and private investment. In other words, the starting point is the same.

However, these principles may constitute a basis for the definition of standard criteria, guiding the principles of resettlement in general (in terms of "resettlements" in this context) as a result of private projects that require community consultation as part of the administrative process to acquire a new DUAT.

The IFC acknowledges that, due to the risk involved - most often resulting in the impoverishment of the affected population - when it is totally impossible to avoid resettlement, it should be minimal and carefully done, in order to mitigate the impacts not only on the displaced population, but also on the host communities.

The general principles to take into account are:

---

[40] The IFC is a World Bank institution that provides financing for private sector activities, in the context of national development in the Bank's member countries.

[41] Handbook for Preparing a Resettlement Action Plan. http://www.ifc.org/wps/wcm/connect/22ad720048855b25880cda6a6515bb18/ResettlementHandbook.PDF?MOD=AJPERES

[42] Ministerial Diploma 29 – A/2000, Article 7, no. 1 (b)

- To avoid, and when not possible, minimize displacements, exploring alternative forms of the project;
- Avoid forced evictions;
- Foresee and avoid or, when not possible, minimize negative environmental and social impacts resulting from the acquisition of land or because of restrictions to its use (i) by means of compensation for the loss of assets; and (ii) ensuring that resettlement activities are carried out after providing the necessary information, and of informed consultation and participation by the affected parties;
- Improve or recover the means of subsistence and the living standards of the displaced persons; and
- Improve the living conditions of physically displaced persons by providing appropriate housing, as well as guarantee of ownership in the resettlement areas.

According to the principles of the IFC, it is important to respect the "cost of replacement", which is understood to be the market value of the assets (not accounting for depreciation of the infrastructures and assets), plus the transaction costs. It is also important to consider the issue of improvements, discussed above, since a broader vision of "improvements", including "all expenses incurred in the land", should be used to significantly increase the value of the compensation calculated.

Regarding the restoration of means of subsistence, the IFC recommends that, in addition to compensation for losses, people affected by resettlement should be given opportunities to improve or, at least, recover their former means, living standards, etc.

PHYSICAL PLANNING

Discussion

We will not analyse the Physical Planning Law in detail in this report, we will simply highlight its role and its links to the land legislation. The physical planning of a certain territory may result in the effective zoning of the landscape where local communities live, and where businessmen wish to implement investment projects. In this case it is not "micro" zoning - this area is good for rice, that one for maize, the other for cattle - but rather a more general definition of the area, like "agro-forestry use", "urban use" or "industrial use".

The District Land Use Plan (PDUT) is the inferior planning instrument in the context of LOT. However, one of the results of the delimitation process in local communities is the design of a Land Use Plan at community level. It is possible, in this context, to understand the process for the formulation of the PDUT

as the aggregation of various local plans (community), subsequently subject to an adaptation to other parameters or to planning and land management instruments that reflect the higher level policies and plans.

The effective implementation of the LOT in a certain area will, in principle, facilitate the DUAT transfer process, both for new ones and those being transferred to third parties. The proposal to simplify the DUAT transfer process - harmonization between urban and rural building transfers - may also include an exemption of the need to prepare a new project, as long as the new activity is included in the zoning concept established through the LOT. In other words, where infrastructures are transferred, it would not be necessary to go through the whole process of obtaining a new DUAT, as long as there was no *change in use*.

Proposal

Alongside the land legislation adjustments proposed here, better implementation of the LOT must be guaranteed in order to create a guiding framework in the field, categorising the type of activity permitted in each area. At the same time, when preparing any legislation aimed at altering the process for transfers of DUATs when purchasing and selling improvements, the LOT and the zoning should be referred to, thus specifying what type of measures or stages may be dispensed with when dealing with DUATs associated with the purchase and sale of infrastructures and, consequently, facilitate the investment process.

TOURISM

Discussion

The figure of the Tourism Interest Zones (ZIT) was created through the Tourism Law. There are presently indications that the concept is being interpreted wrongly, becoming a limiting factor for DUATs in the ZITs. According to this interpretation, any DUAT within a "Tourist Zone" (even prior to the classification) can only be used for tourism purposes, excluding other uses of the land and of the property built on it.

In addition to natural persons who have houses in those areas, there are thousands of local communities with DUATs acquired by customary occupation, who also exercise these rights for private purposes within the context of the family economy. There are enterprises and other non-tourist infrastructures that cannot be reclassified for "tourism" purposes.

However, the letter of the law does not condition the award or recognition of existing DUATs to the development of tourism activities; the ZIT was created solely to preserve the characteristics of the zone that justifies its classification as appropriate for tourism (its natural beauty, proximity to the sea, etc.). In this

context, the only restriction in the DUAT - i.e., to the activity carried out in an area with an existing DUAT - is that it must not adversely affect the special and/or touristic nature of the zone classified as a ZIT.

Proposal

In the context of a specific Regulation or Diploma, the nature and function of the classification of a "ZIT", as a planning instrument and not a conditioning factor in terms of rights over the land, must be clarified.

COMPENSATION

Discussion

Compensation is referred to in several laws addressing the issue of land and natural resources management. In principle, it is only applicable to cases of expropriation because of public interest or utility - in other words, it does not include private projects which presuppose access to land, occupied by a community and with a DUAT recognised by law.

In reality, there are many private projects endorsed by the State, as is the case of mega-projects such as the coal projects in Tete province or the LNG project in Cabo Delgado. As a rule, this type of project implies a kind of expropriation, since the local populations are not really able to "not accept" the fact that, in principle, they have to abandon their land.

Thus, there are, in fact, common characteristics in the processes requiring compensation in "public" cases, and in situations resulting from community consultations (when a "private" entity is involved).

The practice has been to calculate the value of the compensation based on existing crops and housing on the desired land, both by the State and by investors. The result is that the compensation has been translated in small sums, particularly when compared with the foreseen investment value, i.e., with the investor's effective compensation capacity. In this context, investments are shown to have minimum benefits for the population, if any at all. It is common to hear that the projects will create jobs, and thus contribute to fight poverty. Sometimes agreements include the need to leave plots/parcels of land for the population to keep their food production (as was the case, for example, with the Portucel project in Manica Province). However, these approaches do not fully meet the principles in the PNT, nor in the VGGT/PRAI. Investments should not only help to lift the population out of poverty, but also guarantee that the compensations help to improve their quality of life.

More recently, laws were approved that extend to the concept of compensation associated with land issues, now including both tangible and intangible aspects. The LOT introduces the idea of compensating not only for material losses, but also for the impact of social change (loss of social context, proximity to jobs and transport, time residing in a single place, etc.). Other sector laws - the new Mining law, for example - also include references to compensation. The consequence today is that there is no single standard approach, based on guiding principles for economic and socially just compensations, and which reflects the basic principle that compensations should offer an opportunity *to improve the quality of life and escape poverty.*

Proposal

That an instrument with legal force be approved, establishing the fundamental principles of any compensation process associated with access to land, with specific situations being regulated where necessary. The essential aspect would be that all processes reflect a clear approach based on the acknowledgement of acquired rights and on the principle of using investment (or the resettlement resulting therefrom) as an opportunity to *improve the life of people,* and not simply to give them something equivalent to the assets and other intangible aspects lost.

There also has to be a harmonisation of processes between the discussions on public projects requiring the expropriation of land where there was a legally recognised DUAT, and those which occur within the context of private investment - community consultations. In fact, the core objective of both is the same - mapping the acquired rights, as a basis for discussions and, additionally, a baseline study on the socioeconomic situation of the population.

TAX SYSTEM

Discussion

There is evident confusion over the difference between '*taxas'* and '*impostos'*. This is particularly the case when translating '*taxas'* into English, given the immediate similarity with the English word 'taxes', which in fact is *impostos* in Portuguese.

Work undertaken by the World Bank in recent years has concluded that in fact there are no land taxes as such in Mozambique. The '*taxas'* that are paid have two distinct characteristics: firstly they are fees paid for specific services or processes (like making a formal application for a new DUAT); secondly, the annual

payments covered by the Land Law Regulations and updating Decrees[43] are in fact a form of rental paid to the State for the use of the land.

Some form land tax is however an essential element of the overall package of reforms being proposed above. One function of a 'market investments' and reformed approaches to transferring DUATs when investments are transacted, is to ensure the rational and best use of land resources. Nevertheless, in a country where land has no (legal) value, and can be obtained by the more powerful through exercising links to the political power structure – whether at national or provincial level – the temptation to request vast areas of land still exists. An effective land tax system, allied to the rental paid to the State for using the land, can exert a strong control on this tendency, and also promote the rescaling (*redimensiamento*) of large land concessions are that not being used.

Proposal

A full and comprehensive discussion of land taxation is urgently required. This is a *political discussion,* and cannot be substituted by making small changes to the values of existing *taxas* in the present legislative framework. This discussion should have two basic objectives:

- promote the rational allocation of land to 'serious investors' (those with the means to use it productively)
- ensure social benefits through a partial allocation of revenues to local institutions (local governments and local community structures)

The impact of any taxation system on communities and the poor must be taken into account. Fortunately this is already foreseen in the Land Law, which exempts local communities and those using land and natural resources for the purposes of household reproduction (subsistence farming, sale of crops as part of household income, etc). This general principle can be extended in any new legislation developed to establish a progressive and effective land tax system.

The *collection of taxes* and *how they are used* then become key questions. At present the land administration is responsible for collecting *taxas* – fees and rent to the State – and could also assume the task of collecting land taxes. Alternatively the latter function could be integrated into the systems of the Ministry or Finance and other tax collection agencies. This would be appropriate and feasible given that

[43] Decree 66/98 of 8 December, Tables 1 and 2; Ministerial Diploma 76/99 of 16 June and Ministerial Diploma 144/2010 of 24 August

most of those paying taxes would be from the formal economy of private investors with DUATs acquired for the purposes of setting up profit-making businesses on the land they acquire.

The distribution of revenues already has a model to work from. The Forest and Wildlife Regulations call for 20 percent of public revenues from commercial exploitation of these resources to be paid to the local communities in whose territories the resources are sourced. Note in this context that the 'local community' in the Forest and Wildlife context is exactly the same as that in the Land Law – in other words, delimiting a community or communities in the Land Law context will establish which are the communities that should benefit from taxes and other revenues generated inside their established borders. Extending this principle to land taxation would generate significant additional revenues for local communities to use for social and development purposes, and also address the concern frequently heard that 'the 20 percent' is not worth the trouble because the amounts involved are very small.

ENVIRONMENTAL LAW

Underpinned by the fact that obtaining an environmental licence is absolutely essential, necessary and indispensable, different State legislation and regimes may damage the coherence intended in all areas of activity. For example, according to the Mining Law, the prospection and exploration licence holder is not particularly required to obtain an environmental licence, notwithstanding the law stating that the licence holder must conduct his/her activities in accordance with best mining and socio-environmental practices; and to ensure the environmental rehabilitation of the area and repair all environmental damages. Meanwhile, sometimes prospecting and exploration activities may involve significant environmental risks that justify the prior issue of an environmental licence. It would, therefore, be important to map all situations in Mozambican legislation that, if requiring access to and use of land (and other natural resources), would need to be in line with the general principle of precaution, one of the structuring principles of environmental law. According to this principle, environmental management should prioritise the establishment of systems to prevent acts that adversely affect the environment, in order to avoid significant negative or irreversible environmental impacts, regardless of the scientific certainty of the occurrence of such impacts.

Related to this issue is the problem of knowing at what point in time the environmental evaluation of projects requiring access to authorised land should be conducted. Should it be done before or after obtaining the DUAT?

According to the Environmental Law, the issuance of an environmental licence is based on an environmental impact evaluation for the proposed activity and precedes the issuance of any other legally required licences for the case.

Without intending to enter into a debate on whether the DUAT is a licence or not, the issue is that the process for awarding an authorised DUAT presupposes an administrative act that invests in a certain person the power of land use and benefit. While an administrative act, this authorisation should be tiedto the fundamental principles foreseen in the Environmental Law, among others. Precisely in the name of the principle of precaution, it would be advisable for projects of a certain size or nature (like, for example, gas exploration projects) to be subject to an environmental evaluation, before the DUAT is awarded. This issue would need to be explicitly clarified in legislation.

LAND REGISTRY

Discussion

The Land Law establishes that the constitution, modification, transfer and extinction of the land use and benefit right is subject to registration. Meanwhile, the absence of registration does not affect the DUAT of natural persons and communities, acquired by occupation according to customary rules and practices, or of DUATs acquired by occupation.

The Cadastral Services must ensure the cadastral registration of the following elements: information on the identification of the land for which there are DUATs acquired by occupation; provisional authorisations; revoked provisional authorisations; titles; public interest easements; and value of the fees. At the request of the interested parties, the Cadastral Services also record the following: purchase and sale and encumbrance of infrastructures, constructions and improvements in urban and rural buildings; easements; and "ceding of use" agreements entered into for the partial or total exploitation of rural or urban buildings; however, the DUAT also needs to be *registered.*

According to Mozambican legislation, registration presumes ownership (or entitlement to the right) and has effects against third parties. The function of legal registration is important for purposes of certifying rights, and is always required by the financial sector, for example, for purposes of taking out bank loans. Therefore, registration is essential to an investment process built on financial sector support (the case for most projects).

In Mozambique, registration of DUATs is done at the Legal Land Registry, an institution subordinate to the Ministry of Justice. Currently there are only Registry Offices in the provincial capitals and in some larger cities. This means that access to this crucial service for investment is fairly difficult for those who do not live in the large cities. In addition to the issue of access, most of the Registry Offices - and in fact the entire registration System - has still not benefited from any considerable investment, in terms of

modernising the respective administrative services. Furthermore, reference is rarely made to the need of following an integrated programme to articulate the cadastral reforms or changes with the process for harmonising and expanding the Legal Land Registry.

Another issue that deserves attention is the fact that, in Mozambique, there is a relative proliferation of institutions with registration functions, linked to specific sectors of activity, like, for example, the mining registry (for mines). It so happens that the concession of mining titles (licences) may collide with the pre-existence of other equally legitimate rights over the land, potentially leading to conflict. It is true that mining titles must be preceded by a mapping of existing rights, but the fact is that this information on existing rights is not always readily available, and the weak articulation between registration institutions gives rise to situations that open up space for an overlap of conflicting rights over the same area.

In that which concerns infrastructures and constructions in particular, the current situation forces citizens to comply with duplicate procedures (in different institutions) - with direct implications on the time spent and on costs - in order to register the DUAT and those same infrastructures and constructions.

Proposal

For these reasons, we propose that one of the following options be considered:

- possibility of setting up a single *cadastral and legal* system, to provide an overview of the rights and obligations over the land and infrastructures on it, or
- formulation of an integrated programme linking the reform and capacity building of the land administration services, with a similar and harmonized process at the Legal Land Registry.

If the second option is chosen, a key aspect must be to facilitate access not only by investors (who tend to live in larger cities), but also by small farmers and members of farmers' associations who wish to register their respective rights over the land. This would imply the adoption of a large-scale investment project, in IT infrastructures and systems, as well as the recruitment and capacity building of technical and administrative staff.

We feel, therefore, that there is a very clear connection between this proposal and the urgent need to implement a land tax system, capable of at least partly managing initial investment resources, and supporting regular subsequent operations.

CONCLUSION

This report finds that in the current context of Mozambique, the existing policy and legal framework is still appropriate for the challenges facing the country. Although much has changed since the mid-1990s when the NLP and the 1997 Land Law were approved, the sociology and structural conditions have not changed a great deal. While the law is imperfectly implemented, it has achieved important goals. One thing that is different today is that the acquired rights of all Mozambicans who occupy and use land through informal or customary land management systems are now legally protected. Investors also have a clear, 50-year renewable State leasehold which is secure and exclusive and offers ample time to invest and gain a good return. All new investments carry out some form of consultation with local people, with a general recognition that land access is not just a question of going to the Government and asking for it.

Yet already high demand for land has been rising as the economy grows. And while local rights enjoy *legal* protection, most remain unrecorded and 'off cadastre', and are still vulnerable and exposed to capture by more powerful groups. The *approach* adopted by the 1995 NLP and the 1997 Land Law – participatory, negotiated access to local land that generates poverty-alleviating benefits for existing land rights holders who cede their rights – still appears as the best way to reconcile the often conflicting needs of different land users. In other words, its *social objectives* are still valid.

That said, the report identifies areas where the legal framework is indeed out of step with the *economic* side of the land management challenge. The most important question revolves around the ability to use land to generate *capital growth* as well profit. The key issue here is how to transfer land through a market place which allows investors to recover the value invested *at least*, and gain a return on their capital investment if possible. In the current regime of land belonging to the State, there are in fact instruments available that can allow a form of capital appreciation and transfer, using the fact that whatever is built or done to the land (producing real improvements) can be held as private property. It is thus possible to talk of a 'market in investments'. The question then is to ensure that the land which supports these investments (and without which the investments cannot function), passes to any purchaser of the investment with the minimum necessary administration, and with little or no discretionary interference on the part of decision-makers.

The report proposes that the treatment of rural land – or more correctly 'rustic holdings' (*prédio rural*) - be made the same as the treatment of urban land (*prédio urbano*) when the improvements and constructions on the land are transferred to a third party (this can be through gift but in this case the principal means is an agreement to purchase the private assets, or the enterprise which has been created through the original investment. In this context it is suggested also that the distinction between 'urban' and 'rustic' holdings be abandoned (it is after all an essentially colonial concept), and that holdings are simply assessed in terms of their *use* and the *zoning or land use classification* of the areas in which they exist.

It is essential in this context that the LOT (Physical Planning law) is properly implemented. This being the case, the essential condition that must be checked when an 'improvement' or enterprise is sold, is that the purchaser does not intend to *change the use of the land.* However, it is further suggested that this condition is made far less restrictive that at present (at the moment the purchaser must continue to carry out the activities for which the land was first allocated). To promote investment and the rational use of land for the best purposes (which is a function not just of agro-ecological context but also changeable economic, terms of trade and climatic factors), purchasers should be free to alter or completely change the activity

provided that it remains within the general *use as defined by the zoning classification for the land in the relevant District Land Use Plan* (the lowest level instrument required by the LOT).

This approach also allows any changes to be made at the level of the Regulations, avoiding the more complex process of legislative reform. The present need for some form State approval of land passing with purchased improvements can stay in place, with an amended regulation providing for situations when this is *not* necessary (as proposed above).

The other way that land is transferred between different classes of land user in a market economy is through rentals and leases. At present it is politically out of the question to discuss rentals, which are seen as a form of alienation of land by some, or as opening the door to re-creating a rentier capitalist class which will end up with all the land and exploiting ordinary Mozambicans whose right to access land is enshrined in the Constitution. The Land Law did allow for the concept of 'ceding of use' (*cessão de exploração*), but did not adequately deal with how this would work in its 1998 Regulations. The NLP however clearly talks of contracts between local communities and investors, and some form of 'ceding a right without losing it' is implicit in this process (alongside other forms of contract, which might include giving up a right for agreed compensation and other benefits, joint-venture partnerships etc).

As discussion of partnerships has progressed in recent years (in the context of the Consultative Forum on Land but also promoted by a specific project within the National Directorate for Promoting Rural Development (DNPDR – now part of the new MITADER super ministry), pressure has grown to produce a detailed regulation for '*Cessão de Exploração'*. This has been done and a draft Decree was completed in early 2015. The report concurs completely with the objective of providing clarity and detail for how this instrument is to be applied. It also finds however that the present Decree is unconstitutional and requires significant attention before it is finally approved. The question of local communities being able to cede their DUATs acquired by occupation requires far more detailed and careful treatment; also the question of ownership of any 'improvements' made upon ceded land by the person assuming use of it, needs to be looked at again (presently the new user cannot claim ownership and thus cannot use the 'improvements' or the promise of improvements to raise investment finance or mortgages.

The report proposes that in fact a more radical approach is adopted, and that finally the question is addressed as it should be: as a discussion of renting and leasing land over which DUATs already exist (including those acquired by customary occupation). This is a *policy discussion and not a legal one.* Once the policy issues are resolved, it is then appropriate to reconvene an appropriate legal team to draft an appropriate new Decree.

A key issue that has emerged in the discussions around this report is in fact the concept of 'improvements' itself. At present, what constitutes an 'improvement' is stretched to dubious limits to facilitate a *de facto* land market, especially in urban areas (thus a rudimentary wall or even a few marker stones are 'sold' as private property and the DUAT then passes automatically to the buyer). The report proposes that the whole question of 'improvements' (*benfeitorias*) also be subjected to a policy discussion and then more clearly legislated for through a new Decree. Included in this discussion is not just the question of whether a wall or stone constitute 'improvements' which are then 'property', but also the question of what 'improvements' are on land where there is no evident infrastructure or physical 'thing' to sell to a third party who wants the land.

This discussion is especially relevant for local communities entering into consultations which imply some form of 'compensation' for what they are giving up when they cede their land to an investor. Being able to

count 'all the expenses' (*todas as despesas*) made on their land over the years, and to treat their land as functioning agricultural enterprise, will allow them to obtain a value for what they are giving up which far exceeds what they currently secure in most consultations. This may cost investors more, but if the objective of the GoM is *social as well as economic* – the NLP says that it is – then ensuring that local people get the resources they need to escape poverty and find a better life after giving up their land to investors should be a positive and welcome outcome. It is likely that most investors will accept this – what is important is that they get *secure tenure* and a *certain and safe investment climate* out of the agreement. With decent terms accruing to communities based on a wider understanding of 'improvements', better, consensual and 'low or no conflict' agreements will be possible.

A range of other questions are also identified which require changes to improve the overall climate for investors. These include community-investors consultations, the Urban Land Regulations, resettlement regulations, compensation paid to those whose DUATs are expropriated or revoked, the correct and full implementation of the LOT, the need for a proper land tax system, clarity over when Environmental Impact Assessments should be done (proposing that this is before a provisional DUAT is issued), and the question of how the Legal Land Registry (*Conservatória do Registo Predial*) fits into the land governance institution and if and how it too needs to be reformed and reinforced.

The report proposes measures for all of these. In the case of consultations, this essential and innovative instrument should be maintained given the sociology of land use and occupation as indicated above. It is evident that consultations need to be improved, and that at their heart are questions of local community representation and a general lack of understanding of how they work and *how they should be carried out.* Recent attempts to improve this situation have introduced positive measures – the need for two meetings at least 30 days apart to allow for *intra-community* discussion of an investment proposal – but have also introduced measures that are both illegal (contrary to what exists in the superior Land Law) and undermine the voice and rights of local people as co-title holders of the collective DUAT held by the local community they live and work in.

The report proposes that the addition of the Consultative Councils of the village or locality be rescinded, as these councils do not represent the community and cannot sign the Minutes of the Consultation (*Acta*) as if they do in some way act on behalf of the local community as a DUAT title-holder. Furthermore there is still a need to respond with new legislation, to the call in Article 30 of the 1997 Land Law to define 'through a law' the representation of a local community [as title holder], and how it should act. In this context much more attention is needed on the nature of the local community as a collective DUAT title holder, managed internally by the principle of co-title enjoyed by all of its members, men and women.

The report also proposes that a clear and accessible official Manual be developed to guide all those involved in the consultation process. This should include technical issues certainly – the definition of a community, how this is determined on the ground, etc – but should also provide a clear account of the underlying social and developmental objectives of the process, as well as how it is conducted (requiring special skills in communication and mediation).

The Urban Land Regulations are judged to be unconstitutional in the report. These require significant revision, both to take out measures that allow the *de facto* sale of sectioned land (*parcelamento*), and to more clearly safeguard the DUATs acquired by occupation (customary and 'good faith') or poor urban and peri-urban households. The provisions for consultations that exist in the rural context, reflecting the over-arching principles of the NLP and the 1997 Land Law, also need to be incorporate and more carefully detailed.

The reasons for full LOT implementation are given above, in the context of providing background conditions for DUATs to be automatically transferred when rural investments or improvements are sold. *Having a fully functional land tax system is also linked to the need to get land resources being used by those most able to do so, and thus also links into the question of DUAT transfers and the possibility of DUAT leases and/or rentals.* At present there is no land tax, and investors ask for unrealistically large areas which are then left largely unused. A progressive tax structure can stimulate a more rational demand for land, and ensure that existing large unused areas are restructured (*redimensionada*). If the 20 percent provisions that exist with regard to forest and wildlife revenues are also applied to land tax and other public revenues from land (the present fees and *de facto* rent – *taxas* – paid to the State), then local communities can also benefit materially. Within the context of planning legislation, the report also identifies the issue of Tourism Interest Zones (ZITs) as potentially confusing and restricting for investors. There are indications that local governments consider that when an area is so classified, then all DUATs – existing and new – must be 'for tourism', excluding for example private housing, local community DUATs acquired by occupation, and many other industrial and infrastructural uses. A proposal is made to clarify this question in an appropriate way (Decree or Diploma).

The three processes of resettlement, compensation, and environmental impact assessments all come together when it comes estimating and taking into account the impact of a project on local people. To a large extent, they also intersect with the process of community consultation in the case of new private sector investments.

These changes will of course have implications for the process of acquiring land for investors, requiring more time and higher costs. But if the assumption underlying all of this is that the process of private investment must have a development dimension as well as an economic one, then either this has to be made clear to *investors*, or the State should support at least some part of the costs involved. Ultimately for the investor, going through this kind of process will address two of the three key conditions he or she requires: the *security* of the investment, and the *certainty* that it can be carried through without conflicts and other disruption interfering with the investment plan.

Finally, the Legal Land Registry is rarely included in discussions about how to improve the process of land management for investors. However, banks and other institutions insist – rightly – on having the legal register as well as the cadastral register valid and up-to-date as one of the main conditions for considering lending on a project. The issue here is *certainty*, not using land as collateral – if a bank is to fund a project is needs to know that the land is available and secure tenure is in place and legally recognised (for the 50 year horizon allowed by law). The report proposes therefore that alongside measures to improve the legal framework, a programme to reform the Legal Land Registry and to make it more accessible to users, also be developed. Harmonisation of IT systems and procedures is also at the core of this programme.

It is essential to note that many if not all of the changes discussed above involve *policy decisions* and *cannot – or should not - be made simply through adjustments to laws or decrees*. Changing policy by writing laws, without a clear process of policy development and consensus building taking place first, results in bad laws that do not have the full support of all stakeholders. For this reason the report underlines the need to make full use of the Consultative Forum on Land as a policy making instrument, before proceeding to the legal adjustments that may or may not be needed.

FINAL COMMENTS

The proposals above will go a long way to improving the investment climate in Mozambique when land is involved. However, there are some contextual issues which are if anything more important than the legal framework and must be mentioned here. In the context of what follows, any changes made to the legal framework should be made with great care.

Firstly, referring back to the context assessment, it underlines that the *strategic formulation* of the present policy and legal framework remains relevant today and that the underlying social concerns addressed by the NLP and the 1997 Land Law require the rights-based, participatory and equity-enhancing approach that the framework provides. Any changes made should not weaken this approach or undermine the potential and force of the instruments developed, particularly the community consultation and the need to pre-identify existing acquired rights ahead of any investment scheme, be it public or private.

TABELA 1: MOZAMBIQUE – EASE OF DOING BUSINESS RANKING OVERALL AND BY KEY ACTIVITIES, 2014

Activity	Ranking out of 189
Ease of doing business rank	127
Starting a business	107
Dealing with construction permits	84
Getting electricity	164
Registering property	101
Getting credit	131
Protecting minority investors	94
Paying taxes	123
Trading across borders	129
Enforcing contracts	164
Resolving insolvency	107

[1] Source: World Bank, 2015: Doing Business 2015 – Going Beyond Efficiency (12th edition of the Doing Business annual reports)

Secondly, the report notes that by far the largest focus of concern by investors relates to *administrative inefficiency and even incompetence*, rather than to legal constraints *per se.* Mozambique is still well down the list of countries ranked by 'ease of doing business' by the annual World Bank survey of a range of things that businesses must deal with when setting up and operating (Table One). It is evident that there are many things aside from land governance issues that a a major obstacle to investment and to then making the investment work once it has been implemented.

It is also clear from many sources in recent years that the public land administration is still seriously weak, almost ineffective at local level, and still only responds to the needs of a small, urban-based elite who are able to use and manipulate the system to suit their needs. Beyond this is the surrounding political-economy of the country with vastly unequal power relations between those close to power (at national and provincial levels), and those at local level whose land may now be legally protected by the 1997 Land Law, but are nonetheless very exposed to land-grabbing and 'elite capture' of their still largely unregistered rights over land and natural resources. Once again, changing the law to 'improve things' in this context makes little sense, if the administrative and political context is not also addressed. Whatever new legal framework is developed would still be poorly implemented in this context.

The report notes that in this context two donor-funded projects are underway or soon to be implemented which will address some of these concerns.

Thirdly, and fundamentally, the question of both *security* and *certainty* require more than anything else the *rule of law.* It is apparent in all conversations and discussions about land governance in Mozambique that at the heart of many problems and difficulties with Land Law implementation is the willingness of key actors to set aside the legal framework and pursue their own objectives (be they 'official' in the national interest, or for personal gain). Unless this is addressed, then once again any change to the legal framework will be null and void, and it would be as well to carry on with what presently exists.

Finally, the report also notes that the new government has initiated what is the first real institutional reform in the 'land sector' since the 1995 NLP called for institutional reform as part of the implementation plan for the new policy (the first part of the plan was the revision of the Land Law, successfully carried out but then left to an unreformed and conservative land administration to implement).

With the creation of MITADER, Mozambique finally has the potential to fully implement its progressive and widely regarded 1997 Land Law. With the changes proposed above, to upgrade its *economic credentials while leaving its social purpose intact,* and a new institutional framework in place and benefitting from strong donor support (at national and *district* level), full implementation of the framework may now be possible. It is argued here that any major changes to the legislation should not be made until the options presented by this new situation have been fully explored and tested in practice. Only then will it be possible to tell if it is indeed 'un-implementable' and requires more substantive change.

ANNEX A

REVIEW OF THE LEGAL FRAMEWORK

1. Historical background

Before any analysis is done on the land legal framework, it is important to understand the origin of the various legal instruments in order to understand the context of their approval and the implications of current changes.

In 1992, João Carrilho stated that "the application of customary land law in defined areas could facilitate the capacity building of State structures and contribute to decentralisation, protecting small farmers' rights to the land" and that "the difficulty in adopting measures that put such recognition into practice may reside in (i) preference to maintain a single *modus operandi*, even knowing that there are different levels of legislation implementation capacity and that there is a lack of resources to create capacity suited to this generalisation; (ii) difficulty in formally accepting the application of the rules of customary rights for family farming in certain areas within the national territory"[44].

This author also defended that the State had absolute rights over the land, but was, however, "incapable of protecting rights and promoting the interests of the majority of the population", as well as of "incapable of capturing private investment, particularly because land tenure is insecure, laws are not transparent or not uniformly applied"[45].

In summary, the main criticisms to the land framework in force at the time (1979 Land Law and 1987 Regulation) were: (i) the fact that the vast majority of the Mozambican population, that occupied land according to customary rules and practices, is left in a fragile position; (ii) and the private sector was being side-lined, since the law did not provide the necessary openness for access to, ownership and security of the land in order to make the respective investments.

---

[44] CARRILHO, João (1992), "O Debate Actual sobre a Questão das Terras Rurais em Moçambique", *EXTRA – Revista para o Desenvolvimento e Extensão Rural*, Edição Especial, Maputo, Ministry of Agriculture, Centre for Agricultural Training and Rural Development, p. 32.
[45] Idem, p. 21.

The formulation of the current land legislation was guided by the Technical Secretariat of the Inter-Ministerial Commission for the Review of Land Legislation (Land Commission).46 The process was based not only the recommendations resulting from the sociological and agro-economic assessments of the rules and practices of the majority of Mozambicans in relation to access to and use of land, but also to the need to have strong consensus regarding the new law, seeking to reconcile the different interests at stake.

Considering the diagnosis, two basic guiding principles guide the process for the formulation of the new legislation: the need to protect pre-existing land rights and the need to create secure conditions for investments that, in principle, should benefit both local populations and the investors.

The central idea was that the law should not be merely a mechanism to define and protect rights, but that it could be used as an important development instrument. In fact, equal and sustainable rural development was (and is) the main objective underlying the new land legislation. Development would be achieved across several paths, namely: adaptation of local structures to modern soil management methods; adoption of a process to allow local populations to use the value of the capital "locked" in the "land asset"; and through the decentralisation and democratisation of land and other natural resources management, down to community level (Tanner, 2002).47

Thus, the *National Land Policy (PNT)* was approved through Resolution 10/95 of 17 October, on the premise that land is one of the main natural resources the country has, and is therefore worthy of being valued[48].

---

[46] In addition to the Institute for Rural Development, the following Ministries were included in the Commission: Agriculture and Fisheries; State Administration; Planning and Finance; Justice; Natural Resources; Public Works and Housing; Sports and Culture; and Defence (as observer).

[47] TANNER, Christopher (2002);Law-Making in an African context: The 1997 Mozambican Land Law, FAO Legal paper.

[48] The Policy design is supported by structural and circumstantial, positive and negative factors. As positive points we have: Large territorial extension of the country, low population density (still no demographic pressure), relative abundance of soil, water, fauna and flora resources, approximately 2500 km of coastline and beaches, high fertility soils; climate, beaches, flora and fauna favourable for tourism, apparently abundant subsoil resources (needs investigation). The following is highlighted as negative points: majority of the population does not have secure access to and use of land; poverty and lack of formal education for the majority of the population; lack of capital and technology to explore the resources; deficient economic and social infrastructures; lack of production support services, deficient land title, cadastre and registration system; lack of definition of physical and conceptual boundaries for delimitation of land, ineffective land use planning systems, and environmental degradation (our underlining).

The PNT defined the following main objectives: (i) recover food production, so as to achieve levels of food security; (ii) create conditions for family sector agriculture to develop and grow, without a shortage of land; (iii) promote private investment, using land and other natural resources in a sustainable and profitable manner, without harming local interests; (iv) preserve areas of ecological interest and manage the natural resources in a sustainable manner; (v) update and improve a tax system based on land occupation and use, in order to support public budgets at various levels[49].

On the other hand, the PNT defined an important set of fundamental principles, namely: (i) keeping the land as State property; (ii) guarantee access to and use of land (with emphasis on recognising customary land right access and transfer) for both the population and investors; (iii) guarantee women's right to use the land; (iv) promote national and foreign private investment, without harming the local population and guaranteeing benefits for them and for the national public purse; (vi) active participation of nationals as partners in private business ventures; (vii) definition and regulation of the basic guiding principles for the transfer of land use and benefit rights, between citizens or national enterprises, whenever there has been investment in the land; and (viii) the sustainable use of natural resources in order to guarantee the quality of life for present and future generations, ensuring that totally or partially protected areas maintain the environmental quality and purpose for which they were established[50].

Hence, the PNT grouped the principles referred to above and the objectives outlined in the following statement: "guarantee the rights of the Mozambican population to the land and to other natural resources, as well as promote investment in and sustainable and equal use of these resources"[51]. It is important to highlight the establishment of a general guarantee of access to and use of land for the population, as well as for investors, allied with the recognition of customary rights of access to and management of land by resident rural populations, promoting social and economic justice in the field[52].

The PNT called attention to the need to formulate a new flexible Land Law, "that does not specify what to do in each different cultural situation, but admits the principle that the respective system of customary rights in each region can work according to local reality"[53].

Thus, the PNT directed the legislator to promote a review of the law in force with a view to "eliminating contradictions vis-à-vis the new socio-political situation of the country and the Constitution of the Republic,

[49] Cf. Point 14 of the PNT.
[50] Cf. Point 17 of the PNT.
[51] Cf. Point 18 of the PNT.
[52] Cf. Point 17 of the PNT.
[53] Cf. Point 22 of the PNT.

and to simplify administrative procedures" in order to, among other aspects, guarantee "the acknowledgement of customary rights and the customary system of awarding/managing land "[54].

In this way, the PNT foresaw, as one of the aspects to be considered, "the provision of a system to transfer the land use and benefit rights"[55]. It established that such transfers should comply with the area classification for land use defined by the former Ministry of Agriculture and Fisheries[56], based on four different types of areas[57], proposing a special transferability regime for each case:

i. Type A – Densely populated areas with significant use by various users, with greater access to markets (where urban use and the rural business sector predominate), where the largest problem is the limited capacity to expand such resources. According to the PNT, the mechanisms that would allow "the transfer for consideration of land use and benefit titles between titleholders, both between nationals and from foreigners to nationals, whenever there have been investments in the land"[58]. It was also suggested that the minimum sizes of plots of land should be stipulated, in accordance with the respective purposes, with the need to introduce mechanisms to prevent speculation or accumulation of land and which support family farmers and small-scale producers[59];

ii. Type B – Areas with lower population density and less land usage, normally occupied by family/artisanal sector, with limited access to markets. Under the PNT, the greatest problem faced by the occupants of these areas was in guaranteeing secure land access and tenure and/or future use, with customary rights having to prevail in relation to the transfer of DUATs. Provision is also made for access by investors to areas that need to be negotiated and agreed with the community, with the support of the competent state authorities, at the different levels[60].

iii. Type C – Protected areas or areas to be protected, for which the use and benefit right is, from the outset, prohibited. Under the PNT, due to the respective protected status, the transfer of titles, with the exception of areas identified for the implementation of projects foreseen in the Government's master, plan should be prohibited.

iv. Type D – Areas that have not been occupied or explored, given the respective level of inaccessibility, and that are dependent on the capacity for public or private investment. As far as these areas are concerned, the PNT provided that the transfer of DUATs should be perfectly permissible, and it was necessary to introduce fiscal and market incentives to attract investment.

---

[54] Cf. Point 56 of the PNT.
[55] Cf. Point 56 (i) b) of the PNT.
[56] According to Point 59 of the PNT, "this classification should accompany the dynamics of the use of land for different purposes and should be adapted to changes introduced through the country's development process. This would allow land of a certain type to pass from one category to another".
[57] Cf. Point 57 of the PNT. The definition took into consideration criteria such as: dominant forms of use and occupation of land (family sector, business or mixed), areas agro-ecologically suited to agriculture, diversity of users, and intensity of use, accessibility of the land and population density.
[58] Cf. Point 60 of the PNT.
[59] Cf. Point 60 of the PNT.
[60] Cf. Point 61 of the PNT.

For reasons unknown to us, there has been no follow-up to date of the provisions of the PNT with regard to DUAT transfer systems, based on the type or category of areas. One hypothesis to consider would be the fact that this is a fairly unrealistic solution in practice, since these typologies (A, B, C and D) exist in all areas.

We therefore believe that the central idea of the PNT was precisely to not create separate areas, but rather to encompass all situations in a single landscape.

2. Land Law and respective regulations

2.1. Land Law – main aspects

The Land Law (LT), approved on 1 October 1997, comes about within the context of improving and framing the PNT in the social and economic dynamic that was being developed by the country. The Land Law was approved essentially to protect the rights to the land and create secure conditions for new investments that could benefit communities and investors (Tanner, 2002).[61] However, there are authors that call our attention to the fact that the new *Land Law* (1997) is the result of an unstable and precarious compromise, borne from different viewpoints - market vs. subsistence - as well as due to dominant interests[62]. As José Negrão put it, "the new Law does not privatise the land but provides total guarantee for secure investment; it does not demarcate the family sector but allows it to happen under the so-called community land; it does not restrict the access rights of the family sector but centralises the definition of purpose of exploitation; it does not permit the sale but provides sufficient space for inclusion in the regional market through joint enterprises; it does not ignore the sustainability of the use of resources but allows it to be mortgaged to international capital; in short, the new Law was conceived like man, in the image and likeness of the complexity of the power".[63]

Under the LT, "Local community is a group of families and natural persons, living within a territorial area at the level of locality or smaller, which aim to safeguard common interests through the protection of their housing areas, agricultural areas, whether cultivated or fallow, forests, areas of cultural importance, pastures, water sources and areas for expansion " (no. 1, of article 1). This is a definition that seeks not only to reflect local production systems, but also the idea that the "land belongs to those who use it".

---

[61] TANNER, Christopher (2002);Law Making in an African context: The 1997 Mozambican Land Law, FAO Legal paper; p.5

[62] RIBEIRO, Fernando Bessa (2006), *A questão fundiária em Moçambique – Dinâmicas globais, actores e interesses locais*, African Congress in Covilhã, May, pg 9

[63] NEGRÃO, José (1996), *Que Política de Terras para Moçambique – A propósito da Conferência Nacional de Terras*, Maputo, Núcleo de Estudos da Terra

An unavoidable issue in the LT - which represents an important milestone in Mozambican law - is the fact that it acknowledges the Legal Personality of Local Communities. Óscar Monteiro[64] holds that the acknowledgement of local communities' rights ensures that they are included in the legal framework as a constituting part of the national political entity, reassuming the experiences of popular participation seen during the period after the proclamation of national independence. In this way, communities are granted the right to speak for themselves and to participate in the decision-making processes.

Thus, it must be borne in mind that the acknowledgement of the legal personality of local communities takes on very special characteristics, primarily because access to and exercising a DUAT is not tied to the previous Constitution, nor to an acknowledgement based in civil legislation (Civil Code and Law on Associations).

It is important to note that the definition of local community contains a human element (group of families and natural persons), a territorial element (locality or smaller) and a teleological or finalistic element (safeguarding common interests).[65] Thus, any analysis of the concept must take into account these elements, since this is an open, dynamic and flexible formulation which attempts to cover the political, organisational, economic, social and cultural complexity and diversity of the communities.

Local communities have not only the land needed to build their housing and for their agricultural activities, but also fallow land, forests where they get the natural resources they need for their livelihood, places that are of cultural importance, areas needed for grazing their cattle and, fundamentally, the areas that are imperative to the expansion of the community.[66]

The inclusion of the concept of local community was truly a historic milestone in the process of constructing Mozambican law, based on a plural, heterogeneous and diverse reality strongly rooted in customary rules and practices. This was an effort to democratise a legal framework that was too distant, heavy and maladjusted to the dynamic of local realities, and which may be seen, in a very summarised manner, from three key perspectives: (i) community land is not confined to the land the community needs to live or for agriculture; it implies much more than this, and includes community public domain, which may vary from community to community, place to place, district to district, province to province, and region to region; (ii)

---

[64] MONTEIRO, Óscar (2006), *O Estado Moçambicano – Entre o Modelo e a Realidade Social, p.5*
[65] CALENGO, André (2005), *Lei de Terras Comentada e Anotada*, Maputo, Centro de Formação Jurídica e Judiciária, p.32
[66] TANNER, Christopher (2004), *A Relação entre a Posse de Terra e os Recursos Naturais*, document presented at the 3rd National Conference on Community Natural Resource Management, Maputo, 21 July 2004

the land use and benefit rights of local communities exist through the acknowledgement of occupation, regardless of official recognition by the State, or of supporting documents, including titles, or the registration of these at the Land Registry Offices; (iii) the local community is given a decisive and conditioning role in the issuance of titles for new rights in the application authorisation process for land use and benefit rights.[67]

The legislator has assigned ownership of the land to the State[68], thereby not allowing it to be sold, alienated, mortgaged or pledged, only allowing it to be occupied by everyone, irrespective of nationality, ethnic origin, etc.

As such, under the law there are three (3) forms of allocating land, namely:

- Occupation by natural persons and local communities, according to customary rules and practices that do not conflict with the Constitution of the Republic (CR);
- Occupation by natural persons who are nationals who, in good faith, have been using the land for at least 10 years; and
- Authorisation of the application submitted by natural or legal persons in the manner established under the law.

The competence to award the DUAT is as follows:

- In areas not covered by Urbanisation Plans, the Provincial Governors, the Ministry of Agriculture and Food Security and the Ministry of Seas, Inland Waters and Fisheries, and the Council of Ministers are responsible for granting DUATs; and
- In areas covered by Urbanisation Plans, the Mayor, the Heads of Villages and District Administrators are responsible for authorising the DUAT, where there are no municipal bodies and as long as there are cadastral services.

In this context, from the analysis of the forms of acquiring DUATs, it is clearly understood that the Government gave priority first to communities or natural persons, granting them the possibility of obtaining a DUAT through the forms identified above.

It is important to stress that the establishment, modification, transfer and extinction of the land use and benefit rights are subject to registration69, but that the absence of such registration does not prejudice the land use and benefit right acquired by occupation by natural persons and local communities, nor that

---

[67] SERRA, Carlos (2007), *Domínio Público do Estado, Autárquico e Comunitário – Essência, Constrangimentos e Desafios,* Document presented at the Conference of the 10 years of the Land Law, Maputo.
[68] Article 109 of the Constitution of the Republic, combined with article 3 of the Land Law.
69 Article 14, no. 1 of the Land Law

acquired by natural persons who have occupied the land for at least ten years70. Likewise, the land use and benefit right is confirmed by means of a title71. Also in this case, the absence of a written title does not prejudice the land use and benefit right acquired by occupation by natural persons and local communities, nor that acquired by natural persons who have occupied the land for at least ten years72.

2.2. Land Law Regulations

The Land Law Regulations (RLT), approved by Decree 66/98 of 8 December, aims to simplify the administrative procedures and thereby facilitate access to land by national and foreign investors. The RLT is applied to areas not covered by Municipalities with Municipal Cadastral Services.

Under the RLT, the process for awarding titles through an authorisation requires the proponent (legal person) to submit an application to the National Cadastral Services along with the following documents: Statutes; ii) Sketch of the location of the land; iii) Descriptive document; iv) Indication of the size and nature of the project/venture / nature of the activity to be carried out; v) Opinion of the District administrator following a Local Community consultation; vi) Public notice and proof of it having been affixed at the district seat and in the actual location, over a period of 30 days; and vii) Proof of payment of the application for provisional authorisation .[73]

However, under this regulation, in the case of economic activities, in addition to the documents mentioned above, the business plan and the technical opinion relating to it, issued by the entity in charge of the economic area, must also be submitted.

It is important to note that, when dealing with private investment projects, it is necessary for a prior identification of the area be conducted by the competent authorities, i.e., cadastral services, local administrative services and the community, prior to applying for a DUAT. The result of this work must be attached to the sketch and the descriptive document.

2.3. Regulations for Urban Land

[70] Article 14, no. 2 of the Land Law

[71] Article 13, no. 1 of the Land Law

[72] Article 13, no. 2 of the Land Law

[73] Article 25 of the RLT

Decree 60/2006 of 26 December approved the Regulation for Urban Land (RSU), which "aims to regulate the LT" with regard to the regime for the land use and benefit rights for land within cities and towns or in human settlements or villages organised through an urbanisation plan (article 2 of the RSU). Under this regulation, we would be facing a regime of access to land in areas covered by an Urbanisation Plan. Applications should, in principle, be addressed to the Mayor or, depending on the location of the land, the Heads of Settlements or District Administrators.

However, the RSU created an exceptional and parallel regime for urban areas where, in addition to the general forms of accessing land foreseen in the *Land Law,* other forms of accessing land are established; at the same time, important omissions regarding the titleholders of land rights have been detected.

Pursuant to article 31 of the RSU, national or foreign natural persons may hold land right and benefit titles, in the same terms foreseen in the Land Law (articles 10 and 11). Now, if we take article 12 of the Land Law as reference, we see that in the RSU there is absolutely no reference to local communities as holders of rights. Seen in these terms, the legislator not only disregarded the Land Law, but also ignored the fact that there are countless local communities in Mozambique's urban areas. We do not know whether this was simply an oversight or, on the contrary, a clear intention to deviate from the rules defined in the Law in that which concerns, among other aspects, community consultations.

With regard to the issue of new modalities of acquiring DUATs, associated with the disregard for the old modalities of acquiring DUATs, the Regulation provides, as modalities[74]: granting the award, drawing lots/allotment, public auctions, private negotiation and good-faith occupation. Drawing lots/allotment[75], public auction[76] and private negotiation[77] are modalities that are not within the framework of the Constitution and the Land Law, suggesting a position in favour of a broad and free transmissibility of DUATs, including the purchase and sale of land.

[74] Cf. Article 24 of the *Regulation for Urban Land* (2006).
[75] As per Article 26 of the *Regulation for Urban Land* (2006), the draw has as object plots or parcels of land in basic urbanisation areas directed exclusively at national citizens, with it being conditioned to the compliance of 20% for low-income citizens.
[76] According to Article 27 of the *Regulation for Urban Land* (2006), public auctions are used to award DUATs for plots or parcels of land located in areas of full or intermediate urbanisation, intended for the construction of housing, commerce and services.
[77] In light of Article 28 of the *Regulation for Urban Land* (2006), private negotiation is carried out between local State and Municipal bodies and project proponents, for the award of DUATs in plots or parcels of land intended for large-scale housing, industry, livestock and commerce projects.

Furthermore, the legislator established a rule of proof of the DUAT on urban land which is based on the presentation of the respective title[78], totally ignoring any of the other forms of proof of rights foreseen in the Land Law (1997), including testimonial proof, examination and other forms foreseen in the law[79]. It is further recalled that, according to that same Law, "the absence of a title shall not prejudice the right acquired by occupation"[80].

A contextual element to consider is the fact that the RSU (2006) was approved shortly after the approval of the Physical Planning Law (Law 19/2007, of 18 July), and a proper articulation between the two legislative processes was not achieved. The Regulation for Urban Land was incompatible with both the Land Law as well as the rules for Physical Planning.[81] The fact that we have a Regulation approved by the Council of Ministers that is misaligned with hierarchically superior legal instruments, approved by Parliament, leads us to immediately question the legality of the former.

2.4. Resolution 70/2008, of 30 December

It is also important to mention Resolution 70/2008, of 30 December, which approved the procedures for the submission and appraisal of private investment proposals involving extensions of land of over 10 000 hectares. The Resolution defines additional criteria to guide the evaluation process of investment projects whose implementation requires large extensions of land. Basically, it conditions the approval of requests for large extensions of land to strict compliance with environmental and social guidelines and rules, reiterating the principles enshrined in the Mozambican legal framework.

2.5. Community Consultation Procedures

One of the most important aspects of the new Land Law (1997) and that is frequently seen as a constraint in the process of awarding new DUATs under an authorisation, is the investor's obligation to conduct a

[78] Cf. Article 40 and 41(1), of the *Regulation for Urban Land* (2006).
[79] Cf. Article 15 of the Land Law (1997).
[80] Cf. Article 13 of the Land Law (1997).
[81] Serra, ob. cit., p.632

consultation with the local communities residing in the area intended for the implementation of investment projects.

As stated by José Negrão[82], the enshrinement of community consultations is linked to the lack of transparency in the concession of land and other natural resources, associated with the increased focus on cases of corruption, particularly because the framework in force until then granted the State monopoly in terms of decision-making on the adjudication of resources, without hearing the communities. Which is why, starting with the preparatory work, it has been proposed that "it must be mandatory for rural communities residing in the area to be consulted during the process of awarding titles" and that "agreement is reached by those involved regarding the limits that are being defined"[83]. For Christopher Tanner, the provision of community consultations is a strong act of the affirmation of the management powers given back to local communities under article 24 of the Land Law (1997).[84] Along the same lines, Simon Norfolk, understands that the requirement for community consultations creates conditions for decision-making powers on the status of natural resources' use and benefit to pass from the State to the real users of these resources.[85]

The objective of the consultation is precisely to confirm whether the intended area is free and unoccupied. This formality is the responsibility of the local administrative authorities, who should organise and implement the consultation process (although it is normally the investor who bears the costs).

The consultation process was designed primarily to guarantee the rights of the people in the context of the PNT, and so avoid conflicts between current occupants of the intended land - natural persons or local communities - and investors.

There are opinions according to which consultations should also be applied to residents from the neighbourhood/quarter, in an urban context, in the case of investment projects proposed in urban areas where there are local populations with rights acquired by occupation.[86]

It has been widely demonstrated that the consultations have not been efficient. Very often these are not real consultations, given that, almost exclusively, incentives are given to community leaders or neighbourhood

---

[82] NEGRÃO, José (1996), *Que Política de Terras para Moçambique – A propósito da Conferência Nacional de Terras*, Maputo, Núcleo de Estudos da Terra,p.4
[83] Idem, p. 4.
[84] TANNER, Christopher (2011), "Chapter 4 – Mozambique", *Decentralized Land Governance: Case studies and local voices form Botswana, Madagascar and Mozambique*, Cape Town, University of the Western Cape, EMS Faculty, School of Government, Institute for Poverty, Land and Agrarian Studies, p.86
[85] NORFOLK, Simon (2004), "Examining access to natural resources and linkages to sustainable livelihoods – A case study of Mozambique", *LEP Working Paper n. º 17*, FAO, p. 16.
[86] Interview with GAPI on 23 July 2015

chiefs. In many cases, there is no appropriate internal discussion of the object of the consultation at community level, and the final agreement - with the respective "Minutes of the Consultation" - in most cases reflects the discussions held only between the leaders and the investor, with all other community members being excluded.

In this context, it is essential to acknowledge the collective character of the community DUAT, governed by the concept of co-title holders, as is expressly mentioned in the Land Law and in the Regulation. The regime of co-ownership, foreseen in the Civil Code (articles 1403 and following) should be applied to the community members, as co-title holders of the DUAT. This principle, correctly applied, requires that *all co-titleholders* participate in the discussion on any proposal that foresees the use of the communal asset, in other words, the community's land.

It is in national interests that consultations be conducted in an efficient and participatory manner. This was the reason for the approval of Ministerial Diploma 158/2011, of 15 June, which approved the rules for local community consultations within the scope of land use and benefit right titles. This Diploma materialises article 13(3) of the LT, combined with subparagraph e) of article 24(1) of the RLT, reinforcing the compulsory nature of community consultations, as a way of confirming whether the intended space is free and unoccupied.

Under the terms of the above-mentioned Diploma, there are two stages to local community consultations:

a) The first consists in a public meeting with a view to provide the local community with information regarding the application for the acquisition of the land use and benefit right and the identification of the boundaries of the parcel of land; and

b) The second, which should take place *within thirty days after the first meeting, has as objective to hear the local community's decision* as to the availability of the area for the enterprise or business plan.

It is mandatory for the following to be present at the consultations: a) the District Administrator or his/her representative; b) the representative from the Cadastral Services; c) the members of the Settlement and Location Consultative Committees; d) local community members and title-holders or occupants of the neighbouring land; and e) the applicant or his/her representative.

The outcome of the process is recorded in the Minutes of the meeting, which must be signed by three to nine representatives from the local community, as well as by the title-holders or occupants of the neighbouring land. In practical terms, this document is the basis of the contract between the local

community and the investor, although up to now there have been few cases in which it can be said that there is a detailed and carefully discussed and formulated contract. In any case, the idea of "community-investor partnerships" is increasingly being accepted, reflecting the spirit of both the PNT and the Land Law as well as of international principles, currently established in FAO's VGGT and in the PRAI.

If the consultations are conducted properly from a formal and material perspective - guaranteeing that the communities are effectively heard and can address their concerns and expectations, present suggestions and conditions, provide information regarding customary rules and practices, etc. - there is a stronger probability that greater legal security will be achieved for the communities, as well as a better opportunity to obtain benefits within a context of local development. In this way investors would also have greater legal security, implementing investment projects on more stable grounds.

Alongside the procedures mentioned above, under the RLT, the process for the application for DUATs must be accompanied by a set of documents, in triplicate, including the opinion of the District Administrator, following the consultation with local communities[87]. For this, the Cadastral Services must first send a copy of the DUAT application to the District Administrator, in order to affix the public notice at the district seat as well as at the requested site, for a period of 30 days.[88] This is then followed by the consultation with local communities, resulting in, as was previously mentioned, the Minutes of the consultation being prepared.[89]

Thus, we understand that one of the milestones of the new land and natural resources legal framework was the enshrinement of community consultations, making this a mechanism to safeguard, respect and enforce the rights of the community. Consequently, community consultations provide greater opportunities for social justice to prevail.

2.6. Acknowledgement of rights acquired by occupation

The 2004 constitutional review reiterates the principle established in the 1990 Constitution, according to which "when issuing land use and benefit right titles, the State acknowledges and protects the rights acquired by inheritance or by occupation, except where there is a legal/statutory reserve or if the land has been legally awarded to another person or entity".

---

[87] Cf. Article 24 of the *Land Law Regulation* (1998).
[88] As per combination of subparagraph f) of Article 24(1) and Article 27(1), both of the *Land Law Regulation* (1998).
[89] Idem.

One of the conditions for social well-being is, without doubt, the acknowledgement of and respect for the right of access to land, as a universal means to generate wealth, and on which the vast majority of Mozambican citizens depend[90]. As is stated by Gregory Myers, "if the rights to access land are not secure (for example: if land can be taken away from its legitimate owner or user, without legal recourse or compensation, if the process for the acquisition of land is not transparent or considered legitimate and if there is no legal system in which everyone has the right to defend their interests), there will be no investment and insecurity will take root".[91]

In this context, the Land Law reinforced the constitutional regime regarding the modalities for the acquisition of DUATs, providing for, in addition to the modality based on formal authorisation of access, the modality of occupation by natural persons who, in good faith, have been using the land for at least ten years.[92]

This is intended to protect the more disadvantaged population groups - who do not always have the resources to obtain a formal title - against possible land grabs. The acknowledgement of the land right based on occupation or through customary rules and practices that do not go against the law is an innovative solution of the Mozambican land legislation, contributing to ensure that citizens are not prevented from exercising their rights due to the simple fact of not having a written title.[93]

However, despite the legal and constitutional acknowledgement of customary rights, particularly in terms of the management and administration of land in Mozambique, it appears that a culture of resistance still persists among government and state institution employees, as well as among some private operators, which prevents citizens from fully exercising their rights. As noted by Sérgio Baleira, "the grasp of statutory law in the social imagination of agents from the competent state entities in land management and administration and the formal legal culture of private investors and their lawyers have proven to be a factor in side-lining and failure to comply with customary law, particularly where land and other natural resource disputes are concerned".[94]

---

[90] SERRA, Carlos, PhD Thesis "Estado, Pluralismo Jurídico e Recursos Naturais – Avanços e Recuos na Construção do Direito Moçambicano" p.564

[91] citado por MERRY, Sally Engle (1992), Anthropology, *Law and Transnational Process, Annual Review of Anthropology,* AnnuQWal Reviews, Vol. 21,p.6

[92] Article 12 of the Land Law (1997)

[93] Article 12 a) of the Land Law (1997).

[94] BALEIRA, Sérgio (2012), "Como Usar a Gestão e Administração de Terras para a Promoção do Desenvolvimento Sustentável", *Sociedade e Justiça*, no. 3, Centro de Formação Jurídica e Judiciária, p. 13.

2.7. Delimitation of community land

Under Ministerial Diploma 29-A/2000, of 17 March , which approved the Technical Annex to the Land Law Regulation (1998), delimitation of land is a means to prove and identify the existence of DUATs. Another objective of these delimitations is to systematise and integrate the boundaries between communities in the official information system on land rights.[95] Delimitation has also been seen as an instrument for the legal empowerment of communities, with a view to enabling negotiations with private investors who have applied for DUATs.[96]

An important note is the fact that the delimitation should be, from the outset, a simpler and less costly process[97] that does not require the placement of geo-referenced markers at the territorial boundaries. However, this process implies the active participation of the members of the community being delimited, as well as of the neighbouring communities, in order to validate the information obtained.

Joseph Hanlon highlights a strong reason in favour of land delimitations: it dramatically alters the position of the community, given that this awards the community the right to demarcate and register their land, not only current agricultural properties, but also fallow land and reserved land. The author states that, when registered, potential investors must negotiate with the communities, and not just consult them. The delimitation gives the communities power, but the process may also bring problems, creating expectations and, sometimes, digging up old disputes. Although the process is costly and time-consuming, it may be the only manner to protect farmers'/villagers' rights.[98] Theoretically, holding a certificate considerably increases the community's negotiation power, clearing the way for true partnerships.

Under the Technical Annex to the RLT,[99] the delimitation of areas occupied by local communities was structured in five key stages: (i) information and dissemination; (ii) participatory diagnosis; (iii) sketch and descriptive document; (iv) return; and (v) registration in the National Land Cadastre.

---

[95] QUADROS, Maria da Conceição et al (2004), ob. cit., p. 62.
[96] TANNER, Christopher (2005), ob. cit., p. 58;
[97] QUADROS, Maria da Conceição et al (2004), ob. cit., p. 63.
[98] HANLON, Joseph (2002), *Debate sobre a Terra em Moçambique: Irá o desenvolvimento rural ser movido pelos investidores estrangeiros, pela elite urbana, pelos camponeses mais avançados ou pelos agricultores familiares?* Research commissioned by Oxfam GB - Regional Management, Centre for Southern Africa,p.26-27
[99] Articles 5 to 13 of the Technical Annex to the Land Law Regulation (1998)

At the end of the delimitation process a certificate is issued, containing the details registered in the National Land Cadastre, which is then handed over to the local community.[100] However, we would stress again that the absence of a title or of registration does not mean that a DUAT does not exist.[101]

According to the *Technical Annex to the Land Law Regulation* (1998), the delimitation of local communities' areas is carried out primarily in three cases: (i) where there is conflict over land and/or over other natural resources; (ii) when the State and/or investors intend to introduce new economic activities and/or development projects and plans; and (iii) when requested by the local community.[102]

3. The issue of DUAT transferability

Article 16 of the LT provides for the possibility of DUAT transfers by inheritance; through the acquisition of urban buildings; through the acquisition of infrastructures, constructions and improvements existing in rural buildings, duly authorised by the competent entity. The forms mentioned above are valid for national natural and legal persons. The acquisition of DUATs by foreign natural or legal persons is dependent on the following additional cumulative conditions: i) Have a duly approved investment project; ii) If natural persons, must reside in Mozambique for at least five years; iii) If legal persons, they must be duly established or registered in Mozambique.

A potential point of tension between the law and practice relates to the DUAT transfer regime in rural areas. It is known that a considerable part of DUAT title-holders (possibly the majority) acquired the rights through customary practices. Along with this, many of the infrastructures established in these areas are made from low-cost building materials. The question is, therefore, what would be the reference price for such improvements; whether, in effect, it is not the sale of the land itself in question here, rather than the transfer of improvements. Since the sale price of improvements has not been regulated, there appears to be some tension between the general principle of the prohibition of the sale of land and the transfer value of the improvements, very often set based on the "value" of the land itself.103 Similar to this, is the problem

[100] Article 13, no. 4 and 5, of the Technical Annex to the Land Law Regulation (1998)
[101] Article 13, no. 2, of the Land Law (1997).
[102] Article 7, no. 1, of the *Technical Annex to the Land Law Regulation* (1998).
[103] See, on this matter, SERRA, Carlos Manuel (2013), "Transmissibilidade dos direitos de uso e aproveitamento da terra em Moçambique", *Dinâmicas da Ocupação e Uso da Terra em Moçambique*, Maputo, Observatório do Meio Rural, Escolar Editora, pp. 53 – 75.

of knowing what criteria would be used to mortgage the improvements made on rural land? The value of the actual infrastructures? The potential "value" of the land? Both criteria?

Danilo Abdula gives us an example of a banking institution in Mozambique that does not necessarily tie financing to the existence of a DUAT, although it acknowledges that having one would afford the Bank greater security. However, if the DUAT cannot be mortgaged, the Bank requires other types of collateral to be presented, namely corporate/company guarantees, money, equipment, vehicles, etc.[104]

Even in the early 1990's, João Carrilho called attention to the fact that the "land market" was a fairly active reality in Mozambique, where land rights were sold, leased, alienated or transferred, going against the law and without any kind of control by the State.[105] The author recommended that, in the review of the legislation, consideration be given to the possibility of officialising the titles market, bearing in mind the advantages this would bring, namely, an increase in State revenue, potential effective decentralisation in promoting development, incentives for effective and more efficient use of land and the possibility of a more equitable distribution of land, particularly outside of densely populated areas.[106]

During the preparatory work on the proposal for the new Land Law, the problem of land transactions outside of State control had been addressed in the following terms: "there is land that in fact changes ownership, there is capital circulating in exchange for properties, there are extremely complex debt processes, there are leases for plots, there is an increase in land conflicts, there are expectations of large easy profits and there is an accumulation of land concessions for speculation purposes with neighbouring South Africa".[107]

At the time, two types of market were identified: (i) an "informal" market, regulated according to customary rules and practices, covering transactions between rural families; (ii) and a "clandestine" market, operating on the fringe of the Law, involving national and foreign persons with influence, financial or decision-making power, with easy access to the land negotiation processes.[108]

---

[104] Interview held with Banco Terra, on 23 July 2015
[105] CARRILHO, João (1992), ob. cit., p. 33.
[106] Idem., pp. 33 -34. João Carrilho lists, as disadvantages of officialising the "land market", the" possibility of creating more unemployment in the more densely populated areas", as well as problems resulting from the "lack of sufficiently detailed land use planning to prevent against having to buy land sold the previous day, at a higher real value".
[107] NEGRÃO, José (1996), ob. cit., p. 5.
[108] Idem, p. 5.

Meanwhile, there is a legal precedent in terms of the transferability of DUATs, created within the scope of the gas projects in the Rovuma Basin.[109] Pursuant to article 11 of Decree-Law 2/2014, of 2 December, concessionaires acquire the DUAT and may "cede use", mortgage or transfer their rights to third parties.[110]

Some questions are raised from the analysis of the Decree-Law in question:

- What is the form of acquisition and transfer of the DUATs? Will this not conflict with the LT?
- Would this not be violating the general principle of the prohibition of the sale, alienation, mortgage, attachment, etc., of land, enshrined in the Constitution of the Republic and the LT?

It would appear to us that this Decree-Law creates an exception in which the State allows a DUAT title-holder to "share", transfer (without indicating the rules for the said transfer), "cede use" of the DUAT, thereby going against the LT and its Regulation.

4. "Ceding of Use"

"Ceding of Use" is an option that may facilitate access to land by private investors, without prejudicing the actual DUAT title-holders. This is the possibility of leasing/renting the land, paying rent or another value to the title-holder for the use of the land.

The concept of leases/rentals is an issue that has not been discussed at political level. When the Land Law was being prepared, the idea of "ceding of use" was raised as an instrument which would allow the titleholder to hand over the land without losing the DUAT.

In practice, this concept was never adequately regulated and, therefore, the possibility of using a leasing contract between a community, or another DUAT titleholder, and a third party ceased to exist. In reality, leasing/rental is an instrument that offers significant flexibility, since it is a means of transferring the *use (usufruct)* of "underused" land, without losing the DUAT to that same land. In this way, the titleholder may recover the land in future, when he/she has the necessary means to exploit the resources more productively.

[109] See Decree-Law 2/2014 of 2 December
[110] Article 11 of the above-mentioned Decree

After significant debates on the subject in the FCT, it was agreed to address the issue of "ceding of use" openly, resulting in the proposal of a new Decree to regulate this institute, which aims to promote private investment in an already occupied field.

The essence of the document is that it intends to allow the possibility for communities (and other DUAT titleholders) to hand over their land to an investor, based on a contract that specifies certain conditions such as, for example, annual payments, division of shares in the venture, participation in the profits of the investment, etc. In this way, the community could eventually use its land to alleviate poverty and generate new resources to invest in their other *machambas* (agricultural fields) and farms, while private investment is facilitated in a fairer and more equal manner.

Evidently this strategy is being embraced by the GoM in the context of its partnership with the World Bank, with indications that there have been some advances in the discussions. In the excerpt below, from a table in the project financing document of a current agricultural programme, the reference to the expression "*land leasing procedures*" is noted in the context of "simplifying the transfer of DUATs".

However, a strong recommendation in this report is that the current discussions on the new Decree be monitored, particularly to guarantee that no constitutional or PNT principles are jeopardised, and neither is the philosophy underpinning the Mozambican land legislation.

5. Simplified Process for DUAT authorisation

The former Ministry of Agriculture and Rural Development, through its National Directorate for Geography and Cadastre, issued a notice, called the "Simplified Process for Authorisation of Land Use and Benefit Rights".[111] The objective of this measure was to accelerate the administrative procedures for authorising DUATs. A 90-day maximum time-limit was established for processing applications for land use and benefit rights. In addition to presenting a simplified outline of the processing procedures for DUAT authorisations, the notice also contained a copy of the form to be presented to the competent entities and a list of mandatory elements to instruct the process.

Despite it not being formally legal in nature, there are hopes that this decision will have a positive impact on the way in which DUAT authorisation applications will be processed, contributing to faster processes,

[111] This notice, among others, was published in the "Notícias" newspaper, on 14 November 2001.

without neglecting the need to safeguard the guarantees for local communities, namely those resulting from the consultation process.

6. Analysis of other relevant legal devices

6.1 Environmental Law and its regulations

When we speak of access to land, we cannot ignore important issues associated with it, such as the environment and physical planning.

Taking into consideration the objectives of the Environmental Law (L.A), Law 20/97, of 1 October - proper management of the environment and of its components, and through the creation of favourable conditions for the health and well-being of the people, for the socioeconomic and cultural development of the communities and for the preservation of the natural resources sustaining them - we can conclude that the steps that should be taken, in terms of the RLT, for issuance of titles (namely the consultation process, indication of the activity to be carried out) aim to safeguard environmental issues.

It was precisely in the name of the principle of prevention that the legislator approved Decree 45/2004, of 29 September, the Regulation of the Environmental Impact Evaluation Process, whose aim is to guarantee that public or private activities that directly or indirectly influence environmental components are not carried out without the necessary environmental licence being issued.[112]

There are different opinions as to whether the DUAT or the environmental licence takes precedence. There are those who feel that the award of DUAT, being a licence, should be preceded by an environmental impact evaluation on the intended area, by virtue of Article 15(2) of the Environmental Law.[113] The opposite, however, is defended by Victorino Xavier, who sees no danger to the environment in awarding a licence before the DUAT, since the DUAT can be awarded on a provisional basis and withdrawn after the environmental impact evaluation is conducted, if the possibility of environmental damages being caused is confirmed.[114] Similarly, André Calengo, defends that the environmental licence depends on the DUAT, due to the fact that it is issued for a specific area (land).

At the same time, it is important to mention that, because access to land and the activities carried out on it may imply damages (environmental), it is necessary to mention Decree 70/2013, of 20 December, which

[112] Article 2, of the Regulation of the Environmental Impact Evaluation Process
[113] Law 20/97, of 1 October
[114] Article 29 of the LT

approved the Regulation on Procedures for the Approval of Reducing Emissions from Deforestation and Forest Degradation (REDD+) Projects. Under this Decree, in terms of the competencies to issue DUATs, it follows the same requirements established in the LT (see Article 5 of the REDD+ Regulation).

6.2 Physical Planning Law and its Regulations

Resolution 18/2007, of 30 May, approves the Physical Planning Policy (POT), which represents a set of guidelines to help the Government, through a conciliation, integration and participation procedure, at all levels, to define the objectives which the physical planning instruments must meet, in order to achieve a better distribution of human activities across the land, to preserve areas of natural reserves and with special status, and promote sustainable human development.

The Physical Planning Law (LOT), was approved through Law 19/2007, of 18 July, which in accordance with the general and specific objectives of the legal framework of the Physical Planning Policy, aims to promote the rational and sustainable use of natural resources, preserve environmental equilibrium, the quality of life of citizens, a balance between the quality of life in rural and in urban areas, and improved condition of housing, infrastructures and urban systems.

The respective Regulation, Decree 23/2008, of 1 July (RLOT) was approved in order to turn this law into reality, aiming to establish the measures and procedures to guarantee rational and sustainable occupation and use of the natural resources, exploiting the potential of each region, the infrastructures and urban systems, and promoting national cohesion and security of the populations.

These instruments aim to secure and preserve the territory, and thus, subparagraph a) of Article 5(2) of the LOT, establishes that one of the specific objectives of the LOT is to guarantee the right to actual occupation of the national physical space by people and local communities, who are always considered to be the most important element of intervention relating to physical planning and land use, natural resources or built heritage.

6.3 Regulation on the Process of Resettlement Because of Economic Activities

The legislator approved Decree 31/2012, of 8 August (Regulation on the Process of Resettlement because of Economic Activities), which establishes the basic principles of the resettlement process, resulting from public or private economic activities, carried out by national or foreign natural or legal persons, with a view to promoting the quality of life of the citizens and protecting the environment.

Under this regulation, public participation is indispensable throughout the entire resettlement process, in order to ensure that the communities' rights are not affected and that, notwithstanding the resettlement, their living standards are improved.

Ministerial Diploma 156/2014, of 29 September, approved a technical directive on the process for the formulation and implementation of resettlement plans, as a result of the acknowledgement that there have been disparities in the resettlement processes, which may potentially give rise to conflict. The Directive seeks, therefore, to harmonise the principles underlying these processes.[115] As is stated in the preamble, the Directive intends to put into operation the rules and procedures defined in the Regulation on the process of Resettlement Because of Economic Activities, aligning it with the Regulation on the Process for Environmental Impact Evaluations (approved by Decree 42/2004) and with the Directive on the Process of Expropriation for Territorial Planning Purposes (approved by Ministerial Diploma 181/2010).[116]

Thus, the Directive reaffirms the:

- composition and duties of the Technical Monitoring and Oversight Commission (as we saw, the Regulation for the Technical Commission was approved);
- Rights of the affected population (compensation, information, participation);
- Process for the formulation of resettlement plans, referring to Decree 31/2012;
- content of the resettlement plans;
- consultation process and recording of the respective meetings;
- resettlement plan implementation process; and
- monitoring and inspection of the implementation.

In essence, the Directive condenses the regimes established in all other diplomas regarding Resettlement.

An important note is that the Diploma provides guidance for intervention, in the case of involuntary resettlements[117].

As the text states, "it provides the main guidelines for the Government and other stakeholders in the process to align the physical resettlement planning with the planning of the socioeconomic process, with a view to integrate the families and communities involuntarily displaced from their current territories, with the restitution of lost livelihoods and insertion in the local economic development".

---

[115]Trindade, João Carlos; Cruz, Lucinda e José, André Cristiano; *Avaliação Jurídica Independente aos Processos de Licenciamento dos Projectos Minerais e de Hidrocarbonetos*, March 2015; p.31
[116] Idem
[117] Ibidem

However, the Regulation on the process of Resettlement Because of Economic Activities fails to mention the manner in which the calculation of compensations for affected persons is done, although it clearly states that better living conditions should be restored or created. Furthermore, it requires that the affected population be transported to their new place of residence, along with their belongings; they must live in a physical space with infrastructures, with social equipment; they must have space to engage in their livelihood activities; and to offer their opinion throughout the resettlement process.[118]

According to Article 12 of the Decree, in the resettlement process the District Government is responsible for: a) making available spaces for the resettlement of the affected families; b) guaranteeing the regularisation of the occupation of land parcels; c) inspecting the resettlement plan implementation process; d) making available spaces to engage in livelihood activities.

According to Victorino Xavier, despite the law not mentioning compensation in the resettlement process, this situation needs to be considered. For him, the basis of the compensation should also take into consideration the value of the immaterial assets.

A pragmatic solution could be to understand that in the resettlement process, there is no reason for compensations to be any different from those awarded in situations of expropriation. Even so, we need to bear in mind that in cases of expropriation, it is the higher public interest that is at stake. In processes of resettlement because of economic activities, in most cases it is the private economic interests that are safeguarded first, even though there may be indirect benefits for the community.

Conclusions

Mozambique is party to important international conventions that promote the concept of "responsible investment" (FAO's VGGT and the CFS's PRAI). The country is also a member of the *New Alliance for Food Security and Nutrition*, which requires the government to improve its land governance and its regulatory framework.

The National Land Policy (1995) already includes the essence of the VGGT and the PRAI, underpinned by its key statement "to ensure the rights of the Mozambican population over the land and other natural resources, as well as to promote investment and the sustainable and equitable use of these resources". Based on the PNT, the 1997 Land Law was designed to facilitate an interactive and mutually beneficial

[118] Articles 10 and following.

relationship between private investment and holders of DUAT titles acquired by occupation and by good-faith.

The conclusion of the analysis of the legal framework, in this context, is that there is no justification for major changes to the framework, but rather a need to introduce some adjustments to adapt it to Mozambique's current context. In this regard, we underscore the need to:

- Maintain community consultations and improve their use as an instrument for development and investment
- Promote prior delimitation to accelerate the process of identifying land available for investment, with a form of prior agreement from the community
- Harmonise the procedures for the transfer of improvements and the automatic switchover of the DUAT, in the case of urban buildings
- Ensure the approval and implementation of the new Decree to advance the "ceding of use" process.
- Support projects already underway intended to reform and build capacity within the land administration services, with emphasis on capacity building of both the more local and of the provincial services.

In this context, the consultation process is better understood as a "development opportunity" instead of being simply one of the stages in the "simplified procedures" for a new applicant to obtain a new DUAT. Therefore, the objective of the community consultation is not merely to obtain the "no objection" from the local community, but rather an opportunity to respond to the guiding principles of FAO's VGGT and the PRAI approved in 2014.

In other words, the consultation is the process - it is not only one or two meetings - through which the communities negotiate with the private investor to establish "the terms of the partnership" referred to in Article 27 of the Land Law Regulation and in Resolution 70/2008.

The significant advance today, in relation to the discussions of ten years ago on the matter, is the almost approved acknowledgement by the government, of the potential of the concept of "ceding of use", an instrument included in the Land Law Regulations, but which to present has never been specified in detail. Combined with the delimitation and community capacity building process to prepare the land for new negotiations with the private sector, it will be possible to consider either clearly advantageous conditions resulting from the community consultations, or the possibility of proposing shared use or even a type of joint venture agreement, through a community-investor partnership (in which case the community "cedes the use" of its DUAT, but keeps the underlying rights).

New regulations that would allow for greater flexibility and the possibility of mutually beneficial agreements are the ideal way ahead. The legal framework is adapted to the country's current sociological reality, but some changes like those mentioned above, may help to realise its potential as a progressive instrument for the advancement of a "sustainable and equal" development process.

BIBLIOGRAPHY

Calengo, André Jaime (2007), *O Debate Actual sobre a Terra em Moçambique – Notas Introdutórias*, Apresentação por ocasião da Conferência Comemorativa dos 10 Anos da Lei de Terras, realizada em Maputo, de 17 a 19 de Outubro de 2007, p.25

Chiziane, Eduardo (2015), Legislação sobre os recursos naturais em Moçambique: convergências e conflitos na relação com a terra. Maputo, Observatório do Meio Rural, Documento de Trabalho No 28, Maio.

FAO (2012), Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT). Rome, FAO, Committee on World Food Security (CFS) www.fao.org/docrep/016/i2801e/i2801e.pdf

CFS (2014), Principles for responsible investment in agriculture and food systems (PRAI). Rome, FAO, Committee on World Food Security (CFS) http://www.fao.org/3/a-au866e.pdf

Frey, Adrian (2004), Land Law Legislation. Maputo, MozLegal Ltd., with sponsors including the then National Directorate for Geography and Cadastre (DINAGECA) http://www.doingbusiness.org/~/media/FPDKM/Doing%20Business/Documents/Law-Library/Mozambique-Land-Law-Legislation.pdf

Tanner, Christopher (2002), Law-making in an African context: the 1997 Mozambican Land Law. Rome, FAO, Legal Papers Online No 26 http://www.fao.org/Legal/pub-e.htm

USAID (2015), Operational Guidelines for Responsible Land-based Investment. Washington DC, USAID, document developed by Cloudburst Consulting Group, Inc.