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MOZAMBIQUE: EVEN A PROGRESSIVE LAND LAW NEEDS REVISION AFTER A GENERATION OF EXPERIENCE

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Abstract

Mozambique is widely regarded as having a modern and progressive land tenure framework. However, implementation has not always lived up to the promise of the original law. Twenty years of experience have revealed several areas in which the legal framework would benefit from revision and better serve its primary aims of promoting productive land use while still protecting legitimate customary land rights.

Topics that were once off-limit – for example, loosening the restrictions on land rights transfers in rural areas – are now being discussed and openly debated. The time is ripe to address this and other weaknesses in the legal framework and thereby catalyze investment, increase productivity and enhance transparency in land administration. This paper examines the existing legal framework and prioritizes recommendations to achieve the above-mentioned goals while simultaneously safeguarding legitimate land rights of communities and individuals.

Key Words: Mozambique, legal reform, land markets, community land

MOZAMBIQUE: EVEN A PROGRESSIVE LAND LAW NEEDS REVISION AFTER A GENERATION OF EXPERIENCE

Overview

Mozambique is widely regarded as having a modern and progressive land tenure framework, following the enactment of the 1997 Land Law and related legal instruments. However, implementation has not always lived up to the promise of the original law. Twenty years of experience have revealed a number of areas in which the legal framework would benefit from revision and better serve its primary aims of promoting productive land use while still protecting legitimate customary and smallholder land rights.

As demand for access to agricultural land increases – whether from national investors, international conglomerates, or just a local smallholder wishing to increase the size of his or her farm to gain efficiencies of scale – the pressure for clarity and transparency in land administration has correspondingly grown.

Topics that were once off-limit – for example, loosening the restrictions on land rights transfers in rural areas – are now being openly discussed in the press¹ and at the periodic *Fórum de Consulta sobre Terras* (FCT), or Land Consultative Forum, led by government. The time is ripe to address this and other weaknesses in the legal framework and thereby catalyze investment, increase productivity and enhance transparency in land administration. This paper will examine the existing legal framework and prioritize recommendations to achieve the above-mentioned goals while also safeguarding legitimate land rights of communities and individuals. The donor community is poised to provide technical assistance based on best practices from other relevant contexts and the Mozambican government has indicated its willingness to engage in a multi-stakeholder participatory reform process. The USAID “Supporting the Policy Environment for Economic Development” (SPEED+) project is in discussions with the Mozambican government on how best to support this reform effort, with the *Direcção Nacional de Terras* (DINAT) signaling its preliminary agreement with several of the recommendations proposed below. This paper is based in part on initial findings from a SPEED+ project-sponsored study.²

Our basic premise, based on stakeholder discussions and economic analysis, is that increasing transparency and simplifying the procedures for acquiring and transferring secure leasehold access to land via DUATs (*Direito de Uso e Aproveitamento de Terra*, or “Land Use and Benefit Right”) will lead to a higher volume

¹ See, e.g., Caldeira A., “Porque é que em Moçambique na cidade podemos vender a terra e a casa mas no campo não?” in “Tema de Fundo”, 26 May 2017, www.verdade.co.mz.

² The SPEED+ project, implemented by DAI, has completed an assessment of reform priorities for the land sector. Although this paper draws upon the SPEED+ study, the views presented are those of the author and do not necessarily reflect the official USAID position.

of transactions, with a greater number of these transactions brought into the formal registration process. A more fluid environment for transactions will eventually lead to a more market-oriented allocation of land rights, with the legal framework – engaged rather than skirted – protecting the rights of the most vulnerable, including women and the poor. The more efficient allocation of land rights, accompanied by increased investment, will lead to greater productivity and economic growth -- primarily in the agricultural sector but also in other sectors such as housing or light industry which require secure access to land.

Many revisions can be implemented via lower level administrative rules or ministerial regulations, but the government should not continue to put off certain reforms to the Land Law itself. Although all land in Mozambique is owned by the state in trust for the people, citizens (as well as foreigners and corporate entities) may also acquire DUAT rights. Essentially leaseholds granted or recognized by the state, DUATs are for varying periods of time (the time depends on a variety of factors and can even be of indefinite duration under certain circumstances). As elaborated more fully below, we believe the constraints to secure tenure and to a more fluid land market (or its functional land rental equivalent) in Mozambique are not a consequence of the technical ownership of the land by the state, but rather a result of the partial restrictions on DUAT transferability and of certain inefficiencies in the land administration which consequently lead to actual and perceived weak title (i.e. insecure tenure).

Mozambique can therefore make significant strides toward promoting increased investment in land by revising the current legal framework but leaving the fundamental premise of the 1997 Land Law – the state’s unequivocal ownership of all land – untouched.

In analyzing the policy environment for land-based investments, the following investor-driven criteria for secure access to land stand out:

1. Certainty and Transparency
2. Protection of Investment
3. Community Consent and Participation
4. Sustainable Land Administration

If concerns in these areas can be adequately addressed, then the investor (be it a corporate producer or a smallholder making investments to a family farm) can focus on its core business: (a) determining market demand; (b) production; and (c) supplying product to the market.

Certainty and Transparency

The investor strives to reduce unknown risk to the extent possible: the “rules of the game” should be known to all players and should be enforced in a consistent manner. Even if some rules are not favorable to the

investor, they can be budgeted for in advance if they can be predicted. Furthermore, if the rules are issued in official documents, then they can be appealed (and perhaps modified over time).

In the context of land tenure in Mozambique, stakeholder interviews and research show that updated norms for DUAT acquisition – whether for systematic regularization (RDUAT) or sporadic application (via “pedido”) – are not clearly and comprehensively expressed in definitive regulations or administrative instruments.³ This leads inevitably to a variation in the way cadaster services are implemented across the country, posing risk for the investor. Of even greater concern to the investor are the procedures for approval of DUAT transfers in rural areas, which is not automatic and currently involves significant discretion by cadastral officials. Variations in how transfer applications are treated may be the result of innocent shortcomings in resources (lack of capacity), or may occasionally be the result of rent-seeking. Clarifying and simplifying the procedural standards for rural DUAT transfers, with the aim of also reducing discretion in the approval criteria, would go a long way toward reducing the investment risk.

An even more basic investor need is confidence that the land in question will not be subject to potentially legitimate competing claims by a third party – particularly after time, money and effort have already been spent. In the absence of title insurance (either provided by the private sector as in “deeds” jurisdictions such as the United States, or by the government itself as in a title system), an investor is left to rely on the cadaster’s completeness and integrity. The direct issuance of a DUAT to the investor by a Mozambican government official may not be a sufficient guarantee if the government’s own cadaster records are not diligently kept up to date. Moreover, Mozambique has not set up any title insurance fund to guarantee its title issuance. If a prior claim is overlooked when the investor is issued its DUAT, the older land right may take precedence over the subsequently-issued DUAT. Therefore, it is critical that DINAT’s cadaster system is complete and maintained. Of course, the investor can visit the land in question and verify if there is any conflicting occupation. The investor can also go a step further and question neighbors and local officials about any potential third-party land rights they may be aware of. However, only a fully reliable cadaster will reveal the absence of competing claims. Unfortunately, in visits to the provincial cadaster offices during 2017, it was evident that the digital “SiGIT” (*Sistema de Gestão de Informação sobre a Terra*) land information system is not being uniformly updated with all new DUATs issued, nor have all the DUATs prior to SiGIT been successfully migrated. The lack of single reliable repository, with accurate spatial (geographic) data for DUAT grants raises the possibility of conflicting land rights claims and arguably deters land-based investments.

³ The most recent time official technical norms were issued by the cadaster services was via an “Ordem de Serviço” signed by the head of the then corresponding government department, DINAGECA, in 1989.

Information about land use restrictions is similarly difficult for the investor to access and raises the specter that the subsequent discovery of potential non-compliance with land use plans will place an investment or planned development at risk. For example, the *Planos Distritais de Uso de Terra* (PDUTs) or District Land Use Plans, are either often out of date or not yet developed. Moreover, they are not readily available or reliably integrated in their spatial dimensions with the spatial coordinates of the cadaster registry records. It is hoped that the recent consolidation of both DINAT and the planning agency, *Direcção Nacional de Ordenamento Territorial e Reassentamento* (DNOTR), under one ministry in the current presidential administration – namely under the *Ministerio de Terra, Ambiente e Desenvolvimento Rural* (MITADER), the Ministry of Rural Ministry of Land, Environment and Rural Development – will bring closer integration of planning and land acquisition processes.

It must be emphasized that secure land tenure is not only an issue for direct investor access to land but also in out-grower schemes when an investor contracts with smallholders. We found that the external investor may very well insist that the smallholder demonstrate possession of a DUAT or other title documentation, for the simple reason that the investor wants to avoid situations where the smallholder's land right claim is challenged (by a neighbor or disgruntled family member, for example) and results in a halt of production while the conflict is resolved.

While the integrity and completeness of the cadaster is not primarily a legal framework issue, there are some administrative rules that could be put in place to encourage its integrity and sustainability. Moreover, the legal framework, even if only through administrative rule-making, could be strengthened to require more and better public access to cadaster and land use information. For example, an internet-accessible public portal to display cadaster and land use planning information.

The recommendations pertaining to increased certainty and transparency can be summarized as follows:

- **Issue official technical norms for DUAT acquisition, addressing both systematic regularization (RDUAT) and via sporadic application (“pedido”).** Then norms⁴ should cover both urban and rural contexts and clarify such issues as accuracy requirements for surveys, eligibility for free registration under state-initiated regularization programs, the appropriate use of GNSS/GPS technology, and when the need for physical “marcos” (beacons) may be waived. This would necessarily involve the updating and amendment of the Technical Annex to the Land Law Regulations.
- **Obligatory use of SiGIT (digital registry) for all DUAT issuance.** This could be mandated in phases, if there is continued concern of SiGIT's capabilities.

⁴ The norms could be in the form of a “Ordem de Serviço,” “Circular,” or Ministerial Diploma, or most likely some combination.

- **Public online access to land use planning instruments and to cadastral data.** Privacy concerns have to date complicated the public dissemination of cadastral data via on an online portal. One approach would be to authorize online secured read-only access via SiGIT of the geographic borders of *all* DUATs with the names of the holders, but without any further personalized information such as identification numbers. A more cautious approach might be to withhold names (but not the geographic information) of private individuals, but not of corporate holdings. In principle, DUATs should be published in the *Boletim da Republica*, thus the authority for public dissemination on an online platform essentially exists already. The practice of publishing DUAT authorizations in the BR varies from province to province, and is almost never done with RDUATs. The use of an online portal to disseminate such information could in effect substitute for the publication in the BR, which is done inconsistently in any case. Further consultations with DINAT and MITADER should determine whether any formal administrative instruction is necessary to implement this proposed policy.
- **Land Use Plans.** The current inventory should be analyzed to determine which plans not outdated. Plans deemed useful and relevant should be geo-referenced accurately and published online. This step should presumably be non-controversial, given the absence of privacy concerns and the state's clear interest in their widespread dissemination. Having both DINAT and DINOTR (the planning department) under the same MITADER umbrella should facilitate the integration of land use planning with the land rights cadaster and DUAT issuance.

Protection of Investment

In the context of the Mozambican land sector, a potential investor needs confidence about the following issues:

- Ability, if necessary, to recoup its investment by selling improvements on the land (buildings, irrigation infrastructure, planted crops). In practical terms, the ability to sell improvements is only feasible (or attractive to a buyer) if the seller can transfer the underlying DUAT to the buyer
- Flexibility to transfer use rights over part of its granted DUAT (i.e. subdivision of DUAT)
- Flexibility to change its development plan (wholly or partially) within reason and without excessive fear of DUAT revocation
- Protection against expropriation without just compensation;
- Clarity on compensation and resettlement guidelines to occupants of land earmarked for development
- Ability to challenge arbitrary or arguably "wrong"/"illegal" acts in a timely fashion (in court or via alternative dispute mechanism).

As noted earlier, the current restrictions on the transferability of land use rights (in the rural context) is a key constraint to market fluidity in Mozambique. The fact that the state is the owner per se of the land does not constitute a restraint. Secure tenure of long-term DUATs, with renewable and transferable, rights serve as a good proxy for ownership and does not significantly impede the flow of capital to underdeveloped land. There are numerous examples of countries in which full “ownership” of land is vested in the state, and yet secure, renewable and transferable “leaseholds” between a private person (or corporate entity), as lessee, and the state, as lessor, function to enable relatively efficient land markets.⁵ A long-term leasehold in which the state’s discretion over renewability and transferability is very limited can very closely resemble “full” property rights.

In fact, an argument can be made that “full property rights” in a self-proclaimed capitalist-oriented economy such as the United States is only semantically different than a long-term leasehold: after all, a property owner in most U.S. jurisdictions must pay annual property taxes (or risk expropriation by the state) and, furthermore, at all times is subject to eminent domain in which the state can expropriate one’s property for any of number of reasons (such as building a road, a school, or even making way for a redevelopment project involving other private entities⁶) as long the state pays fair compensation. Viewed through a different lens, an annual real estate tax in the U.S. is only semantically different from “rent” paid by a private citizen or corporation for a leasehold from the state on the land in question. In short, there are precious few examples in the world of theoretically “absolute” property rights held by private persons over real property within the borders of a sovereign country. The more critical issue, therefore, from the perspective of facilitating economic development and the flow of capital, is the degree of government discretion in transferability and renewability.

The Mozambican legal framework arguably inhibits investment and development because transferability of rural land, and of vacant urban land, is subject to a high degree of government discretion (unless the transfer is by virtue of inheritance, in which case it is essentially automatic).⁷ Transferability of land use rights with regard to developed urban land is less of an issue, since the legal framework provides for what

⁵ A good example is Israel, in which ownership of the vast majority land is vested in the state and citizens may only hold leaseholds of up to 98 years. Yet the leaseholds are generally secure, renewable and transferable (with very limited state discretion), allowing a fairly fluid market-oriented economy with respect to land.

⁶ *Kelo v. City of New London*, 545 U.S. 469 (2005), was a landmark U.S. Supreme Court which famously held that a city in the state Connecticut could lawfully expropriate land from one private owner and transfer it to be used in an economic redevelopment project by another private entity, ruling that the expropriation for that purpose satisfied the “public use” criteria for eminent domain.

⁷ See Article 111 of the Constitution of the Republic of Mozambique (CRM); and Lei de Terras (LT) Article 16(1).

amounts to the fairly automatic (i.e. minimal government discretion) transfer of a DUAT when an improvement (for example, a building or other tangible development on the land) is sold.⁸

The issue of being able to transfer DUATs in rural lands is particularly important in the context of being able to sell improvements (buildings, irrigation infrastructure, planted crops). A willing buyer for the improvements will likely only be interested if it can also become the DUAT-holder. In urban areas, there is an automatic transfer of the underlying DUAT, but in rural areas this transfer is subject to a variety of discretionary approvals and thus introduces a risk that may impede the initial investment. An investor will prefer the security of knowing that if it is running short on capital mid-way through a project, the improvements and DUATs can be sold to another interested entrepreneur. There are many examples in Mozambique of “abandoned” improvements and infrastructures (which ultimately revert to the state if the DUAT is revoked), but it is not clear if these improvements would have been “abandoned” if the DUAT transfer procedures in rural areas were automatic or at least less discretionary. We therefore reiterate the need for simplifying the procedures for rural DUAT transfers to make the process more similar to urban areas, including the procedures of subdividing and transferring part of the initial DUAT. If rural DUAT transfers were made automatic, this would also open the possibility for a credit market in which lenders would be able to foreclose not only on the infrastructure but also on the underlying DUAT leasehold. If access to credit could be increased, this would increase investment and thus productivity. At the most recent FCT held in November 2017, DINAT and MITADER have signaled their intention to facilitate rural land rights transfers, though apparently via the mechanism of a *cessão de exploração*, an assignment of land rights. However, we suggest that the issue of rural DUAT transferability be addressed more broadly at its root, rather than just indirectly via the *cessão de exploração* mechanism.

The state’s ability to revoke DUATs is another area that would benefit from revision of the legal framework. DUAT-holders are essentially at risk of losing their leasehold rights if they are in violation of their “plano de exploração,” or development plan. Once again, the standards for when a DUAT-holder is in violation of their *plano de exploração* varies in practice among the provinces, with opportunities in rent-seeking resulting from the discretionary power of government officials. While the state surely has a legitimate interest in how land is used, these interests can be served in many instances by greater attention to, and enforcement of, district land use plans. At present, a *plano de exploração* must be submitted with all DUAT applications, regardless of size. (If the DUAT is being recognized via good faith occupation in state-initiated regularization programs, then parcels below 5 hectares are being exempted in practice, though it is not clear on what legal authority this distinction is being made). If the land use plan indicates agricultural use for a

⁸ See LT, Article 16(4), and Regulamento do Solo Urbano (RSU), Article 35(1).

given area, it is not clear why a smallholder, or even a medium-sized investor, should need to submit a *plano de exploração* committing it to details about the crops it intends to plant. If the state does proceed with revocation, then the DUAT-holder should have clear administrative procedures it can pursue to appeal the decision. The intention of this recommendation is not to endlessly tie up the process in bureaucratic wrangling, but rather afford the rights-holder some minimum due process safeguards.

The investor needs the flexibility to adopt to changing market conditions without having to worry about the risk of revocation in the event of violating its *plano de exploração*. When a DUAT is revoked, whatever improvements may exist on the land revert to the state without compensation. While the legal framework certainly acknowledges permissible exception to compliance with the development plan, these rules allow for too much discretion. If compliance with land use and zoning plans are used to protect the state's interest instead of the *plano de exploração*, then such *planos de exploração* are arguably unnecessary for all but the very largest projects. It should be emphasized, however, that reliance on land use plans to safeguard the state's interest, including environmental and conservation concerns, must be accompanied by more attention paid to updating such land use/zoning plans regularly and by greater efforts in monitoring and enforcement of the plans.

In addition, the current legal framework requires that a *plano de exploração* be refiled and reapproved in the context of a rural DUAT transfer – even if the new DUAT holder does not intend to change the plan. The same is true in the various drafts of a new *cessão de exploração* regulation (namely the “cessionario” or assignee would have to refile a *plano de exploração* under all circumstances). Once again, this introduces discretionary approvals, delays, and opportunities for rent-seeking, with limited benefits for the state or the public. We therefore recommend a revision of the legal framework applying to the *plano de exploração* to exempt its requirement for small and medium sized parcels, as well as to clarify and simplify the rules for its application to large-scale investments. We also suggest that any proposed *cessão de exploração* regulation loosen the requirements of having to refile a *plano de exploração*, unless one does not already exist or if the assignee desires to make substantial changes to it. In addition, if the “cedente” or assignor of the concession already has a DUAT title (as will typically be the case for private assignors as opposed to a community), then it appears superfluous to have the contract approved by the governor or other entity that approved the DUAT in the first place. The assignor retains the DUAT and remains responsible and accountable to the state.

One further area related to protection of investment involves the standards for compensation in the event of expropriation. Any investor – whether it be in Europe, America or in Mozambique – realizes that a land-based investment is subject to the risk of expropriation if the state decides the land in question must be dedicated to a public purpose, such as new roads, railways, water or electric infrastructure, or similar uses.

However, Mozambique's expropriation guidelines are not sufficiently clear as to the valuation methodology, or adequate to address value in the context of large-scale investments. We therefore recommend support for ongoing efforts to revise this legal framework. The flip side is the compensation required of private sector investors seeking to resettle occupants on land earmarked for projects. Guidelines for these compensation processes should be reviewed, with special attention paid to international norms such as the "Voluntary Guidelines on the Responsible Governance of Tenure of Land, Forests, and Fisheries in the Context of National Food Security" (VGGT) and the IFC's Performance Standard 5.

An additional area of concern for the land-based investor is knowing that if conflicts do arise, there is a reliable and fair system for resolving such disputes. The first preference should be for quick out-of-court alternative dispute resolution (ADR), particularly community-based mediation which (unlike arbitration) does not produce winners or losers per se, but rather an agreement that should be sufficiently satisfactory to both parties such that going to court is avoided. We therefore recommend capacity-building for mediation-focused ADR. However, if cases do eventually find their way into the formal court system, it is important that judges be well-versed in the land legal framework and render predictable decisions. Any reform effort should be accompanied by both ADR capacity-building and formal judicial training.

Our recommendations pertaining to increased protection for investment can be summarized as such:

- **Revise procedures for modifying and transferring DUATs (and selling improvements, i.e. buildings, other infrastructure, crops) in rural areas** to simplify the process by reducing numbers and types of approvals (such as eliminating need for *plano de exploração* if the transferee does not wish to change the plan); reducing discretion in the approval process (thus reducing rent-seeking opportunities); and applying timelines whose non-compliance can result in tacit approval without a justification for delay (at least for parcels below a certain size). The goal is to encourage the nascent, existing and informal rural leasehold land market, making the rural "market" similar to the existing urban market.
- ***Cessão de Exploração* (assignment or sublease of land rights)** to eliminate the need to refile a *plano de exploração* (unless the assignee desires a revision, or no plan was ever filed in first place) and eliminate the need to seek approval from the original DUAT-seeking authority (unless the "cedente" was never granted a DUAT title, such as in the case of most communities).
- **Relax the *Plano de Exploração* requirement** to eliminate the need for small and medium parcels in favor of compliance on land use planning instruments. This should be coupled with greater enforcement of land use plans. Overall, the approach is to favor post-facto compliance over the requirement of prior approvals. This accelerates the timeline from an investment decision to ground-breaking.

- **Clarify criteria and procedures for a DUAT's revocation** and the reversion to the state of improvements in such situations, and institute administrative appeal procedures to ensure minimum due process to the rights holders.

Community Consent and Participation

One of the most critical issues for investor confidence and security, as well as for the protection of community members' land rights, remains the mechanism for community consent. The Land Law in Article 30 anticipated that the mechanisms of representation of local communities with respect to land rights would be defined by the enactment of future legal instruments to regulate such procedures. However, no such law has ever been enacted. There has been some guidance as to the procedures for conducting a community consultation within the context of awarding a DUAT to a third party on land that may affect or involve community land, and there is guidance (in the Technical Annex to the Land Law Regulations) on the process by which a community delimits its land. Strictly speaking, these are two different processes, though in reality they may often occur at the same time and the differing guidelines may create confusion in their practical application.

Procedures for the community consultation process were modified by a 2010 *decreto* whose effect (somewhat controversial) was to require that the minutes or conclusions of community consultations would be signed by members of the "Conselhos Consultivos" as opposed to directly by member of the communities, and by a 2011 Diploma Ministerial which elaborated on the 2010 *decreto* and required at least two stages to the consultation process.⁹

The 1998 Land Law Regulations originally specified that the minutes or written results of community consultations would need to be signed by between 3 and 9 representatives of the community as well as by title-holders or occupants of neighboring land.¹⁰ The provision did not specify how the representatives would be chosen, though the implication was that the mechanism for representation was to be determined by, or from within, the community. *Decreto* 43/2010 and *Diploma Ministerial* 158/2011 retained participation of community members, but the actual signing of the community consultation is by members of the *Conselhos Consultivos de Povoação e de Localidade*. While naturally this body would almost surely include members of the local community, this council is, technically speaking, an extension of the state

⁹ See Decreto 43/2010 (CM) and Diploma Ministerial 158/2011 (Ministry of Agriculture). For further discussion (and criticism) of the substitution of the *Conselhos Consultivos* in place of the original language of community members, see Baleira, S. & Chiziane, E. (2011), *O Modelo de Consulta Comunitaria*; Norfolk, S. & Bechtel, P. (2013), *Land Delimitation & Demarcation: Preparing communities for investment*.

¹⁰ Regulamento da Lei de Terras (RLT), Article 27(2), as originally enacted and before amendment.

apparatus whose composition is determined by the *Regulamento da Lei de Orgãos Locais de Estado*,¹¹ in effect a representation imposed from above (and thus more politicized) as opposed to self-determined representation from below. Moreover, the requirement that occupants and title-holders from adjoining areas also sign the documents resulting from the community consultation was dropped. On the positive side, the *Diploma Ministerial* 158/2011 mandated at least two phases to the consultations (recognizing the need for a preparatory and informational phase) and warned that consultations not following the procedures in the *Diploma Ministerial* would be invalid (thus presumably invalidating the DUAT application process itself).

The bottom line is that the procedures for community consultation and community land delimitation should be harmonized, and procedures should also be clarified for the community to become a legal entity capable, for example, of opening a bank account and receiving funds it is entitled to (either because of contracts with outside investors, or via the percentage of mining, forestry, and tourism-related fees it is entitled to under those corresponding laws). We heard that in some cases banks had refused to open accounts for communities, insisting the legal framework was not sufficiently explicit.¹²

We believe that consultations must be genuinely participatory and foster informed consent. It is important to note that informed and effective consent by the local community of a proposed project is not only a protection for members of the local communities – it’s also a protection for the investor who does not want to see an initial investment of time, money and effort wasted if, at a later time, disaffected members of the community object to the project and successfully pressure community leaders or the state to cancel the contract, citing insufficient consultation. In short, hasty and incomplete community consent, as well as one-sided (unfair) negotiations will backfire later with community opposition. For that reason, we recommend a revision of the community consultation guidelines to better ensure reliable community participation and clarify procedures for the benefit of the investor. Much useful material already exists on best practices and should be used as guidance, such as USAID’s “Operational Guidelines for Responsible Land-Based Investment” as well as the New Alliance’s “Analytical Framework for Responsible Land-Based Agricultural Investment.”

We also believe that community members’ interests would be better protected if community delimitation were routinely followed by demarcation of all holdings within the community’s delimited land – namely individual household holdings, public holdings (such as schools and government buildings), churches, associations, corporate holdings, protected areas, and common land. Too often community delimitation has not been followed by demarcation of individual holdings. That practice has slowly started to change,

¹¹ Decreto 11/2005 of 10 June.

¹² Interview with Iniciativa para Terras Comunitárias (ITC) on 28 April 2017.

first with the demarcation of DUATs for productive associations and more recently the demarcation of good faith individual holdings below 5 hectares within the community. However, in many regularization programs (such as Terra Segura), holdings over 5 hectares are not entering the cadaster database, nor are the other types of holdings described above.¹³ The potential for encroachment by third parties on individual holdings within community land, and thus the risk for future disputes, increases when such demarcations are not done. In effect, it is the community's common land which is most appropriate for investor projects, but this land can only be defined properly and reliably once the other holdings are clarified. Whether the investor accesses the land via a DUAT, or via a *cessão de exploração* contract, the granted land must be defined carefully.

As already noted above, resettlement and compensation procedures, and related valuation issues, should also be revisited in the context of community land.

Our recommendations pertaining to increased protection for investment can be summarized as such:

- Harmonize procedures for “Consulta Comunitária” in the context of DUAT attribution to a third party, on the one hand, with community consultations in the context of community delimitations, on the other hand, assuring genuine participation of community members in both instances. The *Conselhos Consultivos de Povoação e de Localidade* should be involved in these consultation processes – but their authority should not eclipse the authority of the community itself, which is a separate concept and entity.
- Clarify of rules regarding representation (mechanisms) for local communities, including formation of legal entity and ability to open bank accounts, receive and use funds, and execute contracts with investor companies.

Sustainable Land Administration

If Mozambique is to provide an attractive venue for increased land-based investment, then it must perform its land administration functions – many of which have been discussed above – in a sustainable fashion. This includes maintaining its digital cadaster database (SiGIT), as well as staffing district, provincial and national positions with sufficient numbers of well-trained staff. Unfortunately, these government offices have not been given sufficient human and physical resources to run the land administration services at the optimum level, and the demands will only increase – for example, as greater numbers of parcels enter the formal system via the massive Terra Segura titling program, and as foreign investors continue to look to Mozambique for opportunities.

¹³ Interview with Maputo Province SPGC Chefe Jossias Cossa, 2 May 2017.

However, increased formalization of land rights does hold out the promise of greater revenue opportunities. Increased land-based taxes and fees are a natural source of funds to help sustain Mozambique's land administration services. The World Bank, in 2011, published a "Policy Note" examining the issue of rural land taxation, and made several recommendations which are still relevant today.¹⁴ Among other suggestions, the Note recommended efforts to: (a) increase the rate of collection; (b) increase the level of taxes; and (c) tailor tax rates more proportionately to "real" or market-oriented values. The Note estimated collection rates to drop from an already low 33% in 2006 to an even lower 16% in 2009. Although this data is not recent, interviews with SPGCs officials in 2017 suggest that collections remain low. Apart from the collection issue, World Bank note described individual tax payment amounts as "negligible" for DUAT-holders.

The Mozambique legal framework already exempts the great majority of parcels from the DUAT tax because they fall under the category of "exploração familiar" (family use) or because the DUAT-holders are local communities or members of local communities.¹⁵ In the first place, Mozambique would benefit from more clearly defining the exemption categories of family use and members of local communities (with an eye toward limiting the exemption to subsistence farming households and the urban poor). Although the philosophy of generous tax exemptions may originally have been conceived to guarantee universal access to land for productive use, the impact of the generous exemptions appears to have the contrary result -- namely the lack of a disincentive to leave the land unproductive. The same can be said of the low tax rate if indeed the parcel *is* taxed. Furthermore, hardly any fees are charged in connection with DUAT transfers, which is a common method in other countries to raise revenue for land administration services. The issue of revising the land taxes, both procedurally and substantively, have been on DINAT's agenda and the time is now ripe to support this process. However, it should be noted that initiatives to raise land-based taxes must be analyzed and planned carefully, such that a potential unintended consequence, namely pushing transactions into the informal sphere, is avoided. Increased tax burdens are more likely to be accepted if they result in visible and tangible improvements in land administration and other public services. Citizens are more willing pay additional taxes if they receive better services. It may be advisable to couple any tax increases with a well-organized SBCC (Social and Behavior Change Communication) campaign to facilitate public acceptance.

As mentioned above, a key piece of sustainable and transparent land administration services is the maintenance of the digital cadaster, SiGIT. Unfortunately, the system has suffered from discontinuity in the contractual relations between DINAT and the private sector company (EXI) that developed the system.

¹⁴ World Bank (May 2011). "Policy Note: Rural Land Taxation in Mozambique."

¹⁵ Art. 29 of the Land Law.

A durable long-term solution is necessary (regardless of whether the government continues to rely on EXI or explores other options).

A final aspect that should be duly considered is decentralization of land administration functions. The current centralization of functions creates both administrative inefficiencies and undue costs for rural land rights holders who must travel great distances to accomplish the simplest procedural tasks. The Land Law refers to the creation of Public Cadaster Services in municipalities and districts, but insufficient guidelines or regulations exist as to how that should be implemented.

Summary Political Economy Analysis

The above discussion recommends a series of reform activities. However, critical questions remain as to whether these interventions are timely and feasible. USAID’s recent “Applied Political Economy Analysis (PEA) Field Guide” observes: “Many of the decisions that determine whether progress is made are shaped by multiple stakeholders with varying degrees and types of influence. This includes a number of often conflicting views, a complicated mix of incentives and interests, and ways of doing things that are likely to be rooted in past experience and rules, but molded by powerful contemporary forces, outside of formal institutions or legal frameworks.”¹⁶

The following questions should be answered as part of the initial PEA analysis:

- a) what is the extent of support for these reforms at the MITADER ministerial level (and higher);
- b) what is the extent of support for these reforms at the DINAT directorate level;
- c) at the lower levels of institutional government bureaucracy, what forces will be supportive or resistant to change;
- d) which elements of the private sector may support the reforms and which may oppose;
- e) whether there will be support among civil society organizations; and
- f) whether there is demand for reform at the community level.

A natural starting point for this summary PEA is the recognition that the current administration, soon after the 2014 general elections, emphasized secure land tenure as one of its priorities. In April 2015 President Nyusi himself launched the “Terra Segura” program which promised 5 million DUAT titles in 5 years. Although it does not demonstrate political will for the reform, *Terra Segura* provides a window of opportunity established at the presidential level to move forward a land sector reform agenda that will

¹⁶ USAID Applied Political Economy Analysis (PEA) Field Guide, Version: February 1, 2016, p.3.

simultaneously assist in the achievement of *Terra Segura's* goals and enable a streamlining of the legal framework to facilitate a more fluid dynamic in the acquisition and transfer of rural land DUATs.

Terra Segura provides a gateway for engagement, since the clarification and streamlining of procedures recommended in the above discussion benefits both the regularization campaign of *Terra Segura* as well as investor-initiated acquisition of DUATs. In addition, the goals of *Terra Segura* to demarcate individual land holdings lend critical weight to the argument that a stable and reliable digital cadaster must be maintained. The registration of 5 million DUATs under *Terra Segura* – it can and should be strongly argued – means little unless the cadaster is maintained with up to date information, such as changes in DUAT titleholders due to death, marriage, divorce, transfers, expiration, revocation, and other modifications. In other countries, typically, between 3% and 7% of land right holders change per year.¹⁷ The sustainability of the *Terra Segura* achievements provides a reason to support the recommendations above related to maintaining the integrity of SiGIT, the digital cadaster database, as well as the recommendations related to reforming the land tax revenue base, because the enormous influx of formal titles into the cadaster system will require a much higher volume and level of cadaster services.

Regarding political will at the ministerial level for more general reform of the legal framework, informal stakeholder meetings indicate that MITADER Minister Celso Correia is committed to reform. The declaration issued at the close of the FCT in November 2017 confirmed the government's intention to make a “revisão pontual,” or limited revision, of the Land Law, while clearly leaving some issues – such as full privatization of real property – unequivocally off limits.

At the level of DINAT, the openness to reform appeared to be a mix of outward cautiousness to donors while internally preparations are underway to consider a vast range of reforms, including not only changes to regulatory instruments but also amendments to the 1997 Land Law itself, once considered almost sacrosanct. In fact, DINAT has internally prepared a list of approximately 40 legal instruments in need of revision (or in some cases to be newly created), including 5 separate proposed changes to the Land Law (requiring approval by the national Assembly) and 9 separate *decretos* that would need approval at the Council of Ministers level. Although the list may be overly ambitious, it certainly reflects the realization within DINAT of the need for revision of the legal framework.

Furthermore, MITADER and DINAT also commissioned a document called “Road Map para a Revisão da Lei de Terras” which was finalized in mid-2016 and focuses explicitly on reforming the Land Law and a series of related legal instruments. The report contains some similar analyses and conclusions to those in

¹⁷ Studies have reflected annual turnover rates ranging from a low of 3.0% in the Netherlands, to 4.9% in Thailand, 6.1% in Sweden and 7% in the UK. See “Costing and Financing of Land Administration Services (CoFLAS) in Developing Countries, Working Document prepared for the Global Land Tool Network (GLTN) by Land Equity International, 2015, p.39.

this paper, and was one of the background documents that formed the basis of MITADER's decision to include revision of the legal framework for land as one of the topics for the 2017 FCT.

Complementary to the above, DINAT and MITADER announced at the close of the FCT in November 2017 their intention to revise the "Política Nacional de Terras" (National Land Policy) which was adopted in a resolution by the Council of Ministers in 1995 (Resolução 10/95). DINAT has proposed to revive and reconstitute the "Comissão Interministerial de Revisão da Legislação de Terras," the Inter-Ministerial Commission for the Revision of the Land Legislation, created by Council of Ministers Decreto 6/96 and which spearheaded the drafting of the 1997 Land Law. The 1995 National Land Policy also refers to an autonomous entity that would be responsible for the "National Cadaster," an institutional reform described as still pending in the draft DINAT presentation.

At the lower levels of bureaucracy, there is a predictable mix of openness and resistance to change. We visited one SPGC who had a new *Chefe* committed to the integrity of the new digital database and who was insisting that all DUATs issued, not just RDUATs, be registered in SiGIT.¹⁸ The importance of maintaining the cadaster is becoming more widely understood among cadaster technicians, though clear instructions at the Directorate level, as advocated in this paper, would help. At the District level, the SDPI (*Serviço Distrital de Planeamento e Infra-Estruturas*) appears eager to take on the new cadaster responsibilities (transferred to it from the SDAE, *Serviços Distritais das Atividades Economicas*, because of the MITADER reorganization), but lack sufficient resources and capacity.

Previously taboo subjects – such as the sale (not just "transfer") – of DUATs is now being openly discussed and advocated among university faculty.¹⁹ The existence of an informal rural land market is now widely acknowledged as fact, and there is a growing understanding that bringing the informal transactions into the formal sector can increase tax and fee revenues to the state, as well as provide more security to smallholders wishing to consolidate and grow to medium-sized business. The demand for formal title among communities and small holders is also growing as external investors insist on formal title (or at least some assurance of land rights) in out-grower schemes.²⁰

Despite what appears to be a growing consensus for reform, some pockets of resistance should be expected. For example, the reduction of procedural discretion (and corresponding process simplification) will reduce rent-seeking opportunities enjoyed by some cadastral officials. In addition, it is still widely mentioned that

¹⁸ Chefe Jossias Cossa of Maputo Province SPGC, visited on 2 May 2017.

¹⁹ Interview with Andre Calengo, a prominent land law figure, on 2 May 2017. He referred to a group of Mondlane University faculty who wished to open a public discourse on the sale of DUATs.

²⁰ Interview with head of Manhica SDAE, as well as with representative of producer association, both on 4 May 2017, in relation to contracts with Maragra.

an element of the political elite prefers a lack of transparency in land transactions such that deals favorable to these elite, that might not survive public scrutiny, can be cut in relative secret. The public access for cadastral information, advocated in this paper, will make these transactions more difficult. Nevertheless, the bulk of investors, and particularly foreign investors, welcome more transparency as enabling increased opportunities throughout the provinces. Another dynamic is the institutional pride within DINAT about the widely-acclaimed progressive Land Law. However, this pride (and occasional defensiveness) is gradually being tempered by the realization that after 20 years, a full generation, the revision of any law is not something to be ashamed of.

Conclusion

The foundations for reform are solid and genuine, despite challenges discussed above. The semantics of the legal framework revision will be important – for some audiences, the word “reform” will be entirely acceptable, while others might prefer less explicit terms such as “adjustment” or its Portuguese equivalent. Likewise, while some audiences may be comfortable talking about land markets, other may prefer to add an extra word and talk about land leasehold markets. Largely in recognition of these nuances, a robust program of consensus-building, across public, private and civil society sectors, should accompany all reform efforts.