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# **Land Use Rights for Commercial Activities in Mozambique**

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# Land Use Rights for Commercial Activities in Mozambique

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The consultant wishes to express his appreciation to all those in government, the business community, the research community, and the NGO community who generously provided information and insights. Thanks are particularly due to those in the sponsoring organizations: Paulo Fumane, President of CTA; Tim Born, USAID/Mozambique; Ashok Menon, TIP Chief of Party; Jim Lafleur, TIP advisor with CTA; and Stelia Narotam of the TIP staff. The TIP team provided both thoughtful advice and logistical support during the visit.

It is a bit intimidating to assess a Land Law that has been written on so extensively by strong local experts, experts who have experience of the law from its conception, and especially where a good deal of the literature is in Portuguese, which the consultant does not read. Thus, the consultant is especially gratefully for the close reading and very helpful comments provided on an early draft by Greg Myers of USAID/Washington, Chris Tanner of the Center for Legal and Judicial Training in Maputo, and Russell Brott of Booz Allen Hamilton. Any errors of fact or interpretation that remain are entirely the responsibility of the author.



# Preface

Land law provides not only rules about land rights but also regulatory frameworks and administrative competences that are the basis for mobilizing non-legal incentives. Through its legal enactments relating to land, the State creates property rights, determines the scope of the rights and obligations that accompany them, and provides for regulating use of land. This body of law is fundamental in that it regulates our possession and use of the natural resource that underlies and supports much of the life of our planet, providing the physical underpinning of our environment, our productive activities, and our social and political constructs.

Land laws set the terms for transactions in land; in so doing they help determine the efficiency of land markets and shape patterns of land distribution. They in part determine the distribution of development opportunities and the incidence of poverty. The terms on which landholders hold their land affect their incentives to husband or neglect it. Land and property rights have deep, emotive social and cultural significance in the societies of many developing countries because access to land is intimately related to kinship and identity, and control of land is a base of political and state power.

Today, we are seeing unprecedented land law reform,<sup>1</sup> in part because of the broad trend toward market liberalization and the demand for stronger private property rights in land. The changes in former socialist countries have created almost overnight the need for entire national systems of real property law. In framing these new systems, it is necessary to address not only the needs of economic growth but new demands, such as gender equity, poverty alleviation, and environmental protection. In countries where the state had appropriated and attempted to manage natural resources directly, policymakers are rethinking laws in light of extensive failures in such management. At the same time, a more democratic ethos that requires land tenure to reflect popular choices rather than technocratic “fixes” or ideology-driven solutions has emerged.

Mozambique’s Land Law is modern and progressive. It is often proposed as a model worth consideration by other African countries. But stipulating the desired situation in a law is not enough. The law must change incentives and structure a process of change. All of us who work in this area know of elegant laws that have had little impact on behavior, some for want of implementation and others in spite of serious efforts at implementation. Political will, financial

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<sup>1</sup> See John W. Bruce *et al.*, 2006. *Land Law Reform: Achieving Development Policy Objectives*; Patrick McAuslan, 2003, *Bringing the Law Back In: Essays in Land, Law and Development*; and the Land chapter of FAO, 2002, *Law and Sustainable Development Since Rio: Legal Trends in Agriculture and Natural Resource Management*.

and institutional capacity, and beneficiary awareness all play important roles. The question in Mozambique, as elsewhere, is the extent to which the Land Law is making an effective contribution to development.

The current consultancy is focused by the TOR on Land Law of Mozambique as it affects the development of land intended for commercial production, and not land used primarily for subsistence activities.<sup>2</sup> Most of the literature on the 1997 Land Law and its implementation examines its impact on customary landholders, and with good reason. But the future of holdings granted for commercial development is equally important, and much less has been written on this subject. One exception is a valuable 2005 World Bank report that focuses on commercial operations and investment, and which is cited frequently in this paper.

There is a consensus in Mozambique and among outside observers that investment in Mozambique's commercial and tourist sectors is growing satisfactorily, but that investment in agriculture is lagging badly. A persistent refrain among investors who would like to pursue agricultural projects is that there are bureaucratic and legal impediments to acquiring land and that, in part because of those impediments, they have difficulty obtaining credit. Commercial banks that do in fact seem to have credit available cite two problems: (1) a lack of proposals that seem likely to be profitable given the uncertain conditions under which agriculture in Mozambique operates, and (2) the fact that neither agricultural land itself nor the land use right for such land can under Mozambican law be readily used to secure loans. Those focusing on the inability to mortgage rights in agricultural land ask whether it is not time for the 1997 Land Law to be amended, or for the regulatory framework (rules that elaborate on the law itself) to be modified.

This paper deals with both non-agricultural and agricultural land. It devotes substantially more space and consideration to agricultural land, however, because this is—as will be seen—the more problematic area. It identifies certain legal problems, reviews remedial approaches suggested to date, and draws on international experience to recommend steps forward. While the central theme is the need to allow a greater role for markets, the consultant hopes that this paper will not be perceived as simply another externally funded proposal for “privatization.” The Land Law already recognizes a private right in land, the DUAT, and this paper takes as starting points both the fundamental workability of that right and the perception of many Mozambicans and others who know the law well that there is a serious need to improve the effectiveness and application of the right.<sup>3</sup>

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<sup>2</sup> The focus is both a strength and a limitation. The downside is that the paper says little about the vast majority of DUATs that exist as entitlement of smallholders (but which remain invisible because the state has not prioritized identifying and recording them), or the potential of commercial production to emerge on those lands, and or the legal mechanisms involved in this process.

<sup>3</sup> Rosario and Tanner (2002) provide an integrated vision of how reforms in land rights and their administration could be coordinated for the present commercial and subsistence sectors.

# Executive Summary

The granting of large concessions around the close of the Civil War and the continued granting of relatively large concessions has created a bimodal agrarian structure in Mozambique. A large percentage of land is in very large parcels and a large percentage is in quite small peasant parcels, but very few parcels are of intermediate size. In an advanced agricultural economy, the different scales of production that are economic for different activities usually means that less land is at the ends of the spectrum and more is in the middle. In Mozambique the middle is empty and the market in land rights has had little impact on distribution because of legal restrictions. Most of the land in these holdings remains unused. How will these large holdings be broken into smaller, more efficient units, and what role should markets play in this process?

The Land Law of 1997 sought to (1) rationalize and regularize land granting, (2) legitimize existing grants, (3) moderate granting through criteria and standard procedures, and (4) reaffirm the rights of peasant landholding communities. Though in many ways a model law, the Land Law is transitional. It takes the first steps on the bridge between a state-managed land economy to one in which a market in land rights play a major role. In such a transition, opinions on the appropriate rate of transition differ. Some, primarily from the business and donor communities, have called for modifications of the Law itself or even changes in its regulations. Indeed, though the Law deals effectively with land access issues and, for the most part, with security of tenure, some problems deserve attention:

- ***Unrealistic costs.*** Virtually free access to grants has contributed to an agrarian structure in which land remains unused and landholders lack the ability to use it. Imposition of a realistic cost is the best way to keep appetite in accord with capacity to develop. A framework similar to that currently used for the annual land fees could be used to set authorization fees.
- ***Uncertain finalization.*** Investment and productive land use under a system of state ownership require robust and unconditional land rights. Requiring that development promised in return for a land use right (*direito de uso e aproveitamento dos terros* or DUAT) be carried out before a final rights is approved is logical, but conditionality and legal control of management must not extend beyond finalization. At present, criteria for deciding whether a use plan has been fulfilled are inadequate, rendering decisions uncertain and potentially arbitrary.
- ***Reversion of improvements to the state.*** The Law provides that nonmoveable improvements shall revert to the state upon termination of the right of land use and benefit. This is a serious and unfortunate disincentive for investment and should be changed.

The imminent redrafting of the *Codigo do Registro Praedial* (the Real Estate Registration Code) must be approached with care. Rules on the legal effect of registration and priorities as affected by registration are not clear in the Law's interaction with the Code; care must be taken to avoid devaluing land rights granted under the Law.

Given Mozambique's history of making large land grants, achieving an economically sound pattern of land distribution requires land rights that are transferable and mortgageable. Here, a number of obstacles present themselves. For example, one may transfer a *prédio urbano* without approvals but must get approval to transfer a *prédio rústico*. The discretion allowed administrative authorities is seen as an obstacle, source of uncertainty, and a temptation to corrupt practices. The Land Law and its regulations do not provide for partitioning a DUAT and tenement. Partitioning, however, would enable transferring of developed tenements and quell concerns about land speculation. The law and regulations are also silent on subleasing a DUAT for an urban tenement. The transferability of urban tenements suggests that they can also be subleased, but Article 15(4) of the Land Law stipulates that transfers of rural tenements be approved. Here specifically, the inability to sublease under the DUAT constrains the development of holdings of intermediate size and may be impeding the emergence of Mozambican investors in agriculture.

Limitations on the transfer of the *prédio rústico* are worsened by the fact any transfer of buildings that does occur is not accompanied by the transfer of land. This is a big barrier to mortgaging rights to use land or even buildings. And the mortgaging of buildings without land is not a realistic proposition. Such provisions constrain access to credit for emergent commercial farmers.

The new Urban Land Regulations provide an opportunity to address issues affecting urban land, but rural land issues also need immediate attention and considerate action. In addressing such needs, international experience offers some lessons. First, land markets can be important in redistributing land in proportion to a holder's ability to develop it, especially in redistribution from granted DUATs. Second, if legal restrictions attempt to block demand for land, that demand will be satisfied informally. This is happening in Mozambique. While land may be moving to informal purchasers at lower prices, the insecurity of informal transactions is ultimately to buyers' considerable disadvantage. Third, in the absence of economic charges for land allocated by government, it would be appropriate to recognize land value through a substantial group rent. Exemptions for certain groups may be appropriate, but substantial rent would discourage holding land idle and thereby address a major problem in Mozambique by making land available to fill the "empty middle."

Ten recommendations related to the Land Law address many of these concerns. The Government of Mozambique is urged to

1. Consider imposing an authorization fee on provisional grants of DUATs modified to bear a logical relation to the economic potential of the land granted, including its extent.
2. Establish a clear, objective standard for determining whether an exploitation plan has been carried out.

3. Eliminate exploitation plans, land use conditions, and approval requirements for changes in land use once the conditions of a provisional DUAT have been met and the final DUAT is issued.
4. Amend the Land Law to require compensation for actual value of nonmoveable improvements when a final DUAT is terminated.
5. Revise the Código do Registro Praedial with full participation of those holding or having rights to receive DUATs and those administering that system—and to ensure that those for whom access to that register is difficult will not be disadvantaged by any legal revisions.
6. Make any DUAT for a *prédio rústico* transferable on the same terms as a *prédio urbano*, upon registration, with the transferee succeeding automatically to any obligations of the transferor, including the obligation to fulfill any plan of exploitation on which a provisional DUAT was conditioned.
7. Allow the partition of any tenement and the related DUAT and the finalization of the DUAT for any resultant tenement so long as the conditions of the DUAT have been satisfied with regard to that tenement.
8. Allow all or a part of any DUAT and tenement covered by it to be subject to a sub-DUAT, in whole or in part without any administrative approval.
9. Enhance the usefulness of the *prédio rústico* as security for a loan by removing the requirement of administrative approval for transfer and by providing more specific provisions on mortgagability, similar to those for mortgaging urban land under the new Urban Land Regulations.
10. Launch a parallel process to develop a more detailed Rural Land Regulation, but ensure the development process is far more participatory.

The Government of Mozambique has been attentive to the effective implementation of the Land Law through revisions of the regulatory framework on a number of occasions. These recommendations will hopefully provide grist for that mill.



# 1. Investment and Agrarian Structure: The Empty Middle

Who wants to invest in Mozambique's agricultural sector, what do they need in order to invest, and how well is the Land Law addressing those needs? A brief review of Mozambique's pattern of land distribution is helpful in understanding the country's agrarian structure. In sum, the granting of large concessions has created a "bimodal" agrarian structure, with most land either in very large or very small parcels and hardly any in parcels of intermediate size. A well-developed agricultural economy usually does not have an "empty middle" pattern of land distribution, but one that reflects the different scales of production that are economical for different activities. In Mozambique, however, legal restrictions have restrained the market in land rights and that market has not had much effect on the distribution of parcel size. Most of the land in these holdings remains unutilized. How can large holdings, for example, be broken into smaller, more efficient units, and what role should markets play in this process?

## **HISTORY OF LAND ALLOCATION**

In the early years after independence, Mozambique embraced state ownership of all land and pursued a socialist agrarian policy of replacing colonial agriculture with a structure of state farms, over the opposition of traditional authorities, seeking to reorganize peasant producers into agricultural collectives. These policies paid off poorly in terms of agricultural productivity. And, and in spite of their implementation in quite limited geographical areas, it appears that popular resentment related to them contributed to the Civil War.

During the Civil War and its immediate aftermath, up to about 1993, the government was desperate to stimulate agricultural production, especially production of cash crops such as tobacco and cotton with potential for export and with potential to substitute for imports. If state ownership of land was clear, there was still a vacuum in land management. Even those limited areas that had been under effective state control before the war, such as the state farms, became objects of contention among a variety of stakeholders. Jockeying for control of this land were former state farm laborers, persons displaced by the war who had been settled within the farms' security zones, and the local groups from whose territory the land for state farms had been taken,

either after independence or even in the colonial period. It would take some years to address this confusion.<sup>4</sup>

In the meantime, government sought foreign investment. Under wartime conditions, concessionaires were expected to provide their own security, and in such an environment only extraordinarily large land concessions and extraordinary incentives would attract investors (e.g., input supply and marketing monopolies, land and other natural resources made in the form of concessions for free or considerably below market value). Long-term concessions that provided these incentives were granted. Government could provide few agricultural services, and the private sector had been degrading for years. Foreign investors, often large multinationals, needed to “do it all” themselves: inputs, production, processing, marketing, and transport. They embodied the concept of vertical integration. And they provided one durable element in the agrarian structure: large integrated operations of many thousands of hectares, employing substantial numbers of local workers, dominating local input supply, processing and marketing, and often expanding their scope of production through out-grower agreements with peasant farmers. Negrao (1992) estimates that until 1990, about 28,000 square kilometers in concessions were awarded. Higher estimates have been offered, but in the absence of good records, or even any records, it is not possible to know for certain how many concessions were awarded, by whom and to whom. These awards often ignored the rights of peasant communities or constituted an implicit denial of them as whole villages were included in some concessions.<sup>5</sup>

A second wave of land concessions took place from 1993 through 1997 as national reconstruction took hold. These were for land in commercially productive areas near urban areas, near lines of transport (in particular along the Maputo and Beira corridors), and in some coastal areas. Concessions remained extremely large, on the scale of hundreds and thousands of hectares, and while some were still to foreign investors, many were now to Mozambicans. Very little was paid for these concessions. More recent acquisitions have targeted land with higher values for ecotourism, agriculture, mining forestry and hunting. These tend to be smaller than the earlier concessions and less speculative, but by international standards the areas of land involved are still huge. A 2006 World Bank report estimates that the concessions to private farmers and companies since 1992 amount to about 5,000 square kilometers, and it provides figures on applications for land that give a sense of the vast appetite for land:<sup>6</sup>

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<sup>4</sup> See Tanner *et al* (1993) and Myers and West (1993) and (1994).

<sup>5</sup> One researcher tracking this process at the time reflected, in a recent personal communication to the consultant: “At best, we can say that there was a different interpretation by the government as to who owns the land, at worst that the Government appropriated the land from its customary users.”

<sup>6</sup> World Bank, 1995, 18-19. It is not clear whether the 5,000 square kilometers mentioned in this paper is part of the 28,000 figure from Negrao (1992), as cited above. A number of factors make these estimates hard to sort out: some estimates include land “in the pipeline,” while others do not, and some focus exclusively on land for cultivation while others include grazing or even other uses. In addition to concessions of land for cultivation are vast areas under grazing, hunting, and mineral concessions, and these often overlap with agricultural concessions. Various figures are cited in this paper, but the consultant believes that they are for the most part incomplete, and so understate the amounts.

The number of applications for titles dealt with in a period for the two years from October 2001 to October 2003 was just over 5,500, covering a total land area of 3.9 million ha. Most of the applications were approved, though the amount of land covered by the applications that were approved is not reported.

Put in context, the land area covered by the applications for land titles over this period was equivalent to 90% of the total area of cultivated land in the country.

Some of the applications were for vast amounts of land. As an illustration, 149 applications for land in Gaza in 2002-03 cover 2.3 million ha or an average of 15,500 ha per application. On the other hand, the 183 applications for land titles in Niassa and Tete during the same year averaged 36 ha.

The World Bank report notes on page 19 that the land area covered by the two years of applications is almost equivalent to 90 percent of the total area of cultivated land in the country, and that little of this land is likely to be brought under cultivation in the immediate future. “More fundamentally, it is questionable as to whether any land titles for land areas of more than 1,000 or 2,000 ha should be awarded for agricultural use. Under current conditions, such large areas of land will only be used for extensive livestock production, be discouraged.”

In the absence of cadastral maps, there has often been no serious ascertainment of whether peasants were already using the land, what rights they might have had, or even whether one concession overlapped another. Different government agencies granted different types of concessions, and these were sometimes inconsistent with one another. Many of the applications for land were speculative in nature, and much of the land remains undeveloped. Land granting continues, somewhat abated and joined by land purchases by investors from primary right-holders.

## **CURRENT STATE OF LAND ALLOCATION**

A watershed attempt to provide a legal framework for land allocation, the 1997 Land Law has four principal objectives: (1) to rationalize and regularize land granting, (2) to legitimize grants already made, (3) to moderate the process somewhat through provision of criteria and standard procedures, and (4) to reaffirm the rights of peasant landholding communities.

Allocation processes, which did not originate with the 1997 Law but which it seems to have had little success in moderating, have resulted in what students of agrarian structure call a “bimodal” pattern of agricultural land distribution. This means that owned holdings are either very large or very small, with only a few of middle size. In more advanced agricultural economies, more land is in the middle range. A diversity of land uses and scales appropriate to each produce a range of holding sizes. Very small and very large holdings are the exceptions, not the rule. Economists consider allocating land in appropriate sizes to different purposes and to different users to be a reflection of healthy markets.<sup>7</sup> But in Mozambique large allocations of land by the government

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<sup>7</sup> Bruce Johnston and Peter Kilby in *Agriculture and Structural Transformation: Economic Strategies in Late-Developing Countries* (1975, 19-21) present the classic treatment of bimodal distribution of land and the advantages of a unimodal distribution. The treatment is updated in Tomich, Kilby, and Johnston, *Transforming Agrarian Economies: Opportunities Seized, Opportunities Missed* (1995, 149-186). More

have created the bimodal distribution pattern. On a graph this would resemble a two-humped camel, each hump representing a large amount of land at the upper and lower end of the owned farm size scale. At the upper end, these would consist of (1) large commercial operations that have been granted DUATs and (2) the communities that have such DUATs by virtue of occupation. At the lower end would be smallholders who have DUAT rights under the law. The middle is relatively empty.<sup>8</sup>

Why does this matter? It matters because much highly productive agriculture normally takes place in the middle. The scale of colonial production and the scale of the early concession operations—reinforced by lingering ideas from the socialist period about economies of scale in agricultural production—have caused many Mozambicans to continue identifying efficient commercial production with very large-scale production and subsistence production with small-scale production. Empirical research, however, has demonstrated that there are few economies of scale in agricultural production. On a level playing field, so long as labor costs are modest—as in Mozambique and most of Africa—small and medium farms tend to do better than large farms, mainly because family labor tends to be very efficient and small farms are easier to manage.<sup>9</sup> It can be hard for small and medium operations, however, to achieve their profit potential in the absence of a vibrant agricultural services sector, one that provides economies of scale in processing and marketing. In such a situation, the ability of large operations to integrate vertically gives them a decided advantage.

The filling in of the empty middle, especially by Mozambicans,<sup>10</sup> is impeded not only by the lack of a strong agricultural services sector but also by legal problems. As we shall see, under the current legal framework Mozambicans' purchasing of land use rights tends to break up inefficiently large and poorly used parcels of land only to bulk up inefficiently small parcels of land. Legal inadequacies regarding land use rights make it difficult to market those rights, which, in turn, makes it difficult for aspiring Mozambican investors to acquire the credit necessary to purchase and invest in agricultural land.

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recently, and with reference to Africa, see Gabre-Medhin and Johnston, *Accelerating Africa's Structural Transformation: Lessons from East Africa* (2003).

<sup>8</sup> The 2005 World Bank paper, *An Economic Analysis of Natural Resources in Mozambique: Rural Land Issues and Policies*, is misleading when it uses data on cultivated holdings rather than owned holdings in analyzing land distribution and competition for land between large and small farms (p. 3).

<sup>9</sup> See Tomich *et al* (1995, 109-148) and Carter and Zimmerman (2000, 265-302).

<sup>10</sup> While foreign investment has an important role to play in Mozambican agriculture, commercial agricultural production should increasingly be the business of Mozambicans. The regime for investment in land in Mozambique by foreign investors is relatively liberal compared with many countries in Africa, allowing ownership by foreign-owned firms so long as they are locally incorporated and by foreign individuals who are resident in Mozambique (Art. 11 of the Land Law). Because foreign investors, with the exceptions of the very large concessions, operate within the same legal framework as Mozambicans, the reforms proposed here are important for small and medium foreign investors as well as national investors.

## 2. Fundamentals of the 1997 Land Law

Though this is not the place for an exhaustive discussion of the 1997 Land Law or subsequent regulations, a clear understanding of the Law's historic role will be useful in the discussion of narrower issues.<sup>11</sup> The Government of Mozambique treats the Law as almost sacrosanct, perhaps because it embodies the long struggle to achieve land policy compromises. The government is reluctant to see those policy issues reopened. The law has been generally well received and positively evaluated by experts and has sometimes been suggested as a model for other African countries.<sup>12</sup>

Still, the law needs to be understood in its historical context. It is a transitional law, one that launched the transformation of a mixed socialist and traditional land economy into a land tenure system functioning as part of an emerging market economy. It is best thought of as a bridge rather than a final solution to land policy issues.

On top of the chaos in landholding created by the Civil War was the government's granting of extensive land concessions. Rights of peasant land users were unclear and concerns about displacement were growing. Mozambique had emerged from its Civil War without a coherent body of land law. In the post-conflict situation of 1992, land and property rights were seen as politically delicate subjects and the acceptable parameters of public discussion of them were far from clear. Gradually, however, and with some encouragement from the donor community, the matter moved onto the government's public agenda. USAID funded a program of applied research on land tenure issues by the Land Tenure Center of the University of Wisconsin-

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<sup>11</sup> The Land Law is Law No. 19/97, October 1, 1997. There are two sets of regulations under the Land Law. The first apply to all land: the Land Law Regulations approved by Council of Ministers Decree No. 66/98, December 8, 1998, supplemented by a Technical Annex promulgated under the Land Law by the Ministry of Agriculture and Fisheries, December 7, 1999. We refer to these regulations as the Land Regulations and rely on English translations provided in Adrian Frey and Odete Mugumela, *Land Law Legislation* (Maputo: MozLegal, 2004). The second set of regulations are the Urban Land Regulations, approved by the Council of Ministers in late 2006 but not yet published. USAID provided us an English translation of these, also by MozLegal. According to Article 2, these most recent regulations apply to "areas in legally established towns and cities and in human settlements or population agglomerations organized by urbanization plans." They are referred to here as the Urban Land Regulations.

<sup>12</sup> For example, see De Wit (2000), *Land Law Reform in Mozambique: Acquired Values and Needs for Consolidation*, and Palmer (2000), *Land Policy in Africa: Lessons from Recent Policy and Implementation Processes*.

Madison which stimulated public discussion and led to two land conferences in 1992 and 1994. These fed into an “Ad Hoc” Land Commission established in the Ministry of Agriculture.

In 1993, FAO also began funding research on land issues. By 1995, a new Inter-Ministerial Commission for the Revision of Land Legislation had been created, reporting directly to the office of the President. Eight other government ministries and additional agencies were brought into the discussions, as well as nongovernmental players including “land NGOs,” such as ORAM, the cooperative union UGC, and the research center NET at the Eduardo Mondelane University. These NGOs were not merely consulted, but participated fully in discussions. Early drafts of the law were widely circulated and debated in meetings that were entirely uncontrolled by the state, with written feedback analyzed. A 1996 National Land Conference, with the presence of a large contingent of civil society representatives, discussed the draft bill.

The Commission, with ongoing assistance from FAO, moved directly into work on a Land Law.<sup>13</sup> The Land Law was enacted in July 1997 (Law 19/97) and a set of Land Law Regulations was approved in December 1998 (Decree 66/98).<sup>14</sup> The Land Law confirmed the constitutional principle of state ownership of all land and both ratified and simplified the processes of government allocations of state land. It sought to define a relationship between the concession program and the customary systems of land tenure prevailing in the country.<sup>15</sup> As such, it embodies some critical policy choices, as follows:

- The Law establishes a new property right in land, a land use right that is inheritable and, subject to certain restrictions, transferable. This is a long-term right (50 years maximum, renewable, according to Article 17(1) of the Land Law), and roughly comparable to a lease. This land use right is known by the acronym DUAT (from the Portuguese *direito de uso e aproveitamento das terras*, or right of use and benefit of land).<sup>16</sup> It is a private right in land, a property right, if not full ownership, and legally at least, it is available to all Mozambicans using land.<sup>17</sup>

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<sup>13</sup> A land policy paper was never produced. This was unfortunate, since such a paper can help focus broad public consultation, something that did not take place during development of the Land Law beyond a few conferences and workshops. The law is based on insights drawn primarily from research rather than public consultation.

<sup>14</sup> Those who participated in the development of the law have documented the development process as well as the ideas that influenced development. See Christopher Tanner (2002), *Law-making in an African Context: The 1997 Mozambique Land Law*, FAO Legal Papers Online #26. Quadros, Conceição (2002), *Country Case Study Mozambique, Report to the World Bank Regional Workshop on Land Policy and Administration in Kampala* (Maputo) also sheds light on the intentions of the drafters.

<sup>15</sup> A World Bank report (2005, 12), otherwise a valuable document, suggests that the Land Law failed to address “the balance between more intensive or more extensive land use, which is equivalent to balancing traditional communities rights with attracting more capitalized and commercially oriented farming systems.” In fact, this is the *main* issue that preoccupied the drafters of the law; the equivalence suggested may also be questioned.

<sup>16</sup> The right is a hybrid of the common leasehold (limited in time) and the civil law usufruct. In its heavy conditionality and limited term, it more closely resembles a lease.

<sup>17</sup> While this right is legally available to all under the Law, it is very difficult to imagine most smallholders accessing a DUAT. The lack of information and resources would make this difficult, as would

- The Law organized within a standard framework the imposition of development conditions upon grants of land use rights acquired by application to government. Under Article 25, all applications for land are initially authorized provisionally, subject to fulfillment of an exploitation plan. Provisional authorization is valid for ten years for national persons and two years for foreign persons. Under Article 18(1)(a), the DUAT is revocable for failure to fulfill the exploitation plan accompanying the grant.<sup>18</sup> In that case, under Article 18(2), non-removable improvements on the land revert to the State with the land, and under Article 32(2) of the Regulations, no compensation is due for those improvements.<sup>19</sup> A final DUAT is granted in response to an application to the appropriate authorities once the exploitation plan is fulfilled.
- The Law under Article 12 allows such use rights or DUATs to be created not only by grant from government, but also by prescription (acquiring land rights through occupation) through good faith occupation of land for ten years, and by occupation “according to customary norms and practices.” Land use rights acquired by occupation, either by prescription or by customary occupation, are not conditioned upon exploitation plans. They are not provisional but final. The Law thus recognizes and protects property rights in the broad mass of rural Mozambicans, giving them the same rights as those granted to the influential. A fundamental duality of land tenure was thus avoided. It also allows rights to be acquired over state land by occupation, which is unusual even in state land ownership systems. Depending on how the “good faith” requirement is interpreted, this provision could be very important to informal land occupants in urban and peri-urban areas.
- The Law in Articles 12 and 13 recognizes “local communities” as well as individuals as holders of land use rights. These rights may be held over substantial areas of land constituting a community’s traditional territory. The definition of the areas of such communities in Article 1(1) of the Law is expansive, specifically including “areas for expansion,” but also stipulates that such a community must be no larger than the size of the locality (the smallest official unit of government). A *consultas* process has been developed to assist communities in establishing their DUAT territories,<sup>20</sup> but the state is still the ultimate decider as to the extent

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the lack of government capacity at local level to process an application for a DUAT. In fact, government has failed to systematically identify and record the vast majority of (customarily acquired) DUATs.

<sup>18</sup> The lack of a clear process and criteria for determining whether such a failure has taken place is one of the most serious weaknesses of the Law. It invites abuse of discretion by officials responsible for such decisions.

<sup>19</sup> Conditional land rights are inherently insecure, and given the short term of the provisional approval, many are now in default. Article 48 of the Land Regulations provides that the Law and Regulations apply to applications in process and that applicants must within a period of one year after the Regulations go into force, confirm or reformulate their initial application under pain of cancellation of their application process. A considerable number of DUATs have been terminated for this reason, especially those that were “in the pipeline” and had not been finalized, but the processes of inspection, conversion, reformulation or termination have not been pursued as systematically as should be the case. In addition, areas covered by such “cancelled” rights are reported to be still occupied by the original claimant with no response from the state, resulting in de facto continuing occupation and blocking any chance of reallocation to more efficient users.

<sup>20</sup> On the consultation process, see Tanner and Baleira (2006).

of the territory recognized in the DUAT. As titleholders, local communities have a legal personality and can make contracts. Articles 12 and 13 also recognize that members of those communities can themselves establish individual DUATs on the land they use within those community territories and that these communities can enter into deals with outside investors to allow them to use community land. While community rights are recognized, these are not intended to be “reservations” closed to outside investors.<sup>21</sup>

- The Law creates a distinction between two basic categories of land and buildings, the urban tenement (*prédio urbano*) and the rural tenement (*prédio rústico*). The definitions of these are worth quoting at the outset. Article 1 of the Land Law Regulations, the definitions section, provides:

*Rural tenement (Prédio Rústico):* a demarcated portion of land and the structures on it that have no independent economic use or value, where the source of income depends principally on the land itself, while the structures are there to support the exploitation of the land.

*Urban tenement (Prédio Urbano):* a building incorporated on the land, with the grounds that serve it, where the source of income depends principally on the existing structures and not on the land itself.

It should be noted that the adjectives “urban” and “rural” are misleading, in that it is not the location of the land but the primary source of its economic value that determines into which category it will fall. If the economic value of a parcel is primarily due to the use of the land itself, as would normally be the situation for agricultural land, one is dealing with a *prédio rústico*. If the major source of the value of the parcel stems from a building on it, even if it is in a rural area, one is dealing with a *prédio urbano*. So, for example, a tourist lodge and the parcel upon which it sits, near a wildlife preserve and far from any urban environment, may still be a *prédio urbano*.

Until recently, it seemed that a farm parcel in a city might be a *prédio rústico*, but under the 2006 Urban Land Regulations it appears that a tenement may be a *prédio urbano* simply because it is in an urban area.<sup>22</sup> As we shall see, this has important implications. The distinction between the two types of tenements is a major determinant of the transferability of the land in the tenement in question.

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<sup>21</sup> To date, however, there seems to be little outside investment in these areas.

<sup>22</sup> The Urban Land Regulations, in Article 1(10), provide a definition of urban tenement somewhat different from the definition in the Land Regulations. Sub-article 10 provides that an urban tenement is “a building incorporated on the land, with the grounds that serve it, as well as a delimited parcel or section that is within an urbanized area.” Prior to this provision, one would have imagined that a rural tenement might have existed in urban areas, if land rather than the building was the tenement’s principle source of value, but it now seems that being in an urban area is sufficient to render any tenement urban.

# 3. Access to Land and Security of Tenure

The ability of investors to access land relatively easily and on terms that make them secure in their holding is critical to investment. In other market economies, access to land is primarily through a market in land rights, but in Mozambique state allocation predominates. Access is inexpensive, by almost any standard, because the state does not seek to charge economic prices for land. Indeed its failure to do so is helping to create economically unsound incentives regarding land use. Access problems have instead to do with bureaucratic limitations, some of which are discussed in this section. Security of tenure—the confident expectation that one will hold land without interference and be able to profit from one’s investments—is limited by a number of aspects of the Land Law, and in particular conditions on use and failure to provide compensation for improvements. Insecurity of tenure discourages investment and thus is of major concern.

## **LAND ACCESS AND THE AUTHORIZATION FEE**

The most fundamental policy choice embodied in the Law, constitutionally mandated, is state ownership of land. In a post-conflict situation in which normative confusion about property rights abounded, government needed to engage in a mix of confirmation and allocation of property rights, accommodating different stakeholder groups. Reaffirmation of state ownership provided the legal basis for engaging in this task. A property rights system and holdings under it must be established before markets in land or land rights can begin to function. The Land Law provided government with a basis for balancing needs of existing users, such as local communities, with those seeking land for investment.

It can be argued that the government has not always exercised its discretion well in striking this balance. The allocation of huge holdings to those who in many cases clearly lacked the capital and expertise necessary to develop them was unwise and raised significant problems for policy and law reform today. This is not a special failing of government in Mozambique. It is an absolutely typical result where government distributes land without imposing a significant cost. Imposition of such a cost would have been the best way of keeping appetites in some reasonable relationship to capacity to develop. It is something that still needs to be done.

A framework similar to that currently used for the annual land fees—with some reforms, suggested below—could be used to set authorization fees. If an applicant cannot find the funds to

pay the authorization fee, the applicant is not going to be able find the funds to develop the land.<sup>23</sup>

## STATE OWNERSHIP, CONDITIONALITY, AND SECURITY OF TENURE

The Land Law also reflects the constitutional mandate that all land remain in the ownership of the state and that only use rights be grantable to users. One can question whether this is the best decision—the author on balance prefers ownership, given the problems that arise with state management of land—but it is possible to have a satisfactorily functioning land economy under state ownership. This is only the case, however, if

- Land users are empowered as economic decision-makers by the grant of secure and robust land use rights unencumbered by heavy conditionality. Property rights are of course never absolute, but landholders must have the right to decide how to use their land in response to changing market conditions.
- Land users are able to transfer their property rights and use them to secure credit. Without the ability to do this, land is in effect not part of the market economy and investment in land will be reduced.
- The system of land administration is technically and administratively competent and reasonably honest.

This means that once initial land allocations are made, the government should engage in facilitation and land administration, not land management. Attempting to manage land use through legal controls, such as by granting land for specific uses then requiring administrative approval for changes in use, undermines incentives for land users to invest in and manage land. In Mozambique, the option for state land ownership is based on an assumption that government must manage the nation's land resources. Land is seen as a public asset entrusted to users but the use of which government must supervise.

The international experience is clear that such an attitude and the legal controls that go with it do not result in efficient and productive land use. These are better promoted by property rights—whether ownership or secure land use rights—whose increase allows users to respond to incentives to invest and manage effectively. The Land Law needs to be amended to affirm this freedom of action on the part of the user, especially once the final DUAT has been approved.

The bargain struck with government—land rights in return for performance on a promise to invest and fulfillment of an exploitation plan—has been satisfied when the final DUAT is granted. It should be clear that the right-holder should thereafter have full freedom to alter the land use, consistent of course with environmental laws and other generally applicable rules, without having to seek government authorization.

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<sup>23</sup> A discussion of free allocation and the inevitability of land speculation in those circumstances is in the 2005 World Bank report (13-14). No author is indicated.

## SECURITY IN INVESTMENTS IN IMPROVEMENTS

The government should reconsider one fundamental provision regarding grants of DUATs. Article 18 (2) of the Land Law states that “Upon termination of the right of land use and benefit the non-moveable improvements shall revert to the State.” This does not provide compensation for such improvements and is interpreted by government to show that no compensation is required by law. This is a fundamental deterrence for investment. While it is arguable that such a provision is appropriate where a DUAT is revoked for failure to meet the investment plan and where that failure is the responsibility of the DUAT holder, it is difficult to understand in relation to a final DUAT or any DUAT where the exploitation plan has been fulfilled. The current provision is in fact a dangerous incentive for the termination of a final DUAT by officials for spurious reasons, to allow allocation to another, even where the land has been well used.

## CADASTRAL REGISTRATION AND REAL ESTATE REGISTRATION

Finally, the interface between the register of parcels and titles maintained by DINATEF (The National Directorate of Land and Forestry<sup>24</sup>) under the Land Law and Regulations and the *Codigo do Registro Praedial* (the Real Estate Registration Code) gives reason for concern. A survivor of the pre-independence land tenure system, the *Registro Praedial* (“code”) is outdated and is to be revised shortly under an African Development Bank project. The code is a deed registration law, creating a record of property rights in land and buildings and some modest legal advantages on rights which are registered, enhancing security of tenure in those rights. The purpose of the register is stated in Article 1: “to give public notice of rights in immovable property.” The code allows (but does not generally require) registration of the creation and transfer of property rights, including rights of use such as the DUAT, mortgages and leases for more than six years (Article 2). The registry examines the legality of the acts and standing of the applicants before registration is made (Article 5), but registration is voluntary and a right can be raised and defended even if it is not registered (Article 4). The exception is a mortgage, which must be registered to be valid (Article 5) and which only affects third parties once it has been registered (Article 7).<sup>25</sup> Registration in this register (as well as the cadastral register maintained by DINATEF) is required by all banks before extending land-secured credit.

The legal impact of registration is relatively weak. Registration of a right creates a “presumption that the registered right exists and that it belongs to the person in whose name it is registered” (Article 8), and a right that is registered first will prevail over rights registered later with respect to the same property (Article 9).

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<sup>24</sup> DINATEF was formed in 2004 by the merger of DINAGECA (the National Directorate of Geography and Cadastre) and the National Directorate of Forestry and Wildlife.

<sup>25</sup> Reflecting these provisions, the Land Law provides in Article 14 that the creation, modification, transfer, and termination of use rights are “subject to registration,” but does not require their registration. Again reflecting these provisions, the recent Urban Land Regulations provide that a transfer of a DUAT it is to be inscribed on the title (in the cadastral register) (Article 44), but a mortgage is subject to registration in the Real Estate Register (Article 45).

It is these articles on legal impact that will require care in the revision of the code. A granted DUAT registered in the *Registro Praedial* will prevail over a conflicting, unregistered DUAT, or one registered later. There are also practical problems in that the *Registro Praedial* exists only in Maputo and is difficult and expensive to access. Right-holders other than the wealthy and their lawyers, fail to register their rights in the Real Estate Registry. This will not affect communities and individuals who obtain their DUATs by virtue of occupation. Article 14 (2) of the Land Law provides: “The absence of registration does not prejudice the right of land use and benefit acquired through occupancy... provided it has been duly proven in terms of this law.” The provision will not protect small commercial and other small operators who receive granted DUATs, or acquire them through transfers, if they fail to register them.

This issue should receive priority in revision of the code, and requires a clear strategy. Much will depend on whether a decision is taken to upgrade the deeds registry to a title registry, with a more conclusive effect given to registration of a right. Much will also depend on whether a decision is made to unify the register of titles maintained by DINATEF and the *Registro Praedial*. This is not the place for a full discussion of these issues, but the experience of land registration in Africa is fraught with cautionary lessons, and the matter should be approached with care. Any of these approaches will also require a huge investment to make the legal rights register accessible to the majority of rural rights holders.

## 4. Transferring and Mortgaging the DUAT

Much of the granted DUAT land is in large holdings whose size greatly exceeds the capacity of holders to develop them. How will large holdings be broken into smaller, more efficient units, and what role should markets play in this process? To what extent do the provisions of the Land Law facilitate or limit this process? With these questions in mind, we examine the provisions of the Law with respect to a number of legal transactions.

The basic provision is Article 3 of the Land Law, which states: “The land is the property of the State and cannot be sold or otherwise alienated, mortgaged or encumbered.”<sup>26</sup> This does not mean, however, that the *use rights* provided in the Land Law cannot be sold, or otherwise alienated or encumbered. It is a critical contribution of the Land Law that it makes this distinction and provides for transfers of use rights, subject to serious limitations. In the following discussion we examine the capacity of the holder of a land use right to

- Transfer the land use right,
- Transfer a part of the term (period) of the right, or
- Contract out the use of all or part of the area of land covered by the right (the tenement), without transferring the right itself.

We then examine the ability of the right holder to use his right as security for loans. The rules regarding transferability of the DUAT are considered first, then rules relating to mortgage. A mortgage necessarily involves a transfer upon foreclosure, and a lender will only want the use right if it can in turn dispose of it to recoup its loan. If a land right is not freely transferable, then it cannot be mortgaged.<sup>27</sup>

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<sup>26</sup> This echoes the provision of the 1990 Constitution that “Land is the property of the State and cannot be sold or alienated in any form, not can it be mortgaged.”

<sup>27</sup> The exception is the possessory mortgage, or at civil law the contract of *antichresis*, under which the lender holds and uses the land, returning it to the borrower only when the debt is paid. Such an arrangement cannot be used to fund agricultural or housing development in any satisfactory way, for the obvious reason that it denies the holder of the land right the use of the land.

## TRANSFERRING THE DUAT

The Land Law in Article 12 lists the means of acquisition of a land use right: occupancy and approval of an application. There is no mention of acquisition by inheritance or purchase. But Article 16 (1) provides for inheritance of the DUAT, and then in sub-article (2) provides that “The titleholders of the right of land use and benefit may transfer, *inter vivos*, infrastructures, structures and improvements existing on the land by means of a public notarial deed, preceded by authorization from the competent state authority.” Sub-article (2) does not mention transfer of the land.

In the subsequent sub-article (3) of Article 16, the position with respect to transfer of land in urban tenements is clarified: “In the case of urban tenements, the transfer of the immovable property includes the right of land use and benefit of the respective plot.” Article 16 of the Regulations confirms this and adds that no state consent to such a transfer of an urban tenement, including the land, is needed. Article 36(1) of the very recent Urban Land Regulations confirms these points and provides that such transfer must be recorded on the title. Articles 44 and 45 of these regulations, read together, make it clear that such a transfer need not be registered in the *registro praedial*.<sup>28</sup>

Regarding the transferability of the rural tenement, the Land Law is less clear, but the Land Regulations, in Article 15(2), clarify the matter: “The purchase and sale of infrastructure, structures and improvements located on rural tenements does not imply the automatic transfer of the right of land use and benefit, which is subject to approval by the same entity that authorized the application.” A buyer of a rural tenement can only secure the land (as opposed to improvements) by an application to the authorities, for their approval of the transfer. The application must include proof that all fees have been paid and proof that the exploitation plan has been fulfilled. This is a risk for those proposing transactions; if it is decided that the plan has not been fulfilled, the state may retake the land. The reference to approval of the transfer implies that the land use right is in fact being transferred rather than terminated in the name of the seller and reconstituted in the name of the buyer by the responsible authorities. The term of the use right of the purchaser is then presumably the remaining years of the term of the seller of the use right.<sup>29</sup>

There is thus an important difference between the transferability of the urban tenement and the rural tenement: When a building on a rural tenement is transferred, the land does not go with it unless approval of the state authorities is obtained, but when a building on an urban tenement is transferred, the land accompanies it automatically.

How far does this condition of official approval on the transfer of the rural tenement actually interfere with the development of a market in use rights over such properties? First, it conditions

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<sup>28</sup> The provisions lend themselves to transactions by pretext. For instance, the intended limitation on transferability of the urban DUAT is often evaded by a transfer to the purchaser of any investment or improvement, which can be a rudimentary shed or wall, but works an automatic transfer of the DUAT.

<sup>29</sup> It may be argued that the right is transferred rather than terminated, and that a new DUAT is in fact issued, with the term starting from zero again. This does not accord with the wording of the law itself or interpretations by those involved in the drafting process.

it upon payment of any outstanding fees. But the fees involved are quite modest and cannot be seen as a serious obstacle. Second, it requires that the exploitation plan has been fulfilled. This is potentially a much more serious obstacle, given that many of the tenements are huge and only a small portion of each has been developed. The use rights remain provisional. There is a substantial degree of administrative discretion involved in deciding whether the development is “enough” to satisfy the exploitation plan, and so in allowing such land to be transferred.

It is this discretion that has been identified by various commentators, including CTA, as an obstacle and cause of uncertainty. Such discretion can in addition become a temptation to corrupt practices. It would be difficult to specify standards in this respect, given the lack of uniform requirements for development in the grants, and it has been suggested that the preferable solution is to remove this requirement of state approval entirely and simply require the registration of the transfer as the Law already does in Article 14.<sup>30</sup> This, it is suggested, should be the case even for provisional DUATs, where the exploitation plan has not been fulfilled. The transferee, it is argued, would succeed to the development obligation of the transferee (the responsibility to carry out the plan of exploitation), so the government does not lose that prospect of development.

The suggested reform to require amendment of Article 16(2) of the Land Law might be considered, though given that the provision is not very specific on this point, this consultant is not convinced that such an amendment would be necessary; however, Article 15(2) of the Land Law Regulations would certainly need to be amended.

Government officials, including DINATEF officials and others who oppose such a change in the law, argue that the land was provided virtually free, in return for the development promised, and the right-holder should not be permitted to profit from a transfer where he has not met his side of the bargain. To do so, it is urged, would be to encourage land speculation. The legitimate objection is not, it would seem, that the land right holder is turning a profit; nothing in the Land Law suggests this is inappropriate. It is rather that the profit is turned without first meeting the commitment to implement the exploitation plan.<sup>31</sup>

## **PARTITION AND PARTIAL TRANSFER OF THE DUAT**

It may be that the holder of the DUAT wants to transfer only a portion of his tenement. Given the vast size of some tenements, this is likely to often be the case. What would then be required would be the division of the tenement into two tenements, a legal process known as “partition.” The existing holder becomes the holder of two tenements, and is then in a position, if the necessary requirements can be met with regard to one of those tenements, to transfer that tenement.

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<sup>30</sup> Article 14 (1) provides: “The constitution, modification, transfer and termination of the right of land use and benefit are subject to registration.”

<sup>31</sup> Some in government will argue that this “constraint” actually is a protection against further expropriation (e.g., concessions) of smallholder land.

A recent World Bank report notes: “It is essential to provide a mechanism by which plots of land can be sub-divided in response either to changing economic circumstances or as a mechanism by which improvements on one part of a land holding can be mortgaged in order to finance capital investments in unimproved [land].” The Land Law and the Land Law Regulations are silent on the matter of partition, except in the case of joint titleholders (*co-titulariedade*), in which case Article 12 of the Land Law provides that jointly owned property by national, individual or corporate persons is governed by the rules on co-ownership in Articles 1430 et seq. of the Civil Code. The provision is not relevant to the case of a tenement that is not already jointly owned and thus is of limited usefulness.<sup>32</sup>

Partition would have an advantage for the holder of a provisional DUAT. It could allow the tenement holder to hive off the portion of the tenement where there has been substantial compliance with the exploitation plan, obtain a final DUAT for that portion, and proceed to obtain approval to transfer it. The concern over land speculation would be satisfied because the obligation to develop has been met for the DUAT transferred. Of course this solution would be helpful only for transfer of the developed portion, not the undeveloped portion. It is by precisely this process that one would normally expect a market in land rights to bring holding size into a rational relationship with the investment capacity of holders and efficient scales of production. It would be especially effective if coupled with a land tax that imposes a significant cost on holding land idle.

Since partition of titles that are not joint in nature is not specifically mentioned in either set of regulations under the Land Law, it could be concluded that such a partition would necessitate the termination of the initial DUAT and the creation of two new DUATs. But this would be clearly counterproductive, so an alternative provision is needed. Since partitioning is not covered in the existing law and regulations, they would not need to be amended, and this would be an appropriate topic for a supplementary regulation.<sup>33</sup>

## TRANSFERRING LAND USE BY CONTRACT

In discussing the transfer of a DUAT, the contemplated transfer was the total transfer of the legal interest represented by the DUAT. In that case the transferor would divest himself of any interest in or obligation under the DUAT. This would be analogous to “assigning” a lease. But the use of

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<sup>32</sup> The same report, commenting on Article 12, suggests: “The intention is to permit some form of sub-lease mechanism under which sub-division is possible via and creation of sub-tenancies, subject to the conditions of the master ground lease. However, the detailed working of such a mechanism and its implications for the incentive to develop land must be examined and implemented as soon as possible” (World Bank 2005, 32-33). That understanding of the intention of this article is not consistent with the wording of the article and, based on discussions with those involved in drafting the Law, appears to be incorrect.

<sup>33</sup> This power to partition is potentially very useful to communities that hold DUATs. The *consulta* mechanism was included in the Law primarily to deal with that case, to provide communities with a process by which to gain capital. It is very rarely used in this way by the DINATEF, however, whose major preoccupation is its use to obtain the community “no objection” to the applications for new DUATs on their territory. For a full description of the consultation process, see Tanner and Baleira (2006), Mozambique’s Legal Framework for Access to Natural Resources.

land under a lease can be transferred in another way: it can be effectively subleased as opposed to assigned. So if there were a 50-year DUAT, the holder would transfer the use of the tenement to another for most of that period, say the remaining 40 years. The DUAT is not transferred, just the use of the land. In this case, the holder of the DUAT does not divest himself of obligations under the exploitation plan. If the DUAT was still provisional, he remains responsible for fulfilling the plan. He may require the transferee to perform on the exploitation plan, but he himself is still directly responsible for performance. It is for this reason that while legal systems always require consent of the owner (here, the state) for an assignment, they sometimes do not do so for a transfer of the use or sublease.

The Land Law and Regulations are silent on the permissibility of such an arrangement in the case of an urban tenement. But since urban tenements can be transferred, the reasonable assumption is that “subleasing” of a part of the urban tenement is permitted, and indeed such arrangements are common in urban buildings. But what of rural tenements? Article 15(4) of the Land Law appears to provide for this, specifying that

Contracts for the transfer of land exploitation operation are likewise [as in the case of transfer of a rural tenement, dealt with in the prior sub-section] subject to prior approval by the entity that authorized the application for acquisition or recognition of the right of land use and benefit.<sup>34</sup>

Note that in this case, there is no specific requirement that the exploitation plan be fulfilled. The ability to sublease a rural tenement would allow a DUAT holder who is having difficulty performing on the exploitation plan to allow another with the capital and resources to do so. To the extent that this is an arrangement that would help fulfill the exploitation plan, it seems helpful. It is not objectionable as speculation because the sub-lessor is delivering on his obligation, and whatever payment might be received from the sub-lessee would be reduced by the cost of meeting that obligation. It would be appropriate to have a Ministerial Interpretation/Instruction clarifying that fulfillment of the exploitation plan is not a precondition for subleasing. The larger issue in this case, as with transfers, is whether such consent is needed or can be dispensed with.

## USING THE DUAT TO SECURE CREDIT

The Land Law has a specific provision on mortgaging of the DUAT. Article 16(5) provides: “The titleholder of the right of land use and benefit may mortgage the immoveable assets and improvements which he/she has duly been authorized to make on the land or which he/she has legally acquired a right of ownership over.” Article 34 of the new Urban Land Regulations has the same effect, providing that those holding the DUAT have the right to “(d) to create mortgages over the immoveable property and improvements which the titleholder has erected on the land

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<sup>34</sup> Personal communication from Christopher Tanner, on 12/10/06, in response to a query from this consultant: “I think you are referring to *cessão de exploração*. If so ‘transfer of the land exploitation operation’ is not a very good translation. The Portuguese refers to ‘transferring the right to exploit the land to someone else. *Cessar*’ formally means ‘to cease’ (to do something). *Cessão*’ can be taken to mean ‘stopping (or giving up) use’ in this case, but the term is understood here in the sense of ‘allowing someone else to use land over which you have a DUAT.’” ... Thus the title holder can make a deal whereby a third party gets to use his land, while he retains the DUAT.”

with due authorization or over which he or she has acquired ownership.” Land, as well as buildings, are “immoveable assets” in civil law systems, and read together with the provisions on transferability of urban tenements, it seems clear that land in an urban tenement is mortgageable. Lending institutions have adopted this interpretation and such mortgages are made. The mortgage is generally secured by the building on the understanding that in case of foreclosure, the land will automatically go with the building.

For land in a rural tenement, the position is less satisfactory. The limitation on transfer of the land in a rural tenement appears a serious barrier to mortgaging land alone or even land with buildings. No lending institution would loan against the value of the land without assurances that it could be transferred if foreclosed upon, and a bank would likely be reluctant to lend even against a building on that land without assurances that the land would follow it. The present legal situation appears to make lending against rural tenements infeasible, and the solution would have to begin with a reform to ease the transferability of the use right over the land in a rural tenement.

The proposal made earlier regarding the partitioning the land in a rural tenement is relevant here. Take the case where a lender would not be interested in a rural tenement because the exploitation plan has not been fulfilled for the bulk of the tenement and transfer of the land with the improvements not being approved. In this case, it might be possible to partition the developed portion, obtain a transferable permanent DUAT for that land, and then proceed to mortgage that portion. This would make both the improvements and the land under the tenement more attractive to a borrower, but the borrower would still need assurance that the transfer of the land would indeed be approved when the time came, and there is no provision in the Land Law or regulations for such an approval.

Since this is something not dealt with in the Land Law and Regulations, a supplementary regulation or Ministerial Interpretation/Instruction might be appropriate.

## **IMPACTS AND ISSUES**

How far do the requirements for official approval of transfers and for proof of fulfillment of exploitation plans discourage the development of a market in formal land use rights for rural tenements? (As noted, there is no serious problem with urban tenements in this regard.)

There are anecdotal reports of transfers being refused and of refusals for reasons that involve very subjective judgments as to fulfillment of the exploitation plan that are arguably not legitimate under the Land Law and Regulations. The consultant heard a number of these during his week in Mozambique, but no systematic data on the point exists. The Director of DINATEC remarked at a seminar during the visit that he has approved several such transfers. But several do not make a land market. It is regrettable that no systematic information exists; studies are badly needed.

That said, the comparative experience is consistent with the anecdotes. It suggests that such gatekeeping has a negative impact on transferability beyond that intended by law. Whenever rights are contingent on the exercise of administrative discretion, thereby creating a gatekeeping function for a public official, the gatekeeper tends to take advantage of his position of control. Corruption and favoritism usually result no matter how laudable the policy objective. These are

difficult situations to assess and measure because corruption plays a dual role: posing obstacles not envisaged by law for those without influence and removing them for those with influence. These problems have led most market economies to seek to achieve policy objectives through the play of market forces rather than administrative controls wherever possible. In Mozambique, the need to use such administrative controls is the result of the land being the subject of state ownership and allocation, the distribution of a valuable asset virtually for free, a process existing outside the market economy.

Such restrictions do not affect all equally. When the consultant visited major formal sector lenders in Maputo, he was told that their clients did not seem to experience the consent requirement as a problem. The lenders did not deal directly with this issue, but they did need to see the approvals for transfers and their clients did not seem to have difficulty obtaining them. Their clients tend to be those with the political or financial influence to secure an approval without difficulty.

Large firms can in fact avoid the process of administrative approval entirely. Staff of lending institutions dealing with major investors pointed out that organization of the enterprise as a share company provides a solution. If a land use right is acquired by a company, then effective control over the land and right may be transferred simply by transferring a majority of the shares in the company. This can be done even where there are no improvements on the land and the DUAT is still provisional, so long as the land right has been registered in the *registro predial*. The company remains bound to fulfill the exploitation plan in order to get a final title. A modified version from the tourist sector involves cases where shareholders effectively purchase a right to occupy land by purchasing shares in the landholding entity.<sup>35</sup>

Clearly, this is not a solution for most small and medium investors. It requires substantial expenditures and should not be a strategy for investors who for other reasons do not require a corporate form. Nor will it help fill the empty middle of Mozambique's agrarian structure. What small and medium investors need is simpler market-based access to land already formalized through the Government grant process—extensive undeveloped lands within existing land allocations. Much of this land was acquired for speculative purposes, and while this clearly should not have been allowed to happen, regret and resentment should not prevent the movement of this land into a formal market; if that happens, the land will simply move in informal markets, and if prices in informal market are lower, the greater uncertainty in those markets is more to the disadvantage of buyers than sellers.

Are there negative impacts on investment from the lack of mortgagability of the DUAT for the *prédio rústico*? A recent World Bank report notes:

... it has been suggested that under the present legal regime, improvements in land – whether buildings or irrigation infrastructure – represent satisfactory security for loans in the same way as the land itself is used as collateral in legal systems with conventional private property rights in land. It is hard to see what could justify this

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<sup>35</sup> The mechanism is noted in World Bank (2005, 16) at note 11.

view. Any improvements are only valuable to the occupier of the land. Unless there is a guarantee that the land title or use right for a plot of land whose improvements have been mortgaged will be transferred along with the title to the improvement on the land, the security cannot be enforced in practical terms (2005, 16).<sup>36</sup>

How far are impediments to mortgageability limiting investment in agricultural land? As noted, while a building with land constituting an urban tenement is mortgageable, and a building on a rural tenement may be mortgaged, the land on that rural tenement may not. This not only interferes with mortgageability of the land but of the building itself.

Again, this limitation does not fall equally on all potential investors. For large firms, the corporate form provides an out. Where land is owned by a company, the lender has the borrower execute an irreversible power of attorney in favor of the lender, pledging the shares in the company, and with them the land use rights of the company. The borrower can then execute the security by selling the shares of the company.<sup>37</sup> But the smaller investor, the one who might be able to fill the empty middle of the agrarian structure and bring efficiency to Mozambique's agriculture, cannot use the value of the land to be purchased as security to borrow for the purchase price, and cannot use the land or buildings to borrow for investment in the land. The avoidance mechanism of corporation law is of little relevance to this investor.

Where are the Mozambicans who would farm 10-100 hectares on a commercial basis? Why are there not more of them farming? In theory, access to land is cheap and easy; in reality it is not—and even if it were, small and medium commercial farmers are not in a position to take up land where it may be available through the allocation system. As smaller operators, they must rely on the local marketplace for goods and services to meet many of their needs. Location is important and land where they need it may be available only by acquiring a DUAT from a current holder. Though this is not the only obstacle to more profitable small and medium farms, it is important. Much of the good land near roads, infrastructure, markets, and water is already claimed under concession.<sup>38</sup>

Do these potential investors exist? They do in other developing countries. Mozambicans may be at an historical disadvantage in their lack of experience in managing commercial farms, but this can be said of many countries with long histories of collective agriculture. It changed in those countries and it is changing in Mozambique. Often the potential commercial farmer/investor will

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<sup>36</sup>On the same page, the report argues that because land is available for very modest fees from government, credit is not needed for land acquisition. The report dismisses the relevance of land purchase credit too lightly. The cardinal rule of land value is “location, location, location,” and that land is available somewhere from government does not mean that credit is not needed to purchase land rights in advantageous locations, where almost all state land has already been allocated and the only means of access is acquisition from existing right-holders.

<sup>37</sup> Simon Norfolk, in a personal communication, notes uncertainty as to the legal validity of an irrevocable power of attorney, but lending institutions are now using this mechanism.

<sup>38</sup> Others obstacles include lack of markets and services, public or private; weak security of tenure due to the conditionality of tenure, creating risks of termination and loss of improvements; lack of incentives implicit in limitations on land use; lack of access to land through a market in land use rights, and lack of capital due to inability to mortgage land.

have acquired skills and experience in previous employment. They may have held jobs with much larger private agricultural enterprises, or worked for a public agency involved in land and agriculture. Some may have come from rural areas and may now be ready to return if opportunities beckon. These often include new graduates of agricultural training institutes.



# 5. International Experience: Lessons for Mozambique

One must take care in applying legal models from one national context to another, and nowhere is this truer than with land law where different national land tenure histories can create quite different reform paths. But some of the experiences and elements of reforms in other systems can be informative and useful. The examples presented below are drawn primarily from “countries in transition” which have something in common with Mozambique.

Because this report has focused heavily on the potential of markets in land rights to improve investor access to land and achieve more effective farm size, some discussion of this from a comparative perspective is appropriate. This section first covers the relationship between land markets and land use and distribution, then turns to the tendency of attempts to legally limit markets to drive those markets underground, and finally to the potential role of a land rent in stimulating markets in land rights.

## **LAND MARKETS, EFFICIENCY OF LAND USE, AND LAND DISTRIBUTION**

In normal discourse we speak of land markets, but all markets in land are in fact markets in rights over land. We normally use the term “land market” for a market in private ownership rights over land, and distinguish other markets such as leasehold markets. Under Mozambique’s Land Law the state retains land ownership, so the market recognized is one of limited land use rights. Notwithstanding the limited nature of these rights, the recognition of a market in such rights should increase the value of the land and should allow land rights to move via the market to more efficient uses and users. This expectation is based on the assumption that a more efficient user will be willing to pay more for the land because he or she will use the land more profitably. As will be seen, this is not always true.

The literature on land tenure and the development of land markets in transitional economies is of two minds. On the one hand, the process is seen as essential to the construction of a market economy. The alternative—administrative allocation of land—has generally worked badly. Governments usually allocate land at little or no cost to those receiving it, which infects the allocation process with widespread corruption and favoritism. With no cost constraint on acquisition, such allocations often create concentrations of ownership greater than those created by markets. As a historical point of reference, remember that the concentrations of land

ownership in southern and eastern Africa associated with colonialism and white settlement are not the product of markets, but of state appropriation and reallocation. Most major concentrations of land ownership in post-independence Africa, such as those in Mozambique, have similar origins in state action.<sup>39</sup>

On the other hand, many policymakers as well as some tenure experts remain leery of the unrestrained development of markets in land rights and this is particularly evident in the African literature.<sup>40</sup> The concern is that peasant holders will rapidly be stripped of land through desperation sales to urban and elite interests. Moreover, there is concern that those acquiring land will use it less well than existing holders. This concern is based on clear evidence that land markets in fact do not always make good on their promise to allocate land to more efficient users. Why is this?

Convinced of the relative efficiency of small and medium producers in economies with low labor costs, the World Bank has been frustrated by the failure of land markets (in which it also believes) to move land to those producers. This failure is to some extent due to imperfections in land markets (e.g., asymmetrical access to information), but even more to failures in credit markets. In theory, the poor but efficient small or medium investor should be able to borrow money to buy land, but this is usually not so. This investor usually needs to borrow a modest amount. The transaction costs of lending to this investor are high per dollar lent. Formal lending institutions are simply not structured or located to be accessible to such borrowers. As a result, that someone has money to invest in agricultural land has only a limited relationship to his or her potential to be an efficient producer. Land markets may not then fulfill their promise of promoting greater agricultural efficiency (Deininger, p. 82)

Countries often have segmented land markets, segments of which work in partial independence of one another, and one must distinguish between them when discussing policy positions on the development of land markets. Nowhere is this truer than in Mozambique where distinct markets in land rights are developing: (1) a market in rights from peasant and peasant community holdings acquired by custom or occupation and (2) a market in rights from existing state allocations (Negrao *et al* 2004). This is in spite of the attempt of the drafters of the Land Law to minimize dualism in the new tenure system. The rise of distinct markets, however, has less to do with differences in applicable rules than in the very different base of landholdings upon which these markets are developing.

In the first case, there is reason for concern regarding the possible acceleration of the development of peasant landlessness through the land market. The creation of a well-functioning market in land rights in the context of smallholder peasant agriculture will tend to further

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<sup>39</sup> Consider South Africa, Zimbabwe, Kenya, and other countries where skewed distribution patterns are owed to state action, not markets. The same would apply to pre-revolutionary Ethiopia.

<sup>40</sup> See, for example, Okoth-Ogendo (1986), *The Perils of Land Tenure Reform: The Case of Kenya*; Platteau (1996), *The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa*; Adams *et al* (2000), *Land Rights and Economic Development in Rural South Africa*; and Cotula *et al* (2004), *Land Tenure and Administration in Africa: Lessons of Experience and Emerging Issues*.

concentrate holdings because some smallholders are more efficient producers than others. This will be so even if one limits transfers to members of local communities. The Land Law does allow transfers to outsiders and the careful processes and limits prescribed in the Land Law for this are appropriate until such time as land values are better understood among peasant holders and communities (De Janvry *et al* 2001).

This paper, however, is focused on the second market, the one that depends on the transferability of land in large holdings under government-granted DUATs. Here, the potential impact of a market in land rights is likely to be very different. In an agricultural sector consisting of extremely large landholdings created by state action, a market in land rights will tend to break up the holdings. Why? Contrary to what many casual observers conclude, the large holdings are not in fact efficient in terms of land use. One of the few things that neoclassical economists and Marxist economists agreed on in theory was that economies of scale exist in farming—but practice has not borne this out and research has explained why.

In theory, specialization of labor and mechanization possible in large units would make them more economic and efficient than household farms. But large farms bear some very high costs, such as for machinery upkeep and fuel, and do not end up being very profitable except in special circumstances. Theoretical economic literature explains the relative efficiency of small holdings primarily on the basis of the relative efficiency of family labor on family farms and of small, family-managed operations that include substantial family labor. In comparison, large operations face more problems in achieving efficient management. It turns out that most of the efficiencies once assumed to be associated with scale of production are actually associated with scale of processing. When production and processing are highly integrated, large units can sometimes attain a profitability advantage over smaller units of production (Deininger, 83-84).

Very large units, such as the large farms of South Africa, tend to owe their continued existence to

- Regulations that disadvantage smallholders in market access,
- The focus of research and extension on the large farm sector,
- Subsidies of scale-related technologies (e.g., cheap fuel for mechanized farming), and
- Legal restrictions in subdivision of large holdings (Van Zyl *et al* 1996).

These very large farms are able to adopt “modern” methods, but there is reason to believe, on both theoretical and experiential grounds, that they would often not be as profitable as smallholder operations if the playing field were leveled. In Kenya’s post-independence years, African smallholders competed well with large farm operations in producing maize and cash crops, such as tea and coffee. In Zimbabwe in the 1990s, smallholders rapidly out-competed large farms in maize production when provided with the support they needed (Moor and Nieuwoudt 1998).<sup>41</sup> With a level playing field, a market in land rights will in time result in the breakup of inefficiently large holdings into smaller, more efficient holdings that are in accord with the capacity of their holders to develop them.

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<sup>41</sup> The same lessons would appear applicable in Mozambique.

Post-independence Kenya offers a particularly interesting example of the impact of land markets on land distribution. The “White Highlands,” as they were called in the colonial period, consisted of large commercial farms created by grants of Crown Lands to white settlers. In the wake of independence, the Government of Kenya purchased farms there for a resettlement program called the Million-Acre Scheme. The owners of the farms purchased often then purchased smaller farms, portions of other large farms unaffected by the Scheme. Alongside the resettlement program, an active land market fueled by ready access to credit through a Land Bank began breaking up the large farm units and Kenya Africans soon became major players. Some influential Kenyan Africans and Kenyan companies purchased intact units; often these were then broken up and sold, piecemeal, over time, a process continuing to this day. In many other cases farms were purchased by “land-buying companies” whose members were land-hungry Kenyan Africans mobilized by commercial promoters and incorporated to purchase and then subdivide the large farms. There were finally cases in which farms were subdivided by the original owners and sold as middle-sized farms to African purchasers. Over a quarter of the land originally held by whites in Kenya at independence moved through the market in this fashion during the middle and late 1960s. In 1990, observers estimated that more than three quarters of the original large farm holdings had been broken up.

Markets can play an important role in breaking up large estates, improving land distribution patterns, and making land use efficient, and markets could have this effect in Mozambique as well.<sup>42</sup> There seems little prospect that the bimodal agrarian structure created by state action in Mozambique will be remedied by direct state action. Failure to carry out the exploitation plan agreed on with government is a cause for government canceling or radically reducing some of the more blatantly oversized land allocations, but it seems clear that government is not inclined to do this in any systematic fashion. This is regrettable, but even if it were possible, many of the grants have been finalized, so could only be retaken subject to compensation. A confiscation option exists, of course, but Zimbabwe’s recent experience indicates the results of going down that road.

Land markets may then be the only means to break up large holdings and fill the empty middle, and are certainly the only means to ensure land attains its true value and role in capitalizing development in Mozambique. For the land market to play this role, however, a strategy that ensures market efficiency is necessary: transactions costs need to be reduced and the capital market imperfections that deny credit for land purchases to aspiring commercial farmers need to be eliminated or counter-balanced with credit preferences for such borrowers. The experience of

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<sup>42</sup> See Greta A. Middleton’s *Land Reform and Agricultural Development in Kenya: A Study of Post-Uhuru Policy-Making 1963-1978* ( Ph.D. Dissertation, New York University, 1998). The land-purchasing companies, while an interesting private-sector approach, developed a number of problems, including fraud on the part of organizers and wrangles over subdivision among members. The “Njonjo Commission” recently revisited the issue. See Republic of Kenya. Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land, and New Institutional Framework for Land Administration. November 2002 (Nairobi: Government of Kenya), Appendix, p. 38. The estimate referred to in the last sentence was provided to the author during inquiries in Kenya in 1990. Detailed data on changes in parcel sizes over the years is unfortunately not available.

other countries shows that failure to address these issues severely limits the redistributive potential of land markets (Carter and Salgado 2001).

In developing such a strategy, one must attend not only to the market in use rights but also the market for transfers of the “use and operation” on the land. This is the equivalent of a sublease market, and economists in recent years have focused on rental markets and their advantages in providing those without access to capital with access to land. A lessor or sub-lessor does not need to make a major up-front financial commitment, avoiding the problems posed by the imperfections of credit markets (Deininger, 115-120).

A freer market in land rights in Mozambique would allow profit-taking by right-holders who have used influence to obtain land rights over large areas. They would benefit from their appropriation of public resources. This can be ameliorated somewhat by proper systems of taxation, for instance, applying capital gains taxes to major land transfers. Those who are uncomfortable with the prospect of such enrichment (including this author) may need to bite the bullet and support the development of a freer and more transparent market in land use rights, even where it leads to palpably unjust enrichment.

## THE POWER OF LAND MARKETS

In the early 1990s, in a conversation at China’s Development Research Center, a think-tank attached to the State Council, the Center’s renowned economic reformer Du Runsheng said: “We are introducing markets. Many in the government imagine they can control and limit markets. But they have no idea of the power of markets.”

Markets are natural economic phenomena, not creatures of government or law. Law can be used to try to set boundaries and constrain markets to achieve policy objectives, but in a market economy, to do so is on the same order of difficulty as blocking the flow of a river. Market forces, prevented from moving in one direction, flow in another. This is true of land markets. They are a natural phenomenon and difficult to constrain. Custodians of customary or statutory law will sometimes urge that there is no land market because it has been legally blocked. Invariably, however, the river has gone underground, and there is a grey (informal) market in land rights.

The question is not whether Mozambique will have a market in land rights, but what kind of a market it will have: an opaque and risky market in which land is undervalued, or a transparent and safe market in which land rights achieve their potential market value. The drafters of the Land Law understood the importance of markets in land rights and have provided for them. But they also sought to limit them. They imposed restrictions and approval requirements for transfers of land rights. These restrictions have led to the development of an informal market in land rights: transfers without the legally required authorizations. This development is consistent with the experience in other developing countries.

In Mozambique, the development of the informal land market has been noted primarily in the informal areas of cities and in the peri-urban areas. Data on these markets are unfortunately scarce. Roth *et al* (1995) produced an interesting study on the peri-urban land market for Maputo.

It is in such areas, where land values are rising rapidly, that one expects to find the most active development of informal markets. Carrilho *et al* (2005) and Negrao (2004) both note the development of these markets, and a recent DFID-funded study in Maputo and Matola notes that “a land market exists in the urban and peri-urban areas of the major cities, including Maputo and Matola, and has been on the increase” (Malauene *et al* 2005, 17). That study goes on to list the main characteristics of land markets in the peri-urban areas of those cities:

- Sale and purchase of land outside the official channels of the Municipal Council.
- Increased transfer of land use rights of the population to well-to-do individuals through renting, loans, subdividing the land or ceding it.
- Trends to advance speculation in land. Some people are buying up plots of land from the population, but do not invest in it. They build a flimsy house to secure their rights and add value to the land, and later sell it at a higher price, in clear violation of the provision in the land law that demands compliance with deadlines for the investment plan for obtaining DUAT, as well as on the application of sanctions by the relevant authorities.
- The market is unregulated and lacks free competition.
- The land market dynamic is strongest where there are communications (roads, etc.) and other basic economic and social infrastructures.

But such research is rare, and important studies by Cruzeiro del Sud have not been officially approved by government for release. The government is certainly aware of these informal markets; it is not precisely in denial, but is for now tolerating a certain level of such transactions. They are sometimes ratified by subsequent government action.

What are the disadvantages of such informal markets? Prices tend to be lower because they are discounted for risk; tenure in the land acquired is not very secure; and the wealthy and influential tend to accumulate land at the expense of poor informal holders. The wealthy and influential then use their influence to formalize their holdings. Informality can also affect those who seek to buy land informally from those who hold large allocations. The legally insecure title exchanged in such transactions disadvantages those with modest assets and influence most seriously because cannot rely on influence to protect their landholdings. They have only the law to rely on and they are now outside it. In informal markets, it is the buyer not the speculator selling off land who bears the risks of multiple and inconsistent informal transfers. In such markets, the small and medium investors who should be filling in the “empty middle” suffer as well as the poor (Carter and Olinto 2003).

The recent CLAIMS study of the development of informal land markets in West Africa provides a bleak summary of the failure to provide a supportive legal regime for land markets:

Existing institutions are out of step, unable to deal with problems of scarcity and to co-ordinate or arbitrate between divergent interests in a context where land has become a scarce, economically valuable asset. In this time of changing norms, land actors are left to fill the institutional void. The only (implicit) rules are opportunism, force, simulation and playing on the plurality of norms, since neither the traditional institutions nor state institutions are currently capable of legitimizing, coordinating or controlling these monetary transfers (Chaveau 2006).

It is important to ensure that transactions in land use rights for agricultural land do not slip more and more into the informal market, but remain within the legal framework. It is not particularly difficult for those seeking to evade controls on the market to do so, given the modest administrative capacity of the concerned government agencies and all the other tasks facing them. The informal market is likely growing much faster than government realizes. It is a secret market, after all, and so its full extent is typically only realized many years into its development.

If the amount of land being transferred on informal markets in Mozambique grows, as it must, the long-term consequences for security of tenure will be serious. Limiting the growth of an informal land market will require easing some of the restrictions on transfers imposed by the Land Law, as discussed earlier.

## **STIMULATING THE MARKET IN LAND RIGHTS: THE ANNUAL FEE**

A recent World Bank analysis of rural land issues in Mozambique devoted much attention to the system of annual land fees that are akin to rents imposed by statute rather than contract, and to the potential role of land taxation (2005, 19-25 and 29-32). That report focused on land taxation less as a revenue measure than as a means for creating a cost for holding land idle and thus stimulating the market in land use rights. That is our primary interest here as well. It should be said at the outset, however, that no land tax was ever imposed solely for such reasons. Aside from the units of government that benefit from it as a means for revenue, no political constituency for a land tax exists. Such a tax has been used effectively in many countries to fund local government expenditures and is increasingly seen as central to any truly effective program of devolution of power to local authorities. A recent FAO publication on rural land taxation concludes:

Property taxes can play an important role in developing sustainable rural livelihoods and rural communities. The tax is transparent, cheap to administer, efficient to collect and well understood by the taxpaying public. It is administratively feasible in virtually any circumstances... It is particularly suitable as a source of locally generated revenue for local government (2004, 49).

In Mozambique, such a “tax” already exists in the form of the fees under Articles 28 and 29 of the Land Law. Article 28 provides for an authorization fee, payable at the outset, which is of less interest here, as well as “an annual fee, which may be progressive or regressive in accordance with the investments realized.” Preferential fees may be established for national citizens. Article 29 provides a number of exemptions, including one for “family uses, local communities and the individual persons who belong to them,” in effect exempting most peasant smallholders.

The 1997 Land Law Regulations in Article 41 and Schedules 1-3 specify rates with a series of multipliers according to use, location, holding size and other factors. Taxes are assessed according to this complex mix of factors, which seek to reflect both land value and certain public policies (e.g., the favoring of nationals), rather than according to the actual market value of the tenement. The tax rates span a large range, from MT 7,500/ha up to MT 180,000/ha. In discussing the adequacy of this framework, the World Bank concludes that it is far more complex than necessary, that it does not achieve the policy objectives it seeks to pursue, and that its complexity accounts in part for the widespread failure to collect fees. It further concludes that it “is much

more important to apply *and enforce* a simple structure of land taxes with minimal differentiation between different categories of user and use”(2005, 24).

This consultant is not a specialist in land taxation, but the proposals in the World Bank report in general appear sound. From the point of view of this paper, the need is to (1) eliminate provisions that favor extensive land use and so in effect subsidize large-scale agricultural operations, and (2) provide for per hectare rates of taxation that significantly penalize the holding of land idle.

The first objective would appear to require eliminating the concessionary rate for cattle breeding, wildlife farming, and permanent crops in favor of a standard rate for all agricultural activities. The special rate for cattle breeding and wildlife farming is justified on the ground that this is relatively poor land, but that is already taken into consideration by the location criterion. And in fact, it may not be the poorest land. The relatively modest investment requirements for these activities (and so the relative ease of meeting the development conditions and obtaining a final DUAT) plus concessionary taxation rates create substantial artificial incentives to extend these activities onto land that could be put to better use or, to the extent the land is environmentally fragile, should not be used in this fashion. (The World Bank paper raises a concern about overgrazing and potential environmental degradation in the rapidly expanding area of land under livestock production.)

The second objective may require a more thorough economic analysis of the implications of current per hectare rates. The World Bank concludes that the current rates are insufficient to compel reduction of sizes of existing tenements through subdivision and transfer. While this does appear to be the case, the analysis is flawed by its reliance on Agricultural Census figures on cultivated land rather than total land holdings, the latter being the basis for the tax (World Bank 21). This issue needs more analysis. In pursuing such a strategy, simplicity is not simply one objective, it is a critically important objective. Proposals have been made for taxes specifically focused on unused land, but this raises all the problems of defining and assessing use that plague more administrative approaches. Rates are already attuned to sizes of holdings and this is both easy to assess and appropriate from a policy standpoint.<sup>43</sup>

Increasing rural land taxation is unlikely to be politically popular unless those who hold land are not those who hold power. That is not the case in Mozambique. Still, a tax-based approach to reducing oversized agricultural tenements and filling the empty middle through transfers from those tenements has major advantages over administrative termination or modification of sizes of holdings for failure to fulfill investment plans. The latter is an administrative process. It requires staff and funds to assess whether commitments have been honored. It is subject to corruption and other administrative abuses. In addition, those affected often feel targeted, and this has political implications. And in fact it is not always easy to determine what constitutes fulfillment of an

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<sup>43</sup> In a major comparative study of land taxation in the developing world funded by the World Bank, Bird and Slack (2002) conclude that “increased taxes designed from an economic perspective...[are] unlikely to mean gadgets such as land value increment taxes and progressive land taxes... [but] likely means more attention to developing simple, uniform local property taxes, with the only differentiation being perhaps somewhat heavier taxation of land than of improvements” (43).

investment plan, which may not be very clearly stated. Governments may find it easier to allow more impersonal economic forces, such as those put into play by increases in fees, to do this work. Finally, as the recipient of the fees, the government has a direct and immediate incentive to enforce such fees. As suggested at the outset, revenue is likely a more effective motivation for government than the attainment of a relatively abstract objective such as efficient land use.<sup>44</sup>

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<sup>44</sup> In Mozambique, 60 percent of fees collected go the DINATEF under the Land Law Regulations, creating an incentive on the part of the collecting agency.



## 6. Conclusions and Recommendations

The Land Law is a remarkable and original document, and in the late 1990s it provided invaluable and fundamentally sound directions. It is, however, a transitional law. Further reforms will be necessary as time passes, as the economy and political system mature, and as conditions change. The “best that could be hoped for” in 1997 should not limit future reforms. One can see what reforms are needed and the question is often whether the time is right for them. Uneven implementation of the Land Law complicates the answer. It is always a judgment call in a report such as this whether to focus exclusively on problems for which there is some prospect of a resolution in the short term, or to also raise more fundamental issues whose prospects for short-term resolution appear remote, for political or possibly technical reasons.<sup>45</sup> This section notes some of the latter, then moves into a more detailed discussion of the former.

### LAND ACCESS AND SECURITY OF TENURE

The discussion in Section 3 indicated that the failure to impose a cost on the allocation of land has resulted in the allocation of huge areas of land to many who lack the financial capacity or skills to develop it. Imposing such a cost would have been the best way of keeping appetites in some reasonable relationship to capacity to develop. This still needs to be done. The following recommendation is made:

**Recommendation 1.** The authorization fee imposed on provisional grants of DUATs should be modified so that it bears a logical relation to the economic potential of the land granted, including its extent.

A framework similar to that currently used for the annual land fees—with some reforms, suggested below—could be used to set such authorization fees. If an applicant cannot find the funds to pay the authorization fee, the applicant is not going to be able find the funds to develop the land (World Bank 2005). The recommendation would not require amending the Land Law

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<sup>45</sup> It is of course difficult to amend a law, somewhat easier to amend a regulation, and still easier to provide a supplementary regulation, though both the latter two must be approved by Cabinet in Mozambique. A ministerial order or instruction is simplest but cannot of course alter a law or regulation.

since it would be feasible under Article 28(1),<sup>46</sup> and the relevant ministers have the right and responsibility under Article 41(4) of the Land Law Regulations to periodically update the authorization and annual fees set out in Schedule 1 to the Land Law.

Discussion in Section 3 also indicated that investment and productive land use under a system of state ownership depends on land rights being robust and unconditional. The requirement that the development promised in return for a DUAT be carried out before the final DUAT is approved is logical, but conditionality and legal control of management should not extend beyond finalization of the DUAT. This, however, raises the issue of the subjectiveness of the decision as to whether an exploitation plan has been fully executed so the DUAT can be finalized. In this regard, two recommendations are made:

**Recommendation 2.** A clearer and objectively determinable standard should be established for determining whether an exploitation plan has been carried out (e.g., whether investment has been made in a certain proportion to the value of the land as reflected in a multiple of the annual fee).<sup>47</sup>

**Recommendation 3.** Once the initial conditions under the provisional DUAT have been met, the final DUAT should contain no exploitation plan, nor any land use conditions, nor any requirements for administrative approval of changes in land use.

The bargain struck with government—land rights in return for performance on a promise to invest and execute an exploitation plan—has been satisfied when the final DUAT is granted. It should be clear that the right-holder thereafter has full freedom to alter the land use, consistent of course with environmental laws and other rules of general applicability, without seeking any authorization from government. This would require amendment of Article 18 of the Land Law and Articles 31 and 36(f) of the Land Law Regulations.

Section 3 also suggested that the provision of Article 18 (2) of the Land Law be reconsidered and changed to provide compensation by the state, at least in the case of a final DUAT. Article 18(2) concerns the treatment of immovable improvement upon termination of a DUAT. The following is recommended:

**Recommendation 4.** The Land Law should be amended to require compensation for actual value of non-moveable improvements when a final DUAT is terminated.

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<sup>46</sup> Article 28 (1) provides: “Titleholders of rights of land use and benefit are subject to the payment of fees whose value is established taking into account the location of the land plots, their dimensions and the purpose of their use and benefit. These fees are a) the authorization fee; b) the annual fee...” The Land Law Regulations in Article 41(2) provide for indexing of fees according to those criteria only for the annual fee, but they go on it Article 41(4) to create the ability to remedy this by ministerial action, without amending the Regulations.

<sup>47</sup> This recommendation comes from a draft document shared by Sal and Cadiera Advogados e Consultores, Lda, in which they propose that where a transfer is proposed, “the use plan shall be determined to have been executed whenever the improvements, structures, or infrastructure were referred to in the approved use plan and correspond to at least 50 times the amount of the annual fee” for the right.

This should be done by amending Article 18(2) of the Land Law; a law on valuation is also needed.<sup>48</sup>

Finally, it was suggested in Section 3 that plans to revise the Registro Praedial raise serious issues about the legal impact of registration on the validity and priority of grants and transfers of DUATs. The experience with land registration in Africa is full of cautionary lessons and the matter should be approached with care, especially with regard to rural holdings. The following is recommended:

**Recommendation 5.** The revision of the Codigo do Registro Praedial should be done with full participation of those holding or having rights to receive DUATs and those administering that system. Care will need to be taken to ensure that those for whom access to that Register is difficult will not be disadvantaged by the legal revisions made.

We now turn to more modest issues. The paper has spent more time on issues related to the *prédio rústico* because the legal framework for such holdings is less satisfactory than that for the *prédio urbano*. While it has its limitations and quirks, the legal framework for use rights over the *prédio urbano* appears from information received during the consultant's visit to be functioning reasonably well. The new Urban Land Regulations, 2006, improve the position by substantially clarifying, in a generally satisfactory fashion, relationships between use rights and land use planning processes. The problems in the urban sector are primarily implementation problems, not legal problems, and the emphasis on provisions concerning the *prédio rústico* continues in these recommendations.

## TRANSFERABILITY OF THE DUAT

Under the current legal framework, one may transfer a *prédio urbano* without the consent of any administrative authority, but consent is required to transfer a *prédio rústico*. Various commenters, including CTA, view the discretion of consenting administrators as an obstacle and cause of uncertainty. Such discretion can also become a temptation to corrupt practices. It has been suggested that the administrative approval requirement be dropped entirely, and that there simply be a requirement to register the transfer, as is provided for already under Article 14.<sup>49</sup> This, it is suggested, should be the case even for provisional DUATs, where the exploitation plan has not been fulfilled. The transferee, it is argued, would succeed to the development obligation of the transferee (the responsibility to carry out the plan of exploitation), so the government does not lose that prospect of development. The following is recommended:

**Recommendation 6.** Any DUAT for a *prédio rústico* should be transferable on the same terms as a *prédio urbano*, upon registration, with the transferee succeeding

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<sup>48</sup> Article 28(1) does not expressly prohibit such compensation, so it could be argued that a compensation requirement could be created by amendment to the Land Law Regulations.

<sup>49</sup> Article 14 (1) provides: "The constitution, modification, transfer and termination of the right of land use and benefit are subject to registration."

automatically to any obligations of the transferor, including the obligation to fulfill any exploitation plan on which a provisional DUAT was conditioned.

This might be considered as requiring amendment of Article 16(2) of the Land Law. Given that the provision is not very specific on this point, it might be possible to accomplish it by amending Article 15(2) of the Land Law Regulations.

## PARTITION AND PARTIAL TRANSFER OF THE DUAT

As noted in Section 4, the Land Law and Regulations make no general provision on partition of an existing DUAT and tenement.<sup>50</sup> Partition could allow a provisional DUAT holder to hive off the portion of the tenement that complies with the exploitation plan, obtain a final DUAT for that portion, and proceed obtain approval to transfer it. The concern over land speculation would be satisfied because the obligation to develop has been met for the DUAT transferred. Such a process could help fill the empty middle in the Mozambique's agrarian structure and is relevant to urban tenements. The following is recommended:

**Recommendation 7.** Provision should be made to allow the partition of any tenement and the related DUAT and the finalization of the DUAT for any resultant tenement provided the conditions of the DUAT have been satisfied with regard to that tenement.

Since partition in general is not covered in the existing law and regulations, they would not need to be amended. This would be an appropriate topic for a supplementary regulation.

## TRANSFERRING LAND USE BY CONTRACT

Here we are concerned with the equivalent of a sublease (let us call it a sub-DUAT), in which the DUAT holder does not shed his obligations under the DUAT, but remains responsible for them even though he has contracted with someone else to use the land (and perhaps perform those obligations). In Section 4, it was concluded that while the Land Law and Regulations are silent on the permissibility of such an arrangement in the case of an urban tenement, the transferability of an urban tenements suggested that such "subleasing" of a part of the urban tenement is permitted, and indeed such arrangements are common in urban buildings. But Article 15(4) of the Land Law provides that in the case of rural tenements such arrangements, as is the case for transfers, are subject to prior administrative approval.<sup>51</sup> The justification for this provision is clear, because the

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<sup>50</sup> The exception is Article 12 of the Land Law, which only applies to jointly owned property and is of limited relevance for present purposes.

<sup>51</sup> Personal communication from Christopher Tanner, on 12/10/06, in response to a query from this consultant: "I think you are referring to *'cessão de exploração'*. If so 'transfer of the land exploitation operation' is not a very good translation. The Portuguese refers to 'transferring the right to exploit the land to someone else. *'Cessar'* formally means 'to cease' (to do something). *'Cessão'* can be taken to mean 'stopping (or giving up) use' in this case, but the term is understood here in the sense of 'allowing someone else to use land over which you have a DUAT.'" ... Thus the title holder can make a deal whereby a third party gets to use his land, while he retains the DUAT."

original DUAT holder remains responsible for fulfilling the exploitation plan. The following is recommended:

**Recommendation 8.** It should be provided that all or a part of any DUAT and tenement covered thereby can be subject to a sub-DUAT, in whole or in part, without any administrative approval.

In the case of the *prédio urbano*, in the absence of any provision in the Land Law or the Land Regulations, this could be clarified through a ministerial order or instruction. In the case of a *prédio rústico*, the change would require amending Article 15(4) of the Land Law.

## MORTGAGING THE DUAT

As discussed in Section 4, the straightforward transferability of the *prédio urbano* makes it available to secure a loan, and this is confirmed in the new Urban Land Regulations for any land within urban boundaries. But the limitation on the transfer of a *prédio rústico* and the fact that the right to land does not accompany a transfer of the buildings on it pose significant barriers to mortgaging the right to use the land or even the buildings on it. The mortgaging of buildings without the land concerned is not a realistic proposition. Thus the following is recommended, in part reiterating Recommendation 4:

**Recommendation 9.** The usefulness of the *prédio rústico* as security for a loan should be enhanced by removing the requirement of an administrative approval for its transfer and by providing more specific provisions on its mortgagability, similar to those that now exist for mortgaging of urban land under the new Urban Land Regulations.

This would require amending Article 16 (2) and (5) of the Land Law, and provision of new material on mortgaging of the *prédio rústico* in a regulation.

## RURAL LAND REGULATIONS

The new Urban Land Regulations have provided an opportunity to address issues affecting urban land. Issues regarding use rights in rural land must also be dealt with. The following is recommended:

**Recommendation 10.** The government should launch a parallel process to develop a more detailed Rural Land Regulation, but the process for developing such regulations should be far more participatory than that for the Urban Land Regulations.

The government would do well to consider reconstituting an appropriate forum for such a participatory process.

## CONCLUSION

As suggested at the outset, the Land Law was an innovative and thoughtful reaction to the problems that Mozambique faced ten years ago. It is a transitional law, taking the first steps on the bridge from a managed land economy to a land economy in which markets in rights plays a major role. Thus, the question is not just whether some of the recommendations here are correct, but whether they are timely. That the Government of Mozambique and various stakeholders have engaged in almost constant consideration of possible changes in the Law and Regulations since enactment is a very positive sign. The new Urban Land Regulations are the latest expressions of this engagement. These recommendations are intended to serve the government, CTA and other stakeholder groups, as grist for that mill.

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# Appendix A. Schedule and Persons/Institutions Consulted

## ***Friday, September 29, 2006***

Arrival in Mozambique

## ***Saturday, September 30, 2006***

Review materials provided by Nathan Associates Inc.

## ***Sunday, October 1, 2006***

Visit bookstores to review materials available on land issues.

## ***Monday, October 2, 2006***

- 8:00 am: USAID with Tim Born, Ashok Menon, Adrew Levin and Elsa Mapilele (USAID Private Enterprise staff).
- 10:00 am: Jose Caldeira, attorney. Firm of SAL and Caldiera
- 2:00 pm: Simon Norfolk, Terra Firma

## ***Tuesday, October 3***

- 8:30 am: Jim Lafleur, CTA, and Paulo Fumane, President, CTA
- 1:00 pm: Daniel Sousa, World Bank
- 2:00 pm: Conceicao Quadros, Senior Advisor (Land), Ministry of Agriculture.

## ***Wednesday, October 4***

- 10:00 am: Stelia Narotam, Nathan Inc.
- 2:00 pm: Jennifer Garvey, lawyer, KPMG

## ***Thursday, October 5***

- 7:30 am: Chris Tanner, FAO specialist, Center on for Legal and Judicial Training
- 9:00 am: Jane Grob, Banco Austral
- 10:30 am: Sam Levy, attorney. Firm of SAL and Caldiera

## ***Friday, October 6***

- 7:30 am: Tim Born and others, USAID
- 8:40 am: Deidre Mulunga, Director Registers and Notaries

- 10:00 am: Arlindo Cuco, Director, DINATEF
- 11: 45 am: Paula Ferreira and Celia Meneses, Deloitte Touche
- 2:00 pm: Jose Mucambo, former director, DINATEF
- 3:00 pm: Mario Ussene, Head, Arbitrators Assn.
- 4:00 pm: Higino Marrule, Technoserve

***Saturday, October 7***

- Work on presentation
- Review relevant materials

***Sunday, October 8***

Read materials

***Monday, October 9***

- 8:00 am: Christine de Voest, USAID
- 4:00 pm: Abdul Magid Osman, Chairman of Board, BCI Fomento

***Tuesday, October 10***

- 10:00 am: Cruzeiro del Sud with Tomas Monhicane and Carlos Lauchaud
- 11:30 am: Arlindo Chilundo, Director, NET, University Eduardo Mondelane
- Prepare presentation

***Wednesday, October 11***

- 9:00 am: Presentation to CTA Seminar at Polana Hotel
- 2:00 pm: Carla Guilaze, Registrar, Registro Praedial
- 4:00 pm: Cruzeiro del Sud, Tomas Manicane

***Thursday, October 12***

- Prepare for wrap-up presentation at USAID
- 12:00 pm: Adrian Frey, MozLegal
- 2:00 pm: Dulce Magaia, ORAM
- 3:15 pm: Ashok Menon, Nathan COP
- 4:00 pm: Wrap-up at USAID, Mission Director Jay Knott, Christine de Voest, Luisa Capelao.

***Friday, October 13***

Depart Mozambique

# Appendix B. Consultant Scope of Work

The consultant shall:

- Provide an assessment of the present urban and rural commercial land use concession title registration and transfer system in Mozambique. Such assessment should detail the current constraints, red-tape and bureaucracy that frustrate or impede legal titling, the transfer of land use concession rights and the use of land use concession rights as an asset which may be used as security for a bank of financial lending-house loan.
- Assess the current Mozambican legal framework pertaining to land use concessions, paying particular attention to whether there is current recognition of and provision for:
  - the distinction between conditional and full concession title holding;
  - the distinction between land use concessions covering commercial agricultural activities and the subsistence farming activities of smallholders;
  - the automatic transfer of land use concession should the fixed improvements on such land be sold;
  - the recognition and permissibility of the sub-division of land use concession title in line with the rules of the Commercial Code.
- The Consultant shall review relevant rules and regulation pertaining to land use concession title registration and transfer, together with relevant reports that have been commissioned and produced on this subject.
- Conduct a background literature review pertaining to international best practice in the areas of land law, land titling, land concessions, the use of concession land use rights as collateral, the transferal of concession rights and the buying and selling of concession rights.
- Recommend amendments, scrapping and or the creation of laws, decrees and regulations which will bring Mozambique's land use concession title system in line with International Best Practice.
- Recommend the appropriate scope and ambit for the definition and delineation of commercial concessions with particular reference to the differentiation between land in rural and urban areas that is used for commercial purposes, and, land that is held for personal use and enjoyment and or subsistence activities. The latter falls outside the ambit of this assignment.

- Develop concrete policy recommendations that will facilitate the recognition of both urban and rural commercial land use concession rights titles as guarantees for loans.
- Assist CTA in addressing specific issues in order to lobby for land title transfers free from prior governmental approval and subject to registration at the national registry.
- Consult with financial institutions and propose necessary recommendations in order to achieve the overall objective of using the land use concession rights title as a guarantee for loans.