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## An Assessment of Community Participation in Land Acquisitions in Mozambique and Tanzania

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## I. Introduction

Recent years have seen a resurgent demand for farmland in Africa and other parts of the developing world. Sparked by the global food crisis in 2008, the main drivers for this renewed interest in agricultural land include worldwide food security concerns, rise in biofuel production, creation of carbon markets, population growth, and increasing urbanization (Anseeuw, Alden Wily, Cotula & Taylor, 2012; Cotula, Vermeulen, Leonard & Keeley, 2009; Deininger et al., 2011). The scale of demand is enormous. The World Bank estimated that in 2009 alone approximately 56 million hectares worth of large-scale farmland deals were announced even before the end of the year, compared to an average annual expansion of global agricultural land of less than 4 million hectares before 2008. More than 70 percent of these deals were in Africa, where countries such as Mozambique, Ethiopia and Sudan have transferred millions of hectares in the past few years. (Deininger et al., 2011, xiv). Data from the Land Matrix, an online land monitoring initiative, shows six of the top ten target countries for land investment in Africa<sup>1</sup>. This trend is predicted to continue into the next several decades. The World Bank further estimates that 6 million hectares of additional land will be brought into production each year to 2030, of which two-thirds will be in Sub-Saharan Africa and Latin America where potential farmland is most plentiful (Deininger et al., 2011, xxviii).

For the most part, governments welcome these land investments. Attracting foreign investment is a key strategy for agricultural growth and poverty reduction in most developing countries. In Tanzania, for example, the government in 2009 launched a policy initiative called *Kilimo Kwanza* (Agriculture First), designed to promote agricultural modernization principally through private sector investment (The Oakland Institute, 2011). In Mozambique, the government created in 2006 a new agency to promote large-scale agricultural investment, the *Centro de Promoção da Agricultura* (CEPAGRI) (Oakland, 2011). Many African countries have put into place financial incentives and established one-stop-shop investment promotion agencies to facilitate land investments. Tanzania has the Tanzania Investment Center and Mozambique the Center for Investment Promotion. Alongside the push to generate foreign investment, national elites are reported to also play a major role in land acquisitions, particularly in investments for speculation or profit, although this has received less international attention so far (Anseeuw et al., 2012; Cotula et al., 2009).

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<sup>1</sup> See <http://www.landmatrix.org/en/get-the-idea/web-transnational-deals/>

Most lands targeted for acquisition in Africa are under customary or indigenous occupation, in which millions of rural people live and depend for their livelihoods, well-being, and social and political identities. Customary lands tend to have weak legal status, although land law reforms designed to provide statutory recognition and stronger tenure security have been enacted in some countries.<sup>2</sup> All the same, as numerous studies and reports reveal, land acquisitions are generally exploitative of customary rights holders and often result in their land dispossession and deprivation of access to resources. Particularly targeted are lands held as common property—off-farm assets such as forests and rangelands with no visible signs of occupation—where communities source many of their needs such as building materials, traditional medicines, wild foods and animal protein (Alden Wily, 2013).<sup>3</sup> These lands are valuable as well for the ecosystem services they provide and their critical role in biodiversity conservation, serving as dispersal areas and migratory routes for wildlife. Their conversion to large-scale monoculture plantations has disastrous impacts on local communities, the eco-system, and biodiversity.<sup>4</sup>

However, as wrongful as they may be viewed, land acquisitions and the resultant displacement of entire communities are seldom illegal. They are guided by processes and procedures laid down under national legislation authorizing the conveyance or disposition of customary community lands. The legislation is usually premised on the legal principle of state allodial title to all lands, but some states do recognize customary land rights and provide for consultation and participation of local communities in the process of land acquisition. In those that provide for community engagement, the expression of consent by the community may be a formal requirement prior to the conveyance of land to the investor. This seems to give political space to customary communities to negotiate and shape the terms of the investment, even to reject it. But reports and studies have revealed that this is rarely if ever achieved. Customary and indigenous communities lose their land and livelihoods but receive little or no compensation or benefit for it, whether or not they in fact give consent to the acquisition and no matter the legal recognition of their land rights. In cases of failed investments or delays in project implementation, communities bear even higher risks as they lose both their lands and any prospects for recompense via new livelihood opportunities or the lifting of the local economy (Sulle & Nelson, 2013). Among the repercussions of this kind of scenario

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<sup>2</sup> For example, the subject of this paper, Tanzania and Mozambique, as well as Uganda, Ghana, Botswana, and Burkina Faso. See Alden Wily, L. (2013). "The Law and Land Grabbing: Friend or Foe?" Paper prepared for the Law and Development Conference 2013: Legal and Development Implications of International Land Acquisitions, Kyoto, 30-31 May 2013, p. 12.

<sup>3</sup> It is estimated that 70 percent of the total land area in Africa can be considered as commonage under customary domain. See Makwarimba & Ngowi, 2012, 6, citing Alden Wily, 2011.

<sup>4</sup> See for example <http://www.carbonradewatch.org/issues/monoculture.html>.

is increasing conflict linked to land-based investments, documented in a growing body of research (Sulle & Nelson, 2013).

Given the risks and impacts associated with agricultural land acquisitions, there is a need to better understand the processes relating to them: first, in order to find out where the policy and statutory frameworks may be wanting and, second, to suggest policy options and recommendations that give greater protection to land rights of customary and indigenous communities, particularly to common lands that provide them vital resources and are important for biodiversity conservation.

This paper hopes to contribute to this objective by examining the processes by which agricultural land acquisitions take place in two countries in Africa: Mozambique and Tanzania. The legislated steps and processes involved as well as actual practices—based on existing literature—will be reviewed. Next, these processes will be benchmarked against international standard under the principle of free, prior, and informed consent, which provides the strongest guidance on community participation. The paper will then give some policy options and recommendations moving forward.

## **II. MOZAMBIQUE**

### **1. Land Acquisition Process**

All land in Mozambique is owned by the State.<sup>5</sup> But the 1997 Land Law recognizes land use rights in the nature of private rights called *direito de uso e aproveitamento da terra* or DUAT (translated as “land use and benefit right”). Citizens and communities enjoy land use rights to the lands they occupy customarily or in good faith for at least 10 years. These rights are recognized *in perpetua* regardless of formal registration or titling with the State. Other individuals and corporations, both citizens and foreigners, may acquire land use rights for economic activities by application to the State. The right acquired is in the nature of a leasehold for 50 years (renewable) subject to the fulfillment of certain requirements. These two types of land use rights reflect the State policy of recognizing existing rights of citizens while at the same time promoting private investment.

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<sup>5</sup> Art. 109, 2004 Constitution; Art. 3, 1997 Land Law.

Table 1   Top 10 Target Countries for Land Acquisitions			
Concluded and Intended Deals		Intended Deals	
Country	Amount of Land	Country	Amount of Land
Indonesia	5,909,510 ha	Indonesia	2,273,073 ha
South Sudan	4,862,573 ha	Philippines	2,098,500 ha
Papua New Guinea	3,799,169 ha	Sudan	1,617,253 ha
Mozambique	3,064,086 ha	South Sudan	1,371,120 ha
DRC	2,898,158 ha	Sierra Leone	877,017 ha
Sudan	2,886,266 ha	Mozambique	860,319 ha
Philippines	2,230,650 ha	Uganda	850,127 ha
Congo	2,202,000 ha	Angola	757,000 ha
Sierra Leone	2,116,040 ha	Madagascar	607,000 ha
Russian Federation	1,739,948 ha	Tanzania	586,117 ha

Source: Land Matrix data as of 2/2015

The Land Law and its suite of complementary legislation, including the 1998 Land Law Regulations<sup>6</sup> and various amendments to the law, lays down the process for securing land use rights for commercial investment. It is a multi-stakeholder process led by the government, and in which investors are required to fulfill certain requirements and local communities' inputs are elicited. The key requirement for a prospective investor is an **exploitation plan** for the land to be acquired. The plan must describe the "activities, works and building which the applicant undertakes to realize in accordance with a determined schedule" (Art. 19, Land Law) and be accompanied by a technical opinion from the government agency that supervises the proposed economic activity<sup>7</sup>. For **foreign investors**, the Land Law additionally requires an **investment project** duly approved under legislation regulating the economic activity (Art. 11, Land Law). Large scale projects involving 10,000 hectares or more must include detailed information on the investor's experience in the type of activity proposed, bank references, web address, resumes of proposed project managers, demonstration of financial and technical capacity to undertake the project, profitability and number of jobs to be created by the project, ten-year business plan, socio-economic information about the population residing in the land applied for, and an opinion from the ministry of environment on the environmental feasibility of the project (Investment Guidelines under Resolution 70/2008 issued by the Council of Ministers). The application for DUAT and the investment project must be launched and processed simultaneously (Circular 009/DNTF/07 issued by the National Director of Land and Forestry or DNTF, its Portuguese acronym<sup>8</sup>) (Schut, Slingerland & Locke, 2010).<sup>9</sup>

<sup>6</sup> For urban lands, the 2006 Urban Land Regulations govern.

<sup>7</sup> Art. 19 & 1 (12), Land Law; Arts. 24 (2) & 26, Land Law Regulations.

<sup>8</sup> DNTF stands for *Director Nacional de Terras e Florestas*.

Local communities' inputs are elicited twice, first during land identification and second during community consultations. **Land identification** is led by the provincial cadaster department, the *Servicos Provinciais de Geografia e Cadastro* (SPGC), with help from local administrative authorities and local communities (Arts. 24 & 25, Land Law Regulations). The purpose is to produce a sketch and descriptive report<sup>10</sup> that will facilitate locating the land within the provincial cadastral atlas. The report will also include information on the existing population in the requested and surrounding areas, the existence of third party rights over the requested land, plans for resettlement of affected communities, if necessary, and how the requested area fits into the country's agro-ecological zoning.<sup>11</sup>

**Community consultations** consist of the approval process on the part of the affected local communities. This process was updated relatively recently through Ministerial Regulations (MR) No. 158/2011. Under these new regulations, community consultations shall be conducted in two phases and shall involve the District Administrator, the SPGC, the Consultative Councils for Villages and Towns, members of the local community, the owners or occupants of adjoining land, and the applicant.<sup>12</sup> The first phase is a public meeting for purposes of providing information to the local community on the DUAT application and identification of the boundaries of the parcel." The second phase, to take place thirty days after the first meeting, is the meeting in which the local community makes a pronouncement on the availability of the land for the investment. Additional meetings may be optionally conducted whenever there is new or more information to be presented to the local community. (Art. 1) The proceedings shall be recorded, and the minutes or *acta* signed by the Consultative Councils for Villages and Towns. It is worth noting that under the original provision of

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<sup>9</sup> See Biofuel developments in Mozambique. Update and analysis of policy, potential and reality, by Marc Schut, Maja Slingerland, and Anna Locke, p. 5154. Available online at [https://www.wageningenur.nl/upload\\_mm/2/8/9/0326e0fe-9de9-420b-b538-a5e0c79c8a89\\_schutenergypolicy2010.pdf](https://www.wageningenur.nl/upload_mm/2/8/9/0326e0fe-9de9-420b-b538-a5e0c79c8a89_schutenergypolicy2010.pdf)

<sup>10</sup> The sketch consists of a "diagram on a conventional scale representing the configuration of the parcel of land, while the descriptive report provides a description of the boundary points, boundary lines, and existing servitudes on the land" (Arts. 24 & 25, Land Law Regulations & Art. 2 (7) & (9), 2000 Technical Annex to the Land Law Regulations)

<sup>11</sup> The agro-ecological zoning is a mapping exercise of Mozambique's biophysical potential on a national scale, in which the agro-climatic suitability of different areas and land availability are identified. This is required under the National Biofuels Policy and Strategy, Resolution 22/2009. The zoning was carried out at a scale of 1:1,000,000, capturing contiguous areas of more than 1000 ha. The zoning exercise identified 6,966,030 million ha as being available for large-scale agricultural, forestry and livestock activities (IIAM and DNTF, 2008). Several concerns exist in relation to its reliability and usefulness, among which is that the current scale is too large to allow for more than a broad overview of land availability. A random locality in Mozambique identified as available based on 1 km<sup>2</sup> satellite databases turned out to be extensively utilized and inhabited when viewed at the finer resolution provided by Google Earth (Watson, 2008, 13). A more accurate land zoning exercise is currently being carried out on a scale of 1:250,000. See Schut et al., p.5155.

<sup>12</sup> See also Art. 13 (3), Land Law; Arts. 24 (1) (e), 27 (2) & (3) Land Law Regulations; Decreto 43/2010 of October 20, amending Art. 27 (2) of the Land Law Regulations; Art. 2, Diploma Ministerial 158/2011 "Establishing procedures for consultation with the local communities on the use and property rights of land under Art. 27 par. 2 of the Land Law Regulations."

the Land Law Regulations, the minutes shall be signed by “a minimum of three and a maximum of nine representatives of the local community, as well as by the owners and occupiers of neighboring land.”<sup>13</sup>

The Land Law requires the SPGC to assist in the consultation process by providing interested parties with information and clarification regarding applicable legislation, land application requirements, costs and fees, benefits, impediments or restrictions to which interested parties may be subject or entitled, and procedures for appeals and complaints. Similarly, MR 158/2011 requires administrative authorities at the national, district and local levels to disclose and circulate to local communities the procedures for consultation in order to ensure their effective participation in the management of land and natural resource (Art. 6). MR 158/2011 further provides that where the land to be acquired is more than 100 hectares, the Consultative Councils for Villages and Towns and the District Administrator shall speak to the local community about the advantages and or disadvantages of the application (Art. 4).

After community consultations, the government proceeds with the approval process. The District Administrator issues an **opinion** confirming whether “the area is free and has no occupants” (Art. 13), and if it does, “the opinion shall contain the terms under which the partnership between the applicant and the [local community] shall be governed” (Art. 27(3), Land Regulations). The opinion is forwarded to the SPGC, which then submits the entire application for **provisional authorization** to the approving authority. The approving authority depends on the size of the land to be acquired: provincial governors for lands not more than 1,000 hectares; the Minister of Agriculture and Fisheries for lands between 1,000 to 10,000 hectares, and the Council of Ministers for lands exceeding 10,000 hectares. For land areas requiring approval by the Council of Ministers, the Center for Promotion of Investments (CPI) consolidates the land application and investment project documentation for approval by the Council. (Arts. 22 & 25, Land Law; Art. 28, Land Regulations)

Provisional authorization is valid for a period of five years for Mozambican nationals and two years for foreigners. During this time, the investor needs to accomplish two things: demarcate the land within one year<sup>14</sup> and carry out the exploitation plan<sup>15</sup>. Demarcation involves technical

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<sup>13</sup> See Art. 27 (2) of the Land Law Regulations. The first amendment to Art. 27 (2) is Decreto 43/2010, which expanded the participants in community consultations from three sets of stakeholders – the cadaster services, the District Administrator, and the local community – to six, to henceforth include members of Consultative Councils of Villages and Towns, owners or occupants of adjoining land, and the applicant, as well as changed the signatories of the minutes.

<sup>14</sup> Or the period of extension granted by the SPGC, which shall be up to 90 days. See Art. 30, Land Law Regulations.

<sup>15</sup> The investor may request a reduction in size of the land if it will be unable to comply with the exploitation plan for the whole area within the two-year period.

reconnaissance, staking-out of markers, measurement, and preparation of a technical file that includes a topographic map, list of co-ordinates, details of measurements, and a diagram of links to the geodetic network It (Art. 2 (5) & 19-21, Technical Annex). Failure to comply with either requirement without justifiable reason within the set period is a ground for revocation of the provisional authorization. But the investor may avoid revocation by requesting a reduction in the land area at the end of the period. Revocation results in forfeiture all non-removable improvements made on the land without right to compensation. (Arts. 25 & 27, Land Law; Arts. 28-33, Land Regulations)

Fulfillment of the exploitation plan according to schedule shall entitle the investor to a **final authorization** at the end of the two-year period and the **issuance of a DUAT**. The DUAT will be valid for up to 50 years, renewable for an equal period. Both the provisional and final authorization shall be registered with the provincial cadaster under the SPGC and the Real Estate Registry (*Conservatória do Registo Predial*). Final authorization may also be revoked if the investor fails to follow through the exploitation plan or investment project, and all non-removable improvements shall revert to the state. (Arts. 26, 14 & 17-18, Land Law; Arts. 31 & 18-20, Land Regulations; Decree 01/2003 Amending Arts. 20 & 39 of the Regulations) Any sale or transfer of the structures and improvements built on the land, or transfer of the entire investment project or economic operation, is subject to approval and does not automatically include the transfer of the land itself. Transfer of the land requires a separate approval from the government entity that issued the provisional and final authorization, subject to proof of payment of the annual land fees and fulfillment of the exploitation plan (Art. 16, Land Law; Art .15, Land Regulations). Box 1 below describes the step-b-step procedure for land acquisitions and investments jointly prepared by the government and private sector, principally through the National Directorate of Land and Forestry, the SPGC, and the Association for Commerce and Industry (ACIS).<sup>16</sup> Entitled *Legal Framework for Recognizing and Acquiring Rights to Rural Land in Mozambique: A Guide to Legalizing Land-Holding*, the guide is intended to facilitate investments in the country by simplifying the process for investors.

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<sup>16</sup>The other collaborators are the Provincial Government of Sofala, SPEED or the Support Program for Economic and Enterprise Development (a USAID-funded project), GIZ Pro-Econ or Enabling Environment for Sustainable Economical Development, GIZ PRODER or Program for Rural Development, the Center for the Legal and Judicial Training (CFJJ), and Sal & Caldeira Advogados, Limitada. The version used for this paper is the third edition dated August 2012.

## Box 1 | Step-by-step Procedure for Acquiring or Investing in Rural Land in Mozambique (Investors' Guide)

1. *Identification of suitable area.* The investor is encouraged to pay a visit to the District Administrator to get an initial idea of where land might be available.
2. *Submission of application.* Having identified suitable land, the investor shall submit an application letter, together with company documents and an exploitation plan, to the Provincial Cadaster Services or SPGC. The application letter shall be addressed to the approving authority based on the size of land.
3. *Survey and initial mapping of land.* The SPGC shall conduct a survey to identify the land (together with local administrative authorities and local communities) and prepare the sketch and descriptive report.
4. *Community consultation.* The SPGC shall send the entire application file to the District Administrator and organize the community consultation. As required by law, two meetings will be held, the first one an informational meeting and the second one to hear the community's pronouncement. Proceedings shall be recorded by the SPGC in the minutes or *acta*, which shall indicate the date, the participants including number of community participants, and a summary of the discussions. The *acta* is signed by the Consultative Councils for Villages and Towns.
5. *Public information or posting of the application.* After community consultation, the SPGC shall prepare a summary of the application, the *edital*, and forward it to the District Administrator, who shall then post the *edital* at the District Administration Headquarters for 30 days. The purpose is to allow the general public to comment on the application.
6. *District Administrator's Opinion.* At the end of the 30-day period, the District Administrator shall prepare an opinion indicating whether or not the requested area is subject existing land use rights, and if so and an agreement was entered into by the investor and the local community concerned, the terms governing their agreement. The opinion shall also include any comments received by the District Administrator from the general public.
7. *Provisional authorization.* Upon receipt of the District Administrator's opinion, the investor shall submit to the SPGC a formal application for DUAT with all the supporting documentation from the preceding steps undertaken. The application shall be transmitted by the SPGC to the approving authority based on the size of land.  
  
According to the Investors' Guide, a directive of the Ministry of Agriculture stipulates that the entire process up to the grant of provisional approval should take no more than 90 days, with the goal of improving efficiency of the process. But the application process can and does exceed 90 days in many cases.\*
8. *Publication and real estate registration.* The provisional authorization shall be published in Mozambique's official gazette, the *Boletim da República* and, at the investor's option, registered in the Real Property Registry in the area where the land is situated (Art. 14, Land Law; Art. 20 Land Regulations, as amended by Decree 1/2003).\*\* Real estate registration is encouraged.
9. *Demarcation and implementation of exploitation plan.* Upon grant of provisional authorization, the investor shall proceed with demarcation within one year and carry out the exploitation plan within the 2 or 5-year period (foreigners or citizens, respectively). Demarcation may be done through the SPGC or a government-registered private surveyor, and is extendible one-time for up to 90 days upon request. The investor may also request a reduction in land size for purposes of complying with the exploitation plan. Failure to comply with either requirement is ground for revocation of the provisional approval.  
  
According to the Investor's Guide, investors who foresee problems with compliance should contact the SPGC as soon as possible to discuss options for renewal of the provisional authorization.\*\*\*
10. *Inspection.* At the end of the provisional authorization, or prior thereto at the investor's request, the SPGC shall conduct a site inspection to determine fulfilment of the exploitation plan. The SPGC shall issue an inspection report and, if the investor is in compliance, proceed with processing the final authorization.
11. *Final authorization/DUAT issuance.* Similar to the process of the provisional authorization, the SPGC shall prepare the *edital* and send it to the District Administrator. The District Administrator shall post the *edital* at the District Headquarters for 30 days and thereafter issue an opinion on the issuance of the DUAT. The SPGC then transmits the opinion and accompanying documentation to the approving authority depending on the size of the land. Upon approval, a DUAT certificate is issued in the name of the investor.\*\*\*\*
12. *Publication and real estate registration.* The final authorization shall likewise be published in the *Boletim da República* and must be registered by the investor with the Real Property Registry.

Source:

<http://www.acismoz.com/lib/services/publications/docs/Rural%20Land%20Edition%20III%20English.pdf>

\*Investors' Guide, p. 27.

\*\*Real estate registration is separate from cadastral registration in the Land Cadaster under the SPGC, the latter is an administrative function designed for management of the land resource by the state.

\*\*\*Investor's Guide, p. 32.

\*\*\*\*The DUAT shall contain the following information: (i) identity of entity that authorized the DUAT; (ii) date of authorization; (iii) DUAT number; (iv) name of DUAT holder; (v) identification of the area (coordinates, parcel number and numbers of neighboring parcels); (vi) validity period; & (vii) type of use for which the DUAT was conceded.

## *Assessment of Community Participation in Mozambique*

Mozambique's land law is considered progressive for protecting customary and occupancy land rights while promoting land investment. Likewise, for providing space for local communities to participate in the decision-making process related to the management and use of their lands. But ground reality presents a contrasting picture. Published case studies and field reports show that, in practice, community lands are less protected and allocation of land to investors tend to be prioritized. Despite provisions in the law for community participation, including the relatively recent community consultation guidelines, land allocations to investors typically lack meaningful participation by local communities. This is attributed to inconsistencies and ambiguities in the legal framework itself, faulty interpretation and poor implementation by government agents tasked with carrying out the law, and local communities' general lack of capacity to effectively participate in the process.

### *Legal Inconsistencies and Ambiguities*

#### *a. Community Representation*

An aspect of long-standing controversy and thus demands clarification is the concept of community representation (TerraFirma, 2013). The Land Law does not spell out how local communities are to be represented in the exercise of their right to be consulted regarding acquisitions and investments. The law merely provides that “mechanisms for representation of, and action by, local communities, with regard to rights of land use and benefit, shall be established by law” (Art. 30, Land Law). Prior to its amendment, the Land Law Regulations implied a choice of representation by providing that the *acta* or minutes of community consultations shall be “signed by a minimum of three and a maximum of nine representatives of the local community” (Art. 27[2]). This connotes that the community has a choice of who will represent them in consultations, bolstered by the fact that nowhere in the Land Law or Regulations does it require traditional chiefs or *régulos* to be the legal unquestionable representatives of the community (Akesson et. al., 2008).

However, two pieces of legislation subsequently introduced created inconsistencies that resulted in the weakening community participation. The first is **Decree 15/2000** on State recognition of traditional authority in Mozambique. The decree formally recognized the role of traditional leaders—principally the *régulos* and other superior chiefs in the political-religious order of

Mozambican customary communities—as both community leaders and administrative auxiliaries for state functions<sup>17</sup>. Among other things, Decree 15/2000 provides as an area of “*discussion between local state organs and community authorities the use and exploitation of the land*” (Art. 4[d]; Akesson, et al., 2008). The other legislation is **Decree 43/2010** amending Art. 27[2] of the Land Regulations. This Decree expanded the participants in community consultations to include the Consultative Councils of Villages and Towns and instituting them as signatory to the *acta* replacing representatives of the local community. The Consultative Council is an elective body consisting of representatives from civil society, private sector and the local community, whose role is primarily to serve as conduit between communities and local governments, including by raising awareness of national laws and ensuring participation by community members in the elaboration of the local strategic plans (Orgut Consulting, 2012). Decree 43/2010 essentially implements another law, Decree 11/2005 (Regulations to the Law of Local Organs of the State), which requires local state authorities to observe, “*the active participation of citizens in seeking solutions to key issues..., particularly through local consultative councils... Among [whose] functions... is the consideration of proposals for private investment for the exploitation of natural resources and the use and enjoyment of land*” (Terrafirma, 2013).

#### [Decree 15/2000](#)

Decree 15/2000 is claimed by many government officials as the law establishing mechanisms for local community representation under Art. 30 of the Land Law. But some legal minds disagree. According to them, the basis for representation lies in how “local community” is defined in the Land Law. Local community is a private “grouping of families and individuals living in a territorial area that is at the level of the locality or smaller which seeks to safeguard their common interests” (Art. 1[1]), who shall be deemed as joint title holders “governed by the rules of co-ownership of property” (Arts. 10[3], Land Law; Art. 12, Land Regulations). This definition differs from local community under Decree 15/2000, which consists of populations living within a certain unit of territorial organization, namely, locality, administrative post, and district” (Art. 1[5], Regulation of Decree 15/2000) and constituting the basic building block of state administration and part of the political structure (Tanner, et al., 2006a; Tanner & Baleira, 2006b).

Based on the Land Law, decision-making is at the level of the community that will be directly affected by the land investment. As joint title holders, each community member has equal power to administer the land and participate in decision-making. The community as a group can elect or

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<sup>17</sup> For example, tax collection and informing people about public programs. See Tanner, et al., 2006.

appoint a person or group of persons to act as their representative(s) in community consultations. These representatives may but need not be the *régulos* or other leaders recognized in the context of the political and administrative structure under Decree 15/2000. Moreover, even if argued that Decree 15/2000 implements Art. 30 of the Land Law, such that traditional leaders represent the local community in consultations, under the principle of joint title holding or co-ownership, all members of the community must consent to the land allocation to an investor. Case studies have shown that applying Decree 15/2000 can result in vast swathes considered as local communities and *régulos* and other leaders acting as representatives of communities to which they don't belong or from which they are separated by huge distances physically, socially, and politically. This is problematic in and of itself, but coupled with findings that traditional leaders and local elites in many cases fail to relay information or consult with the wider population, or are motivated by personal gain rather than defending the interests of their communities, the latter as the entity directly affected and actual holder of land rights often end up marginalized in the decision-making process and vulnerable to losing their lands. (Tanner, et al., 2006a; Tanner & Baleira, 2006b; Akesson et al., 2008; Matavel, et al., 2011)

#### [Decree 43/2010](#)

Similarly, Decree 43/2010, in changing the signatory to the community consultation minutes to the Consultative Council, veers from the concept of local community in the Land Law as a private entity whose members are joint title holders to the land. Instead, community members are treated as mere residents of the area who might be affected by the proposed project, with enough interests to justify their right to participate in the decision-making process. Adding Consultative Councils as parties to the consultation proceedings may have some benefit, given their role as a mechanism for participatory decision-making and that their presence is in addition to that of the local community members and other parties. But making them the signatory to the *acta* makes the Consultative Council the principal party that signs off on the land allocation, despite the fact that it is a public body whose geographic distribution is defined differently and with responsibilities of a more political nature. This effectively displaces local communities which are the private rights holders entitled under the Land Law to approve the land allocation. This mistake is reiterated in Ministerial Diploma 158/2011, the Community Consultation Guidelines. (TerraFirma, 2013; Rose & Lopez, 2014).

### b. Community Consent

Another ambiguity in the Land Law relates to the role of local communities in the decision-making process. At issue is the clause “...consultation with the respective communities, for the purpose of confirming that the area is free and had no occupants” (Art.13[3]). The Regulations elaborate that “[i]n the event that the area applied for is subject to other rights, the opinion [of the District Administrator] shall contain the terms under which the partnership between the applicant and the [local community] shall be governed” (Art. 27[3]). Data from surveys and case studies show that government officials generally interpret these two clauses to mean that local communities do not have the right to say “no” to a proposed project or investment. Their role is limited to confirming whether the land is occupied or not and, if so, to negotiate for a share of the benefit stream (Knight, 2010). The focus of consultations is on securing land rights for the investor, in line with policy objectives of the state to promote private investment (Tanner and Baleira, 2006b).

Legal experts dispute this interpretation. They point out that local communities have the implicit power to say “no” to any investor, borne out of its status as collective title holder, with private and exclusive rights to the land being sought. Based on the law, the local community has three options with respect to land investments. The first is to say that the land is occupied and that it declines to relinquish or cede it, in which case the investor has to look elsewhere for land. The second option is to say that the land is *not* occupied, in which case the State is free to grant a DUAT to the investor without the necessity of an agreement with the community. The third option is to say that the land is occupied but the community is willing to cede it, in which case the community can negotiate the benefits and terms for relinquishing its land rights to the investor. Relevant to this, discussed below, is the level of rights awareness and capacity of local communities to exercise any of these options. (Tanner, et al., 2006a; Tanner & Baleira, 2006b; Akesson, et al.)

### c. Community Land

A corollary issue is the interpretation of the phrase “free and [with] no occupants” in respect of community land. Studies show the tendency of government agents to treat land not currently settled, farmed or used for livestock as “free and unoccupied”. This makes common areas and off-farm assets susceptible to allocation to investors. There is no ambiguity involved here, the Land Law constitutes as community land “areas for habitation and agriculture, whether cultivated or lying fallow, forests, places of cultural importance, pastures, water sources and areas for expansion” (Art. 1[1]). Under the Technical Annex, the extent of community lands is established using not only

current spatial occupation and land use and production systems, but also historical occupation and an assessment of population dynamics and future needs (Art. 2[6]). This critical aspect of the law is often unclear to local communities and seemingly misunderstood by government officials. (Akesson, et.al.; Tanner and Baleira)

### Poor Implementation

Another serious concern is the way in which the law is implemented. Studies consistently point to a lack of real and meaningful participation by local communities in the consultation process. A major study conducted by the FAO and the *Centro de Formação Jurídica e Judiciária* (Center for Juridical and Judicial Training or CFJJ),<sup>18</sup> in which 260 land applications across seven provinces<sup>19</sup> in Mozambique were reviewed, revealed several patterns in the way community consultations are carried out, including the following:

- Often, only one meeting is conducted, and when there is more than one meeting, the first is usually a preparatory meeting to set the time and date for the main consultation, with little real information presented to the community. Previous meetings with *régulos* and other local leaders often mean the land request was a “done deal.” (Note that this was prior to the enactment of Ministerial Regulations 158/2011, which requires two consultation meetings.)
- Very few people from the community are involved. Those who participate are normally the *régulos* and other local leaders, with the opinion of the chief nearly always predominating. Meetings with larger numbers in attendance are high only in relation to the norm for most meetings, rather than the number of people affected by the land application. Women are rarely if ever actively involved.
- There were meetings with no one from the District Administration present as required by law.
- Many consultation minutes present conflicting images of what exists on the ground. For example, the minutes will describe farm plots and other evidence of human settlement, but then declare that the land is “unoccupied” for purposes of the land request.

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<sup>18</sup> See Tanner and Baleira, 2006b, 5-6.

<sup>19</sup> The seven provinces are Maputo, Gaza, Inhambane, Zambezia, Nampula, Cabo Delgado, and Niassa. See Tanner & Baleira, 2006b, 4-5.

- Frequently, the views and comments of community representatives are not reflected as part of the agreement of the parties, even if recorded elsewhere in the minutes, including comments with specific requests or conditions made to the investor.
- Investor commitments are presented in vague, generic formulations, such as “*the investor will bring jobs,*” or “*the company must develop social infrastructure, respect the community and refrain from resettling people within the company plots*”<sup>20</sup>. There are no sanctions in the event of the investor’s failure to meet its commitments.<sup>21</sup>
- Agreements often contain insufficient detail, and lack measurable indicators and timeframes to facilitate subsequent follow-up and monitoring of commitments.
- Minutes are not formally notarized or officially recognized in a way that would confer it with legal validity.

The study further observed that despite a standard SPGC form for recording consultation proceedings, there is no uniformity in presentation and huge variations in the type and quality of information recorded.

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<sup>20</sup> See also Nhantumbo & Salomao, 2010, 37.

<sup>21</sup> See also German, 13.

## Box 2 | Case Study: Commercial Forest Plantation in Niassa Province, Mozambique

Chikweti Forests of Niassa is one of several companies operating commercial tree plantations in Niassa province in northwest Mozambique. It is one of the provinces where the government is promoting large-scale investments in tree plantations. Chikweti's projects are located in the districts of Lago, Lichinga and Sanga. Almost all community members in the project areas are peasant farmers who depend almost entirely on small-scale farming, supplemented by hunting and gathering in the forests and fishing in nearby Lake Niassa. From the very beginning of the establishment of the tree plantations, there have been numerous complaints by communities, in some cases leading to open resistance and conflict. Many of the complaints are linked to lack of irregularities in community consultations.

Records show that consultations were conducted by the company instead of local authorities as required by Land Law, raising the issue of impartiality in the proceedings. In Lago district, the administrator accused Chikweti of intentionally falsifying consultations. In Lichinga, only one consultation meeting was held in Cholue community for tracts of land that extended to the communities of Luambala and Lipapa. Several communities have also complained that the company only consulted with community leaders. In some cases, community members reported that Chikweti bribed leaders or promised them jobs on the plantations in order to facilitate the ceding of community lands. This led to conflicts between community members and their leader in Licole, Kambalame and Mussa, where chiefs reportedly received bicycles and were employed as guards once the plantations had been established. It was also alleged that Chikweti started some of its operations before obtaining DUATs and, in some cases, even before carrying out the consultations with local communities. In other cases, no consultations with communities were carried out at all.

During consultations, the communities were not sufficiently informed about the project and its implications. Where communities allowed Chikweti to plant on their lands, they were not informed about the conditions under which they agreed to do so and the exact location of the land the company has requested remains unclear. Interviews with community members and leaders reveal that they were unaware of how long they have ceded their lands. They thought that they have ceded lands not currently in use based on the traditional practice of moving *machambas* (farms) every five to ten years leaving the lands idle. While the company can plant trees on these areas in the meantime, community members thought that they will be able to take their lands back once they need them again to move their *machambas*.

In most cases, there is no written documentation about agreements entered into by the community and Chikweti, resulting not only in the lack of clarity under which the land was ceded to the company, but also impeding communities from claiming promises of social infrastructure made during consultations. Finally, the consultations failed to take into account the tradition in the region that land is in principle a resource accessed and passed on through women in matrilineages. Women have basically been marginalized in the consultations. Testimonies from community members also indicate that complaints filed by those affected have not been investigated and adjudicated by the responsible authorities.

Source: The Human Rights Impacts of Tree Plantations in Niassa Province, Mozambique. FIAN International (2012)

### Government bias

The findings in the FAO/CFJJ report and other studies appear to support the assertion that the government is biased towards investors and fail to see local rights as “real” in the sense of being recognized as private rights under the Land Law. There is an assumption that the land application will go through, and the objective merely is to agree on the terms, not to see if the community will agree or not to the project. (Knight, citing Tanner, 2007, and Calengo, et al; Tanner & Baleira, 2006b) The general emphasis in consultations is on the potential benefits of the project,

particularly job creation and community infrastructure (wells, schools, or health centers), while concerns about potential negative impacts on livelihoods, well-being, and the environment tend to be downplayed. Not that government agents are necessarily aware themselves of the potential negative impacts. Studies find that agents charged with implementing the law in many cases do not fully understand the long-term impacts of large-scale agricultural and investment projects. It was also found that they tend to have vague and frequently wrong understanding of the law or how it should be handled in practice. Moreover, very few of government agents are trained in community level participatory techniques. There are cases as well where government agents receive specific instructions from higher ups to fast track the approval process in favor of a particular project or investor. (Tanner et al., 2006a; Matavel, 2011; Nhantumbo & Salomão, 2010; Tanner & Baleira, 2006b)

### *Unequal bargaining power*

Local communities, for their part, are barely in a position to assert their rights or deal on an equal footing with the government and investors. To begin with, low levels of literacy in rural areas mean that people have very weak understanding of their rights under the law and how to assert them effectively.<sup>22</sup> They are also generally unaware of the real value and extent of the resources they own, and the socio-economic and environmental impacts of the investment project. (Tanner et al., 2006a; Tanner & Baleira, 2006b) In one case, for example, it is said that the community ceded some 45,000 hectares to an investor, under great pressure from the local government, in return for a mill that does not work and a promise to build a local shop which remains unfulfilled. The investor paid less than 10 USD cents per hectare for land that will then be used as a game farm and safari venture, and the community is now prevented from hunting and collecting natural resources and wild foods from the area.<sup>23</sup>

Given their severe poverty, a powerful incentive for local communities is the promise of employment opportunities from the project. The FAO/CFJJ study found that in most consultations, the “carrot of jobs is quickly waved in front of local people” at the start of meetings, many times with the desired effect (Tanner & Baleira, 2006b). But the cases surveyed indicate that, firstly, most jobs are just promises, and secondly, most jobs available to locals are very low level and are not

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<sup>22</sup> It must be mentioned that the lack of awareness and skills are more pronounced for women. The hierarchies of gender in customary law means that, even where consultations take place, women do not actively participate in the process, confirming what is widely known, that it is the men who deal with the outside world in most parts of rural Mozambique. (Tanner and Baleira, 20-1)

<sup>23</sup> See Tanner & Baleira, 28.

secure. The study authors point out that even if employment opportunities are created by the project, this is not necessarily “participation” in the sense that the community is able to determine the nature of the development process and the impacts on their lives (Tanner & Baleira, 2006b; Akesson et al, 2008). Similarly, social infrastructure promised by investors—such as schools, health centers, and rice and flour mills—frequently at the request of the community, seldom gets actualized. There were instances when the machinery for the mill was supplied, albeit second-hand, but the investor failed to install it and get it running. (Tanner & Baleira, 2006b)

The weak position of local communities could at least be mitigated by adequate preparation for the consultation process. The process itself as outlined in the law provides some space for public education in advance of consultation. But reports indicate that there is little or no effort from concerned government agencies to help local communities prepare. Communities generally do not know in advance critical information such as who the investor is, what the planned investment will be, precisely what land is being requested, or how much money the investor stands to profit from the proposed venture (Knight, 2010). The FAO/CFJJ study shows that what happens in practice is that communities get dumped with a huge amount of information in the first and only meeting, in which the whole project is described often in technical language and containing ideas and activities that are remote and incomprehensible even for local leaders. Some attempt may be made to quickly explain the Land Law, and thereafter the local community or its leaders are asked to make a decision (Tanner & Baleira, 2006b). Local communities are on their own, with no legal or technical support made available to guide and assist them in the whole process. (Waterhouse et al., 2010; Tanner & Baleira, 2006b; Nhantumbo & Salomão, 2010) In some areas where NGOs are active, communities are better able to assert their rights and negotiate better terms, but with few exceptions NGO presence is generally unwelcome in the eyes of government agents, who view them as obstructions to the approval of the project (Salomão, 2014<sup>24</sup>).

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<sup>24</sup> Interview dated March 2014.

### Box 3 | Case Study: Agricultural Project in Maputo Province, Mozambique

This case involves the acquisition of 500 ha. by a Mozambican investor in the centre-south of Maputo Province. The area was defined as *terra baldio* (waste land) by SPGC technicians in the land application, implying that no-one was using it and that it was therefore available to allocate to an investor.

For the community, however, it is far from being vacant land—it has religious importance (graves are found there) and is being kept for future use and for their children.

According to the application, a consultation took place, signed by the community. The *consulta* appears to have been a visit to the area by the investor, accompanied by “two friends”, who appear to have been either SPGC or administration officers. The investor talked to the people living nearby and said he wanted to occupy 500 ha.

The community leaders told the investor he might have 150 hectares, but that he would have to come back as all the members of the community should be present to decide. The investor never came back.

Although the visit did not result in an agreement, the land application went ahead with several local signatures on the *acta*. The community leaders insist that they never signed the *acta* or any other document and consistently deny that any consultation took place. They say that the signatures were falsified or the investor secured the signatures of local people who had nothing to do with their land. Meanwhile, the land was occupied by the investor, who has since sold it to another investor who plans to farm the land and raise livestock.

Source: LSP Working Paper 28: Mozambique’s Legal Framework for Access to Natural Resources. Tanner & Baleira, 2006, p. 16, citing Moises (2005); Seuane and Rivers-Moore (2005)

## III. Tanzania

### Land Acquisition Process

In Tanzania, all land is public land held in trust by the President on behalf of all citizens. There are three categories of public land: general land, reserved land, and customary land [see Box 3]. General and reserved lands are under government control and management, while village land is managed by the village council, the village governing body established under local government legislation and the village assembly (every person 18 years old and above residing in the village)<sup>25</sup>. The law grants the President the power to transfer land from one category to another, that is, to reclassify general or reserved land to village land and *vice versa*<sup>26</sup>. The principal legislation governing land rights and land acquisitions are the Land Act and the Village Land Act (VLA).

<sup>25</sup> See Local Government (District Authorities) Act; also Sec. 2 & 8, VLA.

<sup>26</sup> Sec. 5, Land Act; Secs. 4-5, VLA.

#### Box 4 | Tanzania: 3 Categories of Public Land

**General land** is all public land which is not reserved land or village land *and includes unoccupied or unused village land*. Surveyed land located in urban and peri-urban areas fall under general land. (Sec. 2, Land Act; Sec. 2, Village Land Act Note: *Italicized* part does not appear in the VLA; See also Tanzania Investment Center website)

**Reserved land** refers to all land set aside for conservation and special public purposes, including forest reserves, national parks, game parks and game reserves, public recreation grounds, lands reserved for public utilities and highways, land where water resources for a natural drainage basin originate, and lands designated under the Town and Country Planning Ordinance, and lands declared as hazardous lands<sup>27</sup>. (Sec. 6, Land Act)

**Village land** means all land falling under the jurisdiction and management registered village. Land classified as village land is comprised of 12,000 villages (10,500 of which are registered). It includes—

- lands within the boundaries of the village established by demarcation or designated under previous laws;
- all lands that are part of a registered village (under the Local Government (District Authorities) Act;
- land designated as village land under the Land Tenure (Village Settlements) Act of 1965;
- land that has been demarcated as village land under any law or administrative procedure – whether formally approved or not;
- land that has been agreed to be village land by relevant stakeholders; and
- land that villagers have been regularly using in the 12 years before the Village Land Act was passed, including lands lying fallow, lands used for pasturing cattle, and land used for passage to pasture lands. (Sec. 7, Village Land Act; Knight, 2010, p.161)

<sup>1</sup> Hazardous land is land the development of which is likely to pose a danger to life or to lead to the degradation of or environmental destruction on that or contiguous land (Sec. 7, VLA).

Under these laws, there are two primary modes of obtaining rights to land, called a “right of occupancy”. The first is through allocation from the state of general or reserved land, called “granted right of occupancy” and regulated under the Land Act, and the second is through customary tenure, called “customary right of occupancy” and regulated under the Village Land Act. All 10,000+ villages<sup>28</sup> in Tanzania have customary rights of occupancy to lands they occupy, either in an informal basis referred to as a “deemed right of occupancy,” or formally under a Certificate of Village Land issued by the Commissioner of Lands once village land is demarcated and its boundaries clearly determined and not in dispute (Sec. 2, Land Act; Sec. 2, VLA). Individuals, families or groups of individuals residing within the village may obtain a Certificate of Customary Right of Occupancy (CCRO)<sup>29</sup> for specific plots allocated to them for their use and occupation (Sec. 12[2], 22-29 VLA).

Rights of occupancy, whether granted or customary, are transferable to third parties. This can be achieved through the assignment of “derivative rights,” defined as a right created out of a right of

<sup>27</sup> Hazardous land is land the development of which is likely to pose a danger to life or to lead to the degradation of or environmental destruction on that or contiguous land (Sec. 7, VLA).

<sup>28</sup> Villages are defined under the Local Government (District) Authorities Act and other local government legislation.

<sup>29</sup> Also referred to as Certificate of Customary Title (Sec. 12[2], VLA).

occupancy, such as a lease, sub-lease, license, usufruct or similar interest, subject to conditions. The holder of a granted right of occupancy, a CCRO, or a derivative right may also make a “disposition”<sup>30</sup> of right, including any sale, lease, assignment, partition, exchange, mortgage, or creation of easements and usufructuary rights over the land, subject to approval by the concerned authority and to conditions laid down in the land laws. (Sec. 2, 19, 36-43, Land Act; Sec. 2, 30-33, VLA) The 2004 Land Amendment Act further allows citizens to partially transfer interests in land in a joint venture for investment activities (Sec. 3[c]).

An interested investor has therefore several ways by which to acquire land in Tanzania—through a granted right of occupancy, a derivative right, or by acquiring the rights of the two aforementioned holders or the holder of a CCRO. But for **foreign investors**, the legislation has two caveats. The first is that foreigners may only obtain land in connection with an investment approved under the Tanzania Investment Act (Sec. 19[2] LA, as amended by Sec. 3, The Land Amendment Act 2004). The second is that foreigners may not be granted customary rights of occupancy or CCROs (Sec. 18 VLA). The process and procedures for acquiring or investing in land varies according to the category of land and the type of right to be secured.

#### General or Reserved Land

The process for acquiring a **granted right of occupancy** to general or reserved land is set forth in the Land Act (Sec. 25-30). The investor shall submit an application to the Commissioner of Lands, together with required documentation—company information, approvals from local authorities, etc.—including, for foreign investors, a Certificate of Approval/Incentives issued by the Tanzania Investment Center (TIC)<sup>31</sup> for the intended investment. The Commissioner will review the application and, if necessary, refer it to concerned authorities, such as the agency having jurisdiction of reserved land, if applicable, or to local authorities if the Commissioner finds that project will have a substantial effect on the activities or services that local authorities provide. Thereafter, taking into consideration representations made by the concerned authorities, the Commissioner makes a determination whether or not to grant the right of occupancy and the conditions under which such right shall be granted. If yes, the Commissioner shall make an offer in

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<sup>30</sup> Disposition is defined as any sale, mortgage, transfer, grant, partition, exchange, lease, assignment, surrender, or disclaimer and includes the creation of an easement, a usufructuary right, or other servitude or any other interest in a right of occupancy or a lease and any other act by an occupier of a right of occupancy or under a lease whereby his rights over that right of occupancy or lease are affected and an agreement to undertake any of the dispositions so defined. (Sec. 2, Land Act and VLA).

<sup>31</sup> The TIC is designated under the Tanzania Investment Act as primary agency for promotion, coordination, and facilitation of investment in the country. (Sec. 5, Tanzania Investment Act)

writing to the investor, and the investor must accept in writing. After acceptance, the Commissioner (on behalf of the President) shall issue to the investor a Certificate of Occupancy. The certificate shall be for a period of up to 99 years and subject to the payment of a premium and annual rent.

For **derivative rights**, the application shall be filed with the TIC. The Land Act provides that lands to be designated for investment purposes by non-citizens shall be identified, gazetted and allocated to the TIC, which shall then create derivative rights to investors (Sec. 20 [2]). Similarly, the Tanzania Investment Act, under which the TIC was created, lists as among the functions of the agency the identification of investment sites or lands and to provide, develop, and administer them for investors (Sec. 4-6 Tanzania Investment Act). Towards this end, the TIC has established a 'land bank' from which investors may identify project sites. The procedure to be followed is outlined in the TIC website.<sup>32</sup> Essentially, it involves filing an application for land occupancy, paying the required amount (including premium<sup>33</sup>, rent<sup>34</sup>, and TIC facilitation fee), and finally signing the derivative right in the form of a lease and securing a sub-title in the investor's name as tenant. The title or certificate of right of occupancy remains in the name of TIC.

<b>Type of Ownership</b>	<b>No. of Parcels</b>	<b>% of Parcels</b>	<b>Area in Ha.</b>
Private Individuals	301	40.21	443,301
Village Councils	260	35.71	1,976,153
Local Authorities	135	17.86	618,175
Central Government	47	6.22	498,675
Grand Total	743	100.00	2,636,304

Source: 2003 Study made by the Ministry of Lands, Housing and Human Settlements Development (MLHSD) for the Government of Tanzania. See <http://www.dilaps.or.tz/downloadfiles/3/The%20Land%20Bank%20-%20Appraisal%20of%20Prime%20Issues.pdf>

### *Village Land*

Much of the land identified as suitable for investment in different parts of Tanzania is village land used and occupied by local communities (Sulle and Nelson, 2009). The simplified procedures described above for acquiring a granted right of occupancy on general land or a derivative right from the TIC is typically preceded by the **transfer of village land to general land** based on the

<sup>32</sup> See TIC Summary of Procedures to Obtain Land at <http://www.tic.co.tz/procedure/286/165?l=en>

<sup>33</sup> Sec. 22 & 31, LA

<sup>34</sup> Sec. 22 & 33, LA

President's power to reclassify land for public interest purposes, including "investments of national interest" (Sec. 4, VLA).

The procedure for transfer is outlined in the VLA. It requires consent of the village council and the village assembly, after proper notice and the opportunity for individual or group rights holders who will be affected to make representations regarding their concerns to the Commissioner and the village council. Under the law, the village council recommends but it is the village assembly that decides on the transfer. The village council will convene a village meeting for this purpose, which shall be attended by the Commissioner or an authorized representative to explain the reasons for the proposed transfer and answer any questions the villagers may have. The investor, if identified at this point, shall also attend the meeting upon request by the village council or assembly in order to answer questions regarding the intended use of the land (called "village transfer land").

The approving authority depends on the size of the village transfer land. If the area is *less* than 250 hectares, the village assembly shall decide whether or not to approve the proposed transfer. If the area is *greater* than 250 hectares, the village assembly shall make a recommendation to the Minister who shall—after taking into consideration such recommendation and any representations made by the District Council—decide whether to approve or disapprove the transfer. No transfer shall be made until compensation, including type—which may include an exchange of general land—amount, method and timing, has been agreed upon between the Commissioner and the village council and affected individual or group CCRO holders. If no agreement is made, the issue shall be brought to the High Court for final determination, pending which the Commissioner may direct payment of compensation in the amount deemed proper.

Official reclassification from village land to general land is a presidential prerogative. In this regard, the President may allow holders of individual or group CCROs to continue occupying the land, subject to terms and conditions he may impose, or compulsorily acquire their land subject to the payment of compensation. The reclassification shall be published in the Gazette and will come to effect 30 days after publication date.

In many instances the **investor directly negotiates with the village**, facilitated by the TIC or district and local government officials. The procedure commonly followed differs from the one provided in the VLA for transfers (see Box 5), but village council and village assembly approval is typically secured. A village meeting is held for this purpose and the minutes of meeting serve as evidence of approval of the allocation of village land to the investor. The minutes are transmitted to

either the TIC or the Commissioner for processing of the land transfer, subject to the payment of compensation to the village.

### Box 5 | Procedure for Transfer of Village Land to General Land

Procedure in the Village Land Act	Procedure in practice
<ol style="list-style-type: none"> <li>1. <i>Publication and notice to Village Council.</i> The Minister publishes in the Gazette and sends to the concerned village council a notice specifying the location and boundaries of the area to be acquired, the reason for the transfer, and the date when the President may exercise his power to transfer the land or part of it (not less than 60 days from publication of notice).</li> <li>2. <i>Notice to individual or group rights holders.</i> If any portion of the land to be transferred is allocated to or being used by a villager or a group of villagers or other authorized persons, the village council shall inform the affected persons of the contents of the notice.</li> <li>3. <i>Representation by affected rights holders.</i> The affected individual or group rights holders may make representations to the Commissioner and the village council regarding the proposed transfer, which shall be taken into account in the final decision.</li> <li>4. <i>Village Assembly meeting.</i> The village council shall convene the village assembly to consider the transfer. This meeting (and any similar village council meeting) shall be attended by the Commissioner or an authorized officer to explain the reasons for the transfer and answer questions. The investor, if identified, shall attend the meeting upon request by the village council or assembly to answer questions.</li> <li>5. <i>Village Assembly decision/recommendation.</i> If the area to be transferred is <i>less</i> than 250 ha., the village assembly shall decide whether to approve or refuse the proposed transfer. If the area is <i>greater</i> than 250 ha., the village assembly shall recommend to the Minister who shall make the final decision.</li> <li>6. <i>Presidential action.</i> Upon approval of the transfer in whole or in part, the President may exercise his power to transfer village land to general land.</li> <li>7. <i>Notice and effectivity of transfer.</i> Once finalized, the transfer of village land to general land shall be published in the Gazette and come to effect 30 days after publication date.</li> </ol> <p>Source: Sec. 4, VLA.</p>	<ol style="list-style-type: none"> <li>1. <i>Investor identifies suitable area.</i> The investor, with the help of local brokers or TIC officials or politicians, approaches the district council of the area where suitable land may be found.</li> <li>2. <i>District Council identifies land.</i> The district council then identifies a suitable location within its jurisdiction and approaches the village council to secure approval of the request for land.</li> <li>3. <i>Village Council decides.</i> The village council and the village land council (a land dispute settlement body established under the VLA*) considers the request and makes a decision, usually approving the request.</li> <li>4. <i>Village Assembly decides.</i> The village council then convenes the village assembly to decide on the request, usually approving it as well. The minutes of the meeting serve as evidence of approval of the use of village land for investment.</li> <li>5. <i>Submission to TIC.</i> The minutes of the village assembly meeting are submitted to either the TIC or the Commissioner in order to facilitate the transfer of village land to general land, subject to compensation.</li> </ol> <p>Source: Sulle and Nelson, 2013, p.9</p> <p>*The village land council is required to be established in every village. Its main purpose is "to mediate between and assist parties to arrive at a mutually acceptable solution on any matter concerning village land." (Sec. 60, VLA)</p>

Transfer of village land to general land is deemed necessitated by the provision in the VLA that restricts the grant of customary rights of occupancy to Tanzanian citizens (Sec. 18[1] [a]). Since this restriction does not apply to them, **local investors**—Tanzanian nationals and entities the majority of which are owned Tanzanian nationals—may acquire village land through allocations of customary rights of occupancy to non-residents or non-village organizations by village councils (Sec. 22, VLA). Under the VLA, the investor shall submit an application to the village council, together with required documents and fees, and the village council has up to 90 days to decide. In making its decision, the VLA requires the village council to seek guidance from the Commissioner on the application. Where no such guidance is received, it shall decide taking into account (i) any advice given by the district council having jurisdiction of the village; (ii) the contribution the non-village organization has made or undertaken to make to the community and village public facilities; (iii) the contribution to the national economy and well-being; and (iv) whether the amount of land is so extensive or located in an area that will or is likely to impede present and future occupation and use of village land (Sec. 23, VLA). The village council may approve or disapprove the application, or approve partially or attach conditions to the grant, including those that may be required by the Commissioner. For those approved, the village council shall issue a CCRO for such period as it may decide, provided not exceeding 99 years, and subject to the payment of a premium and annual rent. The CCRO shall be registered with the District Land Officer. (Sec. 22-29, VLA)

#### *Derivative rights granted by village council*

Investors, whether local or foreign, may also acquire village land via derivative rights—such as a lease, license or usufruct—granted by village councils as authorized under the VLA.<sup>35</sup> This method will not entail land reclassification or grant of “title,” but still enables the investor to access village land. There are three classes of derivative rights, distinguished by size of land and period of grant: (a) Class A, for plots not exceeding five hectares and for a term not exceeding of five years; (b) Class B, for plots more than five but less than 30 hectares and for a term of more than five but less than ten years; and (c) Class C, for plots more than 30 hectares and a term of more than ten years. The investor shall apply to the village council, which shall then notify village members. The approving authority is based on the class of right being sought. The village council decides on Class A applications<sup>36</sup> and makes a recommendation on Class B and Class C applications. Class B and Class C

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<sup>35</sup> See Nshala, 2014; Prof. Fimbo, Dr. Tenga.

<sup>36</sup> The village council must make a decision within 60 days upon receipt of the application or receipt of additional information, failing which the application shall be deemed approved (Sec. 32[3], VLA).

applications are subject to confirmation by the village assembly,<sup>37</sup> with Class C requiring input or advice from the Commissioner. The application shall be deemed refused if the Commissioner advises against it.<sup>38</sup> The VLA also sets a timeframe for decision-making for each class of derivative right, at the end of which either the application is considered approved or the decision of the preceding body shall prevail. Similar to allocations of CCROs to non-residents and non-village organizations, the VLA sets forth certain criteria that must be abided by village councils and assemblies in allocating derivative rights, including likely benefits to be derived by the village, the need to have sufficient reserve land for future use, and ensuring that the special land needs of village women, landless people and disabled persons will continue to be adequately met. (Sec. 32-33, VLA)

Investors may also acquire village land from holders of individual or group CCROs or holders of derivative rights who, as mentioned above, are allowed under the VLA to make dispositions or assignments of rights. As with village land in general, individual CCROs may only be assigned to citizens, but derivative rights may be assigned to both citizens and foreigners. The assignment is subject to approval by the village council. For assignments of CCROs, the VLA requires the assignee to make the village his or its principal place of residence or business, and to commence within six months the construction of an industrial, commercial or other building or the operation of an agricultural, mining, tourist or other development. (Sec. 30-31, VLA)

### ***Assessment of Community Participation in Tanzania***

Tanzania's land laws contain progressive elements in terms of recognizing customary land rights and according it equal weight and validity to formally-granted land rights (Sec. 18[1], VLA). In terms of land administration, the law also devolves decision-making at the village level, primarily through the village council, an elected body of which at least 25 percent must be women<sup>39</sup>, and the

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<sup>37</sup> The timeframe is a bit confusing. The village council shall make a determination, after submission to the village assembly, within ninety days (from receipt of the application or additional information it required). The determination shall then be forwarded to the village assembly, which shall not be less than seven days before the meeting at which the latter shall consider the application. The village assembly shall have thirty days to decide whether to approve or refuse, beyond which the decision of the village council shall prevail.

<sup>38</sup>The process for approving Class C applications is essentially the same as for Class B applications, except for longer periods given for making the determination—120 days for the village council, 60 days for the village assembly (counted from date of the village meeting). The application will be submitted to the Commissioner within 30 days of approval by the village assembly. The application will be deemed refused if the Commissioner advises against it and the village council agrees within 210 days.

<sup>39</sup> Required under a 1997 Constitutional reform, see Gender Equality in Local Governance in Tanzania Association of Finnish Local and Regional Authorities The North-South Co-operation Programme. See Saara Simonen, 2010, 19.

village assembly, which consists of all members of the village 18 years old and above (Sec. 8, VLA; Also Alden-Wily, cited in Palmer, 1999, 3; Knight, 2010). Notwithstanding, some quarters have criticized the land laws for provisions that they contend pave the way for the taking of large tracks of land from communities. A notable critic is Issa Shivji, chair of the Land Commission created to advise in the formulation of the National Land Policy that preceded the land laws. Among others, Shivji asseverates that the lands laws, rather than devolve land administration, in fact centralized administration, management and allocation of land in the executive arm of the government, with the “role of more elective bodies, like the local authorities, and more representative and open bodies, like the village assembly, virtually done away” (Shivji, 1999; see also Sundet, 2005). Case studies and reports also demonstrate skewed interpretation and poor implementation of the law by government authorities. Concerns are further expressed regarding the lack of capacity of local communities to participate meaningfully and effectively in the decision-making processes related to land allocations.

### *Legal Barriers to Participation*

#### *a. Reclassification of village land*

One of the most criticized aspects of the land laws are the provisions on land reclassification or transfer from one category to another. Specifically, Section 4 of the VLA which confers to the President the right to transfer village land to general or reserved land for purposes of “investments of national interest.” This provision is viewed as essentially compulsory acquisition with some decision-making yielded to the village community (Makwarimba & Ngowi, 2012; Knight, 2010; Chachage & Baha, 2011, citing Nshala 2008). The village assembly has power to approve or decline a proposed transfer only if it is less than 250 hectares. But beyond this, the village assembly can only recommend and final say is placed in the hands of the Minister. According to studies, this creates an incentive for investors to request larger areas to facilitate approval, particularly as there is no legal limit to the size of the land that can be given to an investor (Makwarimba & Ngowi, 2012). Hence, not only are village communities deprived of decision-making power, they are also vulnerable to losing larger tracts of village land. The provision is inimical to the decentralization concept and provides opportunities for corruption by bureaucrats (Shivji, 1999; LRRRI, 2010, citing Nshala 2008; Sundet, 2006).

Indeed, most land acquisitions by foreigners involve a transfer of village land to general land (Knight, 2010; Sulle & Nelson, 2013; Chachage & Baha, 2011; Oakland, 2011). The proceedings involve negotiations at the village level, often initiated by the investor with the help the TIC, local brokers or politicians. As there is yet to be a law or regulation providing guidance, the procedures followed may vary from investment to investment. This lack of official guidance for direct negotiations between investors and village communities remains as a gap in the legal framework that is waiting to be filled (Makwarimba & Ngowi, 2012; Oakland, 2011; Sulle & Nelson, 2013). Some advocates argue that direct negotiations with foreign investors need not result in land reclassification since the VLA grants village communities the authority to lease or grant derivative rights to their lands without restriction as to the nationality of the lessee. (Nshala, 2014; also Fimbo & Tenga)

#### *b. Definition of general land*

The other controversial aspect of the land laws is the definition of general land. The Land Act's definition of general land includes "unoccupied or unused village land." It is not explained what the terms "unoccupied" or "unused" mean, and the phrase does not appear in the definition under the VLA. The result is a legal loophole that makes village land susceptible to allocation to outsiders. Village lands not under cultivation or permanent settlement, or set aside for grazing, commonage, or for future use or population expansion may be easily by interpreted by government authorities as "unoccupied" or "unused" and made available to investors. Control and decision-making over village land is thus effectively taken out of villagers' hands. (Knight, 2010; Sundet, 2005; Oakland Institute, 2011)

The repercussions of the loophole are far-reaching. In their study of biofuel investments in Tanzania, Sulle and Nelson (2009) reports that most land obtained or targeted by biofuel companies is village land that is not permanently settled but used for various economic activities. These lands tend to be woodland that is generally used for forest-based economic activities—including charcoal production and harvesting of products such as traditional medicine, fuel wood and building materials—and is a major part of local economies. Also targeted are pastoral land, which are often labeled as barren, idle, and marginal, when in fact are being used for seasonal grazing or for access to water sources by pastoralists and by other rural people, especially women, to collect firewood, charcoal, honey and fruits (Oakland, 2011, citing Dale, 2011). Sundet indicates

that the inclusion of the phrase “unoccupied and unused village land” to the definition of general land is intended to free up “surplus” land in villages for investors.<sup>40</sup>

### Implementation Issues

Over and above legal barriers, village communities are severely handicapped in land acquisitions by lack of capacity. Low levels of education means that most villagers have very little understanding of the land laws, including the rights granted to them and the acquisition process. Often, the consultation process is often “the first meeting with statutory law for majority of the villagers” (Thething and Brekke, Section 4.4). They also have limited ability to absorb technical information that may be relayed to them in connection with a proposed land investment. In many cases villagers do not even fully appreciate the economic value of the land they are ceding. In one study, it was found that the villagers did not fully realize the value of their land at the time they approved the investment, the land being mainly bush land used for the collection of various natural resources, but not to grow food crops. Because of this, and the promise of job opportunities, social services and infrastructure, they ceded their land to investors. As is typically the case, most of the promises were verbal pledges that were not put into writing as a contract. As a result, the villagers gave their land without the means to hold the investor accountable for the promises made. (Oakland, 2011)

Villagers are also frequently not provided sufficient information regarding the investment project and its potential impacts, especially the negative ones. In another case, the acquisition of 32,000 hectares of village land in Kilwa District for a biofuel plantation by a Dutch/Belgian company, Bioshape, villagers were reported as saying that they thought they had only leased their land. They did not understand that their approval of the land acquisition would involve extinguishing their customary rights to the land and its transfer to general land. The minutes of the village meeting in which the villagers approved the use of their land showed that the company only partially sensitized the people, highlighting the potential benefits of the investment but not its potential disadvantages. Bioshape’s biofuel project subsequently collapsed, leaving the land idle, but villagers are barred from legally accessing the land to hunt or collect materials and wild foods (Sulle and Nelson, 2013; Oakland, 2011). A common sentiment among villagers affected by land acquisitions is that they have no power to influence the terms of the negotiation nor the outcome, and that the

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<sup>40</sup> Sundet, 2005, 3.

scope of the project had already been decided at the time of the village meeting (Theting & Brekke, 2010; Chachage & Baha, 2011).

#### Box 6 | Case Study: Lack of Information in Sun Biofuels Investment in Kisaware District, Tanzania

Kisarawe District, located about 70 km. southwest of Tanzania's capital, Dar es Salaam, has about 100,000 inhabitants, of which about 80 percent are engaged in agriculture. Additionally, the use of various forest resources supplements people's livelihoods.

In 2009, Sun Biofuels began the process of acquiring land in Kisarawe by approaching 11 villages surrounding the targeted plantation area—Mtamba, Muhaga, Marumbo, Palaka, Kidugalo, Kurui, Mtakayo, Vilabwa, Mitengwe, Mzenga 'A', and Chakaye—directly. The project aimed at producing jatropha on more than 8,211 ha. of village land. The acquisition process involved meetings between company representatives and village assemblies. During these meetings, Sun Biofuels appears to have deliberately made promises of employment generation and the construction of roads, schools, water wells, and clinics.

Villagers in Kisarawe refer to their encounters with Sun Biofuels as information meetings rather than negotiations; throughout the meetings they were informed about the various benefits they would enjoy from the project. For instance, villagers in Kurui reported that they were happy to agree to the land acquisition as they were promised hospitals, roads, pharmacies, and employment. The promises given by the company were never codified in a formal contract.

District government officials in Kisarawe conceded that only one-sided information was given to the locals during community consultations. After deciding at the district level to proceed with the project, community development officers were sent around the villages to "educate" local people on the benefits the investment would bring, with no mention of what villagers stood to lose. District officials claimed that local people were aware of potential disadvantages because some of them were involved in the environmental impact assessment, and contend that they agreed with the district officials' judgment that the proposed investment would be advantageous to the local community overall.

However, it is important to note that potential disadvantages were not "advertised" to the local population in the same way as the benefits were.

According to one villager from Palaka Village:

"We agreed verbally to give our land to the investors because we wanted their promises of social services in the area, but we don't know exactly how much land per person was taken as we have no documents and plans to let us know where our land starts and finishes. I did not know my land laws and land rights so didn't understand what I had agreed to until my land was gone, and I received no compensation."

Another villager, an elderly man from Kurui Village, pointed out that:

"There is a big difference between agreement in the land acquisition process and participation in the meeting. They took our participation in the meeting as an agreement of our consent. But there was nothing to sign, no contract."

The villagers were not compensated for the loss of their land. Instead of benefiting from the investment, the local population ended up with fewer resources, more expenses, and lost access to essential common goods such as water, grass, and forest products.

Sun Biofuels went bankrupt after two years of activities and was bought by 30 Degrees East, a private investment company registered in Mauritius. The Sun Biofuels bankruptcy has left the population in a dire situation. Locals have lost their farmland and their supply of fresh water as well as access to essential natural resources, while the durable employment and creation of infrastructure that were expected with this investment did not materialize. Employees hired by Sun Biofuels were dismissed and the new company employed only 35 people as of 2012.

Source: Oakland Institute. (2012). Land Deal Brief: Tanzanian Villagers pay for Sun Biofuels Investment Disaster.

## IV. ANALYSIS

The land laws of Mozambique and Tanzania are considered to be among the more progressive in Africa. In both countries, the law recognizes customary land rights, devolves land administration down to the community level, and provides mechanisms for community consultation and participation in decisions relating to land use and development. However, as demonstrated in the discussion above, the rights mandated in each country's legislation fail to translate into real gains and benefits in practice. In terms of community participation, there appears to be two main reasons for the variance—lack of clarity and inconsistencies in some provisions of the law regarding the rights granted, and severe lack of capacity on the part of local communities to assert their rights.

Based on international standards, respect for the rights of communities and of their authority to make decisions grounded on those rights are encapsulated in, among others, the principle of free, prior and informed consent (FPIC). This principle is enshrined in international human rights law and upheld in the FAO Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests. It has been also adopted by the African Commission on Human and People's Rights as a standard for protecting community rights to land and natural resources. It is therefore critical to evaluate the legal framework and state action respecting community participation in land acquisitions and investments in Mozambique and Tanzania in accordance with this principle. It will ensure that reforms to be proposed will adhere to international standards and have increased likelihood of translating to actual gains on the ground.

**"States should engage with and seek "the support of those who, having legitimate tenure rights, could be affected by decisions, prior to decisions being taken, and respond to their contributions; taking into consideration existing power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes."**

*(FAO Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests [3B6])*

We base our definition of FPIC on the Guidelines on Free, Prior and Informed Consent prepared under the auspices of UN-REDD, which builds on common understanding endorsed by the UN Permanent Forum on Indigenous Issues.<sup>41</sup> According to the Guidelines, consent is **free** when it is given voluntarily and is based on a process that is self-directed by the community from whom

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<sup>41</sup> See Guidelines on Free, Prior and Informed Consent, 18, at [http://www.unredd.net/index.php?option=com\\_docman&task=doc\\_download&gid=8717&Itemid=53](http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=8717&Itemid=53).

consent is being sought, unencumbered by coercion, intimidation or manipulation, as well as expectations or timelines that are externally imposed. **Prior** means consent is sought sufficiently in advance of any authorization or commencement of activities. It refers to a period of time before the activity or process when consent should be sought, as well as the period between when consent is sought and when consent is given or withheld. Prior means at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community. **Informed** refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and as part of the ongoing consent process. Information should be accessible, clear, consistent, accurate, constant, and transparent; delivered in appropriate language and culturally appropriate format (including radio, video, graphics, documentaries, photos, oral presentations); objective, covering both the positive and negative potential and consequences of giving or withholding consent; complete, covering the spectrum of potential social, financial, political, cultural, environmental impacts, including scientific information with access to original sources in appropriate language; delivered with sufficient time to be understood and verified; and reach the most remote, rural communities, women and the marginalized.

A review of the law and the practice of community participation in land acquisitions and investments in Tanzania and Mozambique show significant departures from the FPIC standard. Based on the literature cited above, the gaps can be summarized according to each of the criterion constituting the standard.

***Free.*** Key provisions in the land laws of both Mozambique and Tanzania thwart community participation that is truly free and in the capacity as title holders to customary lands. Tanzania's Village Land Act, by empowering the President to transfer village land to general or reserved land, privileges the government to either pre-empt or override a village council and assembly decision to refuse a proposed investment. The authority of the village assembly to refuse a proposed acquisition or investment is limited to land acquisitions involving less than 250 hectares, whereas in practice most investments require land in the thousands of hectares. Mozambique's Land Law does not contain the same explicit override provision, but contains language that limits the scope of community decision-making to simply confirming whether the land is "free and has no occupants." This is disputed by legal experts, who assert that communities as title holders have implicit power to say "no" to a proposed investment. But government agents tend to apply a literal interpretation that presumes the acquisition will go through, the objective being merely to confirm whether the area requested is actually occupied or not and, if yes, to negotiating for a share of benefits. Another

controversial interpretation refers to the terms “unoccupied,” “free” or “unused” land. Government authorities in both countries invariably interpret these terms to mean all lands that are not currently farmed or containing permanent settlements. The effect is to disenfranchise the community with respect to their lands that may be lying fallow or which they have set aside for commonage, grazing or future use. Decisions can hardly be considered freely-made when externally imposed expectations or legal interpretations seriously limit the options available.

Another crucial aspect is the power asymmetry between the government and investor, on the one hand, and the local community, on the other. In both countries, the government asserts the stance of being the ultimate owner of community lands, not simply as trustee of land on behalf of all citizens. Investors, for their part, possess massive advantages in terms of resources and knowledge of the law and processes involved. They also have as trump card the ability to generate things much needed by rural communities—jobs, infrastructure and social services. On the other hand, rural communities suffer from low levels of education and lack the capacity and resources to bargain on an equal footing. Indeed, a common finding in the studies is that communities feel they have little power to influence the terms of the negotiation or its outcome.<sup>42</sup> Extreme poverty, limited rights and lack of viable alternatives combine to make communities vulnerable to coercion, intimidation and manipulation. Consent is not really free when the community lacks leverage vis-à-vis investors and the government.

***Prior.*** Both Mozambique and Tanzania require some form of prior notice regarding a proposed land acquisition or investment. Mozambique’s Land Law calls for a 30-day notice posted at the district council headquarters and the affected locality, and its community consultation regulations require a 30-day period between the first consultation meeting and the second one in which the decision is made. Before the enactment of the community consultations regulations, most consultations were one-off events wherein communities are informed of the project and simultaneously asked to decide on it. Tanzania’s Village Land Act has distinct procedures and notice requirements for different types of acquisitions. But direct negotiations with village communities, the most common mode of acquiring land by investors, follow informal procedures that may or may not adhere completely with the requirements of the law for other acquisitions. This lack of official guidance is cause for concern in many ways, not least among them that advance notice and information may become low priority for government authorities and investors concerned with fast tracking the proceedings.

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<sup>42</sup> See, for example, Theting and Brekke, 2010.

Local communities should have the time needed to understand, verify, and assess the type of information that will lead to an informed decision on the proposed project. This does not seem to be the case in the land laws of both Tanzania and Mozambique, and certainly not in practice. Studies report that local communities do not receive critical information in advance of consultation meetings—such as who the investor is, what the planned investment is, or which parcel is being requested—and the meetings themselves tend to be rushed. When there is more than one meeting, the first focuses on the procedural aspects, such as date and time of the second meeting, with little in the way of real discussion on the project itself.

***Informed.*** The regulatory frameworks of both Tanzania and Mozambique do not detail the type and amount of information that should be furnished by government authorities and investors to local communities regarding a proposed land investment. Although Mozambique’s Community Consultation regulations require authorities at the national, district and local levels to disclose and circulate to local communities the procedures for consultation in order to ensure their effective participation. Likewise, the Land Law requires the cadastre services to assist in the acquisition process by providing interested parties with information and clarification on matters including applicable legislation, land application documents, requirements of demarcation, benefits or impediments that parties may be entitled or subject to, and available mechanisms for redress. But this provision seems geared more for investors than local communities.

Ideally, to ensure real and meaningful participation, local communities must be made aware well in advance about their rights and remedies under the law and the processes and procedures by which land acquisitions are made. They must also understand the market value and potential of their land and the resources (trees, etc.) found on it. The particulars of the proposed land acquisition, such as size of land, boundaries, etc. must be provided, and the project itself explained to them, its nature and impacts, both positive and negative, and short-term and long-term. In the context of low levels of literacy, all these information should be in language that it accessible to the community and in formats familiar to them, such as radio, oral presentations, dramatizations, or videos. In addition, to make up for their lack of capacity and resources, legal and technical assistance should be made available to the community, or the assistance of NGOs allowed in navigating the process.

In practice, case studies show that communities often go into negotiations with minimal understanding, if at all, of their legal rights or the process of land acquisition. There is little attempt by government agents to sensitize the community about the regulatory framework involved, not

necessarily out of indifference or ill design (although corruption is rampant), but because they are either unclear about it themselves or are pressured by higher ups to fast track the acquisition process. Sometimes, there is a quick attempt to explain the law to the community during the consultation meeting itself, but even this is more of an exception rather than the rule. Poor knowledge of the law can have very serious consequences for communities. In Tanzania, for example, villagers lament they had no knowledge that the investment will result in land reclassification and that they cease to have any rights to the land, even when the project collapses.

In both countries, many communities are unaware of the exact size of land to be acquired or the amount of compensation that would be commensurate to the value of the land. Against the backdrop of extreme poverty and need, the promise of job opportunities and community services and infrastructure prove persuasive to communities. These benefits tend to be negligible and are generally not recorded in the form of a binding contract between the parties. During consultation meetings, government agents and investors usually focus on the positive impacts of the project, especially employment benefits, and downplay potential negative social and environmental consequences. The government lacks the resources to provide communities with legal and technical assistance during negotiations, yet often harass and intimidate NGOs that try to work with communities.

### *Corollary Issues*

The studies cited in this report also point out that consent may be additionally be undermined by intra-community power imbalances and issues of representation. They find in many instances elite capture of the process that calls into question the legitimacy of the consent given. As observed in Mozambique, community consultation meetings on land acquisitions tend to be dominated by local leaders, with the opinion of the village chief typically predominant. Few people from the community are actually involved in the decision-making process and women and other vulnerable groups rarely if ever participate. Moreover, ambiguities regarding representation in Mozambique's regulatory framework result in communities that are directly affected by the land acquisition being sidelined in the decision-making process. To summarize the earlier discussion on this, a decree recognizing traditional chiefs as both local leaders and administrative authorities is being applied de facto in the implementation of the Land Law, which leaves the mechanisms for representation by local communities in respect of land rights (DUATs) for a subsequent law. This is a problem because local community as defined in the Land Law is a collective private entity comprised of

families and individuals at the level of the locality or smaller; whereas local community in the decree refers to populations within a unit territorial and political organization, whether a locality, administrative post or district. What ensues are cases where vast areas are treated as a local community and traditional chiefs acting as representatives of communities to which they do not belong or from which they are separated by huge distances not only physically but socially and politically as well. This is compounded by the amendment in the Land Law changing the signatories to the minutes of consultation meetings from members of the community to members of consultative councils of village and town, again, a public body whose geographic distribution may be defined differently and whose responsibilities are more political in nature.

Tanzania's Village Land Act is more clear-cut in terms of representation. The village council has overall management and decision-making power over village land, but certain transactions will require village assembly approval. The VLA also tries to address power inequalities by affording protection of women and vulnerable groups within the community<sup>43</sup> and extending representation to women in the village land council and village adjudication committees, complementing women's representation in the village council as provided under local government laws.<sup>44</sup> Nonetheless, this must be weighed against the fact that village governance bodies tend to reflect social hierarchies in the community and often fail to represent or take into consideration the interests of economically and socially marginalized groups (Makwarimba and Ngowi, 2012, 33).

Consent as envisioned under the FPIC principle is a collective decision, made by members of the affected community in their capacity as rights holders, arrived at through a process that respects their customary rules, and ultimately an expression of self-determination. This means the community can decide "yes" or "yes, with conditions," or "no." Despite strides made in recognizing customary ownership to land and in devolving land management in the land laws of Tanzania and Mozambique, local communities still remain vulnerable to outsiders interested in their lands, lacking the ability to effectively participate or shape or refuse deals.<sup>45</sup> The current situation falls short of the global normative standard of consultation and consent framed by the FPIC principle. As shown in the reports and case studies cited in this paper, this vulnerability arises from weaknesses in the laws themselves and poor implementation thereof. This is framed by a political milieu in which the state remains radical owner of all lands and that emphasizes commercial agricultural

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<sup>43</sup> See Sec. 3[2], Land Act; Secs. 3[2] and 20[2], VLA.

<sup>44</sup> See Secs. 53[2] and 60[2], VLA. See also, Knight, 180-82.

<sup>45</sup> See also, Vermeulen & Cotula, 23.

expansion and foreign direct investment.<sup>46</sup> Both sets of factors combine to rob communities of their most valuable and often only asset, their land.

## V. THE WAY FORWARD

As aptly observed by Sulle and Nelson, there is a need to rethink the basic framework governing investments in land, and the ways the local communities, outside investors and government policy-makers interact and the roles they play.<sup>47</sup> At its current state, the policy and legal framework of Tanzania and Mozambique fail to minimize the risks and negative impacts as well as maximize the benefits and potential of land investments. Some recommendations towards this end include:<sup>48</sup>

- Clarify ambiguities and inconsistencies in the regulatory framework. This includes resolving the ambiguity in terms of “representation” in Mozambique’s Land Law and Decree 15/2000, harmonizing the definition of “general land” in Tanzania’s Land Act and Village Land Act. In both cases, the resolution should be an interpretation that favors stronger community rights.
- Integrate the principle of free, prior, and informed consent in national legislation and regulatory frameworks.
- Provide capacity building to local communities, including legal literacy training, paralegal programs, training in negotiating skills, and providing legal and technical support during the acquisition process.
- Provide clear information to all parties on procedures for acquisition, criteria for decision-making and conditions, and opening decision-making to public scrutiny.
- Establish mechanisms to ensure participation of all members of the community, such as conducting separate meetings with women and other groups that tend to be silent during community meetings.
- Allow civil society and NGOs to work with communities to raise awareness and give support during negotiations without the risk of harassment and intimidation.
- Develop tools for monitoring and evaluating land deals, including databases and inventories, in order to improve transparency.

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<sup>46</sup> See Vermeulen and Cotula, 23-25; Knight, 234-35.

<sup>47</sup> Sulle and Nelson, Biofuels Investment and Community Land Tenure in Tanzania, 6.

<sup>48</sup> See Cotula, et.al., Land Grabs or Development Opportunities.

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## **LAWS**

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### ***Tanzania***

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