Communities’ Ability in Consultations and Land Transactions: Improving the “Empowering Effect” of Tenure Security Initiatives in Rural Mozambique

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Paper prepared for presentation at the
“ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY”
The World Bank - Washington DC, April 8-11, 2013

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Abstract

The 1997 Land Law in Mozambique recognizes the "Right to Use and Benefit from Land" (DUAT) in the following situations: collective or individual "customary occupation"; individual "good faith occupation"; temporary (renewable) authorization for commercial exploitation of the land to national and foreign individuals or corporate entities. Mozambique's Land Law establishes also that in case of competing claims over a piece of land between the investor and the community, a process of consultation and a benefit-sharing agreement have to be undertaken. However, the weak knowledge of legal provisions and, in particular, of the consultation process by the majority of rural communities, does impair the capacity of local users to claim their rights effectively and to make investors accountable to the terms of "unwritten" contracts which follow from the “transfer” of community land. The four cases of community-investor “land deal” described in this paper clearly confirm this evidence and corroborate the idea that, in order to make possible the legal empowerment of rural communities, there is an urgent need to reconsider the nature and relation of different tenure security initiatives in support of rural groups' rights. Beyond the application of legal tools (such as the realization of delimitation), paralegal initiatives need to be augmented (awareness-raising, paralegal trainings, support for the transfer of land, etc.) and the outcomes of the consultation process better implemented and monitored.

Keywords: “Capacity to claim”, Consultations, “Group’s Rights”, Legal Empowerment.

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The paper is presented as part of the thematic area “Securing land rights and improving land use at the grassroots” Session: “How to make the continuum of rights operational”.
COMPETING CLAIMS FOR ACCESS TO LAND IN RURAL MOZAMBIQUE.

• Available Land

In Mozambique, as in the majority of SSA (Sub Saharan African) countries, the issue of land investment is strictly related to rural development and poverty reduction. Land for cultivation and other natural resources (such as forests and water) forms the major source of livelihoods for the majority of rural population (Terrafirma, 2013a: 7), 75% of which is employed in the agricultural sector. There are 3.8 million farms in the country, with 5.6 million hectares of annual crops, meaning that the average farm is only 1.5 ha and 99% of them are classified as ‘small’ (10 hectares or less) (ibid.).

Out of the 80 m hectares of total Mozambique land, 36 are considered potentially arable, 6 already under cultivation and 7 available for agricultural investments (Hanlon, 2011a: 8). In this context, land already occupied includes 17 million hectares of parks and other protected zones, 10 millions officially delimited to communities and approximately 3 million already allocated to investors (ibid.). Authorizations for large-scale land plantations have been awarded to investors between 2004 and the end of 2009, being 73% for forests and 13% for agro-fuels and sugar (Hanlon, 2011a: 5). In 2010, the GoM (Government of Mozambique) blocked concessions because of an exponential raising in land disputes between investors and local communities (Nhantumbo, I. & Salomão, 2010; Hanlon, 2011a). Only at the beginning of 2011, it re-started to authorize deals for big companies while waiting, at the same time, for the results of the new “zoning exercise” which should redefine the extension of land made available for agricultural investments. While this land zoning is very important in order to productively allocate the use of land in rural areas, the Government generally supports the vision that there is still an huge amount of land which is not used and thus available for commercial agriculture. Across this extended part of the country, however, there are several communities who occupy the land and whose land rights can be compromised when investors’ interests overlap with those of these pre-existing users.

• The Open Border Model “in Practice”

The GoM’s position concerning “potential free land” is that conflicts between investors and communities can be avoided because the country has a vast extension of land still unused on which communities’ subsistence farming and agricultural big investments can strategically coexist. It is indeed around this

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1 At the time of writing, the second zoning exercise has not been issued yet. An initial zoning exercise at a scale of 1:1,000,000 (finalized at the end of 2008) identified 7 million hectares of land as potentially available. However, according to the Government, the land still available for agrofuel investments in Mozambique is much more than this figure. For this reason, the GoM is preparing the second zoning exercise, at the scale of 1:250,000. See Hanlon, J. (2011a). Understanding land investment deals in Africa. Country report: Mozambique. Oakland, Calif.: Oakland Institute. See also Terrafirma, (2013a). Land Delimitation & Demarcation: Preparing communities for investment. Report for CARE-Mozambique. Terrafirma, Rural Development Consultants. Maputo, Mozambique.
argument that the Government has constructed, since the 90s, its policy of openness to foreign investors with the intent to sponsor agricultural investments while securing, at the same time, the tenure and livelihoods of the poor. According to this vision, even if communities have their own collective right over land, they can potentially benefit to be opened to “the outside world”. In support of this idea, and starting from 1997, the GoM has thus embraced the “open border model” to agricultural development (Tanner, 2002; WB/FAO Policy Note, 2010) which is indirectly promoted as main model also in the land law provisions. Its idea is constructed in opposition to a potentially closed model, where communities may enjoy the fullest protection possible with exclusive rights over extensive areas but they are essentially isolated. Investors stay outside, “together with their resources, skills, and taxes” (Tanner, 2002:43). In the open case, instead, “outsiders are allowed to enter in, but only – by law – after consultations with the communities which also have a natural resource and land management role that is legally attributed to them” (Ibid.).

As will be touched over in the next section, this model can be theoretically very participatory and equitable. In practice, however, after more than 15 years of implementation of the land policy and land law, its application has showed clearly to what extent it is difficult to find a convergence between communities’ and investors’ interests and to negotiate the use of land on an equal basis. The difficulty in applying this model and in channeling the overlapping claims of investors and communities is evident also in the four cases analyzed in this paper. The document presents in fact different “land disputes” in the 4 communities interviewed during April 2012 in the Province of Manica and Sofala (centre of Mozambique) and shows several challenges faced by rural communities in dealing with outsiders asking for their lands. In particular, all actors met during the field work declared to have been unable to agree with the company a profitable exchange and to fully protect their rights against companies’ profit claims. It has to be said that only 2 communities out of 4, the community of Chirassicua/Province of Sofala (sugar cane investment) and the Community of Mbonda/Province of Manica (biofuel investment), had as external interlocutor a private investor already established on the field with authorization to exploit. The Community of Canda/Province of Sofala is instead a case of a Community which had to deal with a national authority (the Ministry of Tourism) and a non-governmental project of conservation along a portion of the buffer zone in the National Gorongosa Park. The management and conservation of Gorongosa National Park is in fact a joint effort between the Government of Mozambique and the Gorongosa Restoration Project, a US-based non-profit agency. The community, which complained of consistently not receiving the 20% of payment expected for its engagement in the fauna-conservation initiative, had initially agreed with the stakeholders involved to enter in this project. However, recently contacted in order to cede further “its land” in the buffer zone, it is trying to oppose the decision and it is
still waiting for reactions by the competent authorities which want to re-evaluate the Park and make it a larger conservation and touristic area. It was not possible to understand from the local chief if, other than the non-profit project, there have been, at the time of the interview, others outsiders looking for the integration of the buffer zone within the border of the Park. In principle, the project is a non-governmental initiative which is promoted also in order to improve the living conditions in the area. However, the point is that this continuous “invasion” in the community’s zone is creating a sort of competition for the access to land among different members who have to be displaced from the buffer zone and find alternative livelihood options.

Finally, the community of Pindanhanga, district of Gondola, in the Province of Manica, is a community which has a “collective license” to exploit timber but which is constantly menaced by several external actors interested in entering the area for timber and also to start gold extraction in a border zone where several villages have their family production.

LAND USE RIGHT (DUAT) AND REAL TENURE OPTIONS FOR RURAL COMMUNITIES.

• The Recognition of Pre-existing Rights

The Land Law of Mozambique has been approved in 1997 following three “non-negotiable” conditions (Tanner 2002, Norfolk & Tanner, 2007; Knight 2011). First of all, the State was to remain the sole owner of all land in Mozambique. Secondly, private investments in agriculture, mining and tourism needed to be fostered. Finally, “customary land claims – and the customary, local systems that managed them - were to be formally recognized” (Knight, 2010: 104). With these premises, in his article 12 the law defines three ways through which the “Right to Use and Benefit from Land” (DUAT- Direito de uso e aproveitamento da terra) can be obtained and recognized (Tanner, 2002; Norfolk, S. & Tanner, C. 2007; Hanlon, 2011a) as follows:

1) DUAT obtained by occupancy through - a) customary (traditional) occupation: the occupation of land by individual persons and/or by local communities, in accordance with customary norms and practices, so long as these do not contradict the Constitution (Norfolk & Tanner,2007: IV) ;
   b) good faith occupation: by national persons who have been using the land for at least 10 years.

2) DUAT obtained through c) an award on a concessionary basis: the State grants (or not) this DUAT after the evaluation of an application submitted by an individual or corporate person who request the land for investing on it (grant renewable 50-years/ state leasehold).

Following the “scheme” of the Mozambique land law, the first critical point to underline is that DUAT resulting from any of these three situations enjoys exactly the same level of protection in the law (Tanner,
Given the automatic legal guarantee for pre-existing rights, DUATs obtained through customary and good faith occupation (a) and b) do not need, in principle, the written recognition to be legitimized (Land Law, art. 14, 2). The second important element is that the law also recognizes “legal identity” to the local community which is “a collective DUAT holder…with the power to allocate and manage DUATs on behalf of the State” (De Wit, P., Tanner, C. & Norfolk, S., 2009: 9), in accordance to the most prevalent customary system and taking into account two important limitations. Firstly, customary norms and practices cannot contradict the Constitution (for example, by undermining the acquired rights of women) (Ibid.). Secondly, local managers (essentially traditional authorities) of community DUATs must respect the principle of ‘co-titling for the use and management of land which implies “that all members of the group have an equal voice and must participate in decisions over their common assets” (Norfolk, S. & Tanner, C. 2007:5). This is the most important achievement of the law because it truly defends customary rights and it also gives the possibility to vulnerable local users to be protected under the “umbrella” of the community.

- **Land Rights Formalization**

The essential point to understand from the brief analysis of the Land Law is that DUAT is a right that is the same for everyone (Hanlon, 2011b:2). Then, this right can be formalized in different ways. In fact, according to 1998 Land Law Regulations, groups falling within the above mentioned situations A) and B) (customary occupation and good faith occupation) can obtain formalization of their DUAT rights (which is not compulsory) through “delimitation” of their land, by setting out the boundaries and using streams as natural borders. This process is relatively cheap and implies the issuing of a certificate through the Provincial Service of Geography and Cadaster (SPCG - Serviço Provincial de Geografia e Cadastro) (Hanlon, 2011b: 2). The delimitation process is also open to individuals, “either those from the customary realm who want to separate their individual rights from a community-held DUAT (desmembramento – or “opting out strategy”) or those who have acquired rights as a result of their good faith occupation of land” (Norfolk, S., & Tanner, C., 2007:13). On the contrary, in relation to category C) of DUAT, - anyone who wants a titled document needs to “demarcate” the land, which means setting out the boundary with GPS equipment and putting marker posts on the ground - (Hanlon, 2011b: 2). This procedure implies a compulsory consultation with community members and the issuing, firstly, of an authorization (provisional for the first 2 years) by the competent authority and, finally, of the title officially recorded in the National Registro Predial (Norfolk, S., & Tanner, C : 32). According to the law, demarcation can be carried on even by a community asking collectively a title (Baleira & all, 2010:7). In reality however, delimitation is the general process used for registration of “community
rights” based on verbal testimony and “community consensus”, while demarcation is used for “private land holdings” and concessions for large scale investments.

Finally, the introduction of the “community consultation” process, obligatory in the case of DUAT authorization for commercial exploitations, is another vital and innovative element of the 1997 Land Law. At art. 13, the law obliges an investor to determine if the land being requested is ‘free from occupation’ by negotiating with all community members. If the land is occupied, the consultation must determine the conditions through which local people will cede their rights (if they want to), or share them with the investor in some way (De Wit, P., Tanner, C., Norfolk, S., 2009:13). According to the GoM, given the clarity of legal provisions which deal with the “three types of DUATs”, the delimitation of community land is essentially not necessary because the law already vastly protects occupants’ rights through the consultation process itself (WB/FAO Policy Note, 2010:38). Many public officers think also that delimitation requests by communities have in several cases discouraged foreign investments in land (WB/FAO Policy Note, Hanlon, 2011b). On the contrary, the majority of “development and aid actors” sponsors the process of delimitation as a strong form of protection of community rights and effective to prevent “predatory behavior” from external speculators (Tanner, C. & Norfolk, S., 2007; Knight, R., 2011). However, the delimitation mechanism as a “preemptive strategy” to protect local rights (De Wit, P., Tanner, C., Norfolk, S. 2009) is just the first phase in the process of community empowerment. Other vital steps are resettlement and compensation schemes and the negotiation of eventual benefits with the investor, especially in terms of employment opportunities and production strategies. In this regard, evidence of the last 15 years suggests that the “contracting ability” of rural communities to agree with the investor some social and economic benefits from the deal is very scarce if not inexistent.

The fieldwork carried on by the principal author in the four communities of central Mozambique mentioned above, strongly confirms this evaluation. The communities of Chirassicua, Mbonda and Canda have been delimited by the national Ngo ORAM, while the community of Pindanhanga has been supported for delimitation by the SPCG. Notwithstanding these achievements, all communities claimed to have experienced problems in the subsequent process, both in regards to resettlement and compensation and, in particular, for the concrete “benefits” expected from the “unwritten contract” established with the Company at the moment of the consultation. This suggests that, even when progressive legislation is in place, the effective possibility of rural communities to gain from investment projects is extremely reduced if it is not accompanied by a continuing process of awareness-raising to help them to understand and claim their resource rights in front of investors’ and government’s big commercial plans.
LAND TRANSACTIONS AND LEGAL TOOLS TO PROTECT “GROUP’S RIGHTS”

- Legal Empowerment for Rural Communities.

In the majority of land deals “agreed” until now, consultations made for the transfer of “collective land” to the investor have been essentially “a no objection process” (Norfolk, s. & Tanner, C., 2002: 32) by community members who rarely have the power to negotiate with the company for a mutually beneficial agreement and to make the investor accountable for the (unwritten) terms of the “contract”. This imbalance in bargaining power over the land suggests that the degree of enjoyment of resources rights and the way legal entitlements (provisions protecting land rights) are used to safeguard specific land interests by different stakeholders do depend not only on legal tools available but also on the capacity of right-holders to claim what they are entitled to (Cotula, L., 2007:39-41).

The combination of legal arrangements and the capacity to correctly use them to protect local users’ rights is the essence of the concept of legal empowerment (Cotula, L., 2007; Cotula, L. & Mathieu, P., 2008; USAID, 2007; Bruce, W. & all/IDLO, 2010). It is defined as “the use of legal tools to tackle power asymmetries and help disadvantaged groups to have greater control over decisions and processes that affect their lives” (Cotula, L. & Mathieu, P., 2008: 15). Theoretically, legal tools can guarantee the security of tenure of local land-holders, making them confident that they will not be deprived of their rights arbitrary because they are protected by law (Cotula, L., 2007: 7). However, law making and law implementation is a political process and the outcome of negotiations between competing interests in society (ibid.). Consequently, the extent to which legal tools will be used by rural poor to tackle power asymmetries and influence decision-making processes that affect their resources rights (leverage in decision making/capacity to claim) is not obvious in poor contexts (Cotula, L., 2007), such as in the case of rural Mozambique. The approval and implementation of a progressive land law is thus not enough to guarantee the security of tenure if not accompanied by a continuing processes of awareness-raising and fair interaction among right-holders (clients), service providers (public officers) and outsiders (investors) (Cotula, L. & Mathieu, P., 2008). In other words, legal empowerment can be effective only if two components are taken into account (Cotula, L. & Mathieu, P., 2008:17) (see also Figure 1 at page 21):

1) Legislative interventions to shape the nature and content of legal claims (who has what right over what and towards whom) in a way that favours disadvantaged groups;
2) Efforts to strengthen the capacity of disadvantaged groups to make more effective use of those legal claims (“capacity to claim”), essentially through paralegals tools.

The analysis concerning legal tools to protect communities’ rights and the division used in this paper to describe them is largely inspired to the following study: Cotula, L. (2007). Legal empowerment for local resource control: Securing local resource rights within foreign investment projects in Africa. London, UK: IIED publications.
The rest of this section will be thus dedicated to a deeper analysis of the first component (the legal provisions protecting communities’ rights) while the next section will deal with the consultation process and the “capacity to claim” component of legal empowerment in rural Mozambique.

- **Tools for Vesting Resources Rights in the Community.**

  The first set of legal tools vesting resources rights in the community is related to the identification of the right-holding entity and the definition of its functions. The extent to which local users’ rights are protected by this set of legal provisions depends on the way the law takes into account three main aspects: a) Who is the “community”?; b) What are the tenure and management rights of the community? c) Are there legal conditions for the vesting of resource rights in the community?3.

  For what concerns the first question, all communities in Mozambique are considered as legal entities with a “private land-use right” which is recognized automatically by law but formally registered when they obtain the delimitation certificate. This legal provision can help protect them against eventual predatory behaviors (by investors) as well as against the unfair “intrusion” of the State in the allocation and use of community land. However, the law does not explain how internal governance of the community works in relation to “land decisions” (Knight, 2011: 108) and it simply maintains the leadership role of traditional authorities who act as trustees of the community, in accordance with the most prevalent customary system. This provision may thus entail accepting in some ways inequitable relations among different actors both across the borders of the community and for single members within it. Even if the law establishes the co-titling system for collective ownership and the opting-out solution for those who want to register their individual rights outside community’ borders, the eventual “division” and transfer of communitarian land is strongly influenced by the most powerful actors (traditional authorities) who are in principle the guardians of community natural assets. Indeed, it regularly happens that only customary leaders take decision on behalf of the community. This attitude becomes rather dangerous when the community has to deal with foreign investors. In fact, many companies try to find a compromise only with local authorities (formal and informal) who very often seek personal gains while disregarding collective land interests (Nhantumbo, I. & Salomão, 2010; Hanlon, 2011a).

  The field work presented in this paper shows very well the above mentioned dynamics. While evident cases of corruption have not been declared by community members interviewed, it is clear from the analysis that power unbalances within the community influenced strongly the outcomes of the transaction

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3 The division in these three main questions is again strongly inspired to the analysis of legal tools for protecting resources rights made in the above mentioned work: Cotula, L., 2007, op.cit. page 62.
with the investor. For example, the Community of Canda, which has obtained the delimitation in 1999, is in principle a collective-holding entity which uses and manages land according to the co-titling rule. However, when the project for conservation in the National Gorongosa Park started, the decision on how to deal with buffer-zones of the Park where many community families live, was very controversial. While persons who had been promised to have job in the “conservation project” agreed, customary leaders in this case strongly opposed the “offer”. Since the project is continuing to expand in the buffer zone, the traditional leaders are afraid that this displacement will create tensions among different families living at the border of the park, where an overpopulation trend is challenging the collective use of land by community members. Even in the community of Mbonda (Manica), the process of transfer of “collective DUAT” to Sunbiofuel Company was very complicated, with competing claims for this deal manifested within the same community (promises of outgrowing production schemes and work to someone and not to others). However, the difference was that in this case the position of the customary leader has accelerated the land transfer to Sunbiofuel, which has also started to produce before obtaining the DUAT authorization. More in general, in all four communities interviewed, the possibility of acting as a single entity was extremely weak, given also the heterogeneous extension of these such large collective holdings (ranging from 12,000 until 100,000 hectares for one single community).

As for the answer to the second question, the nature of the community’s rights and role (page 8 of this paragraph), this local entity, with a “private land-use right”, had the following main functions conferred by law: a) the management of natural resources; b) the process of titling, as established in paragraph 3 of article 13 of this Law; c) the identification and definition of boundaries of the land that the communities occupy; d) the resolution of conflict (Tanner, 2002). Theoretically, the land is thus hold and managed collectively and for a long-life time to safeguard the subsistence strategy of the same community. However, the community can be confronted with the decision of expropriation by the state (for public reasons) or with a request of land transfer by an investor. In particular, when land is transferred to an investor, this implies the possibility that it could remain in Company’s hands up to 99 years, becoming a sort of “private property” of the investor (Knight, 2011: 108) and thus changing practically the nature of community’s land use right. This is also true as regard to State-communities relation and the right that local entities have on other valuables resources other than land (Cotula, L. 2007:67). In fact, the final ownership of all resources is vested in the State which can decide to “expropriate” land because of the presence of valuable raw material (minerals, timber, etc.) or because of conservation reasons (for example protected areas). In other words, there are several real situations under which the community’s land-use right can be challenged and its level of enjoyment strongly reduced.
For example, the National Gorongosa Park is a protected zone whose ownership is vested in the State but the project for its conservation is practically “invading” the area delimited and attributed to the community. Notwithstanding the collective holding certified by the delimitation, the community cannot react to this decision because the conservation project is presented as “a public interest” investment. Even in the case of the Sunbiofuel company (community of Mbonda, Manica) and in that of the sugar cane plantation by Tongatth (Chirassica/Sofala), there has been a “no-choice transfer” of community land to the investor. This has lead the affected families to find alternative tenure options for subsistence farming in other areas of community land, with consistent problems for their livelihood strategies.

The alteration in the nature of community land rights is strictly related to the final element of this first set of tools (third question above, page 8) that is the eventual existence in the law of conditions and arrangements for vesting resource rights which limit the ability of the community to concretely protect its land. The article 13(2) of Mozambique’s Land Law explicitly eliminates these restrictions and states that, although local land rights can be registered, they are legally protected even if they are not. While a useful first step, this is not enough to secure land rights control. As we have seen, there is still a tendency to think that non registered lands are *terra nullius*. For this reason, communities are practically lead to delimit their borders as a pre-emptive strategy to be prepared for potential dealings with the investor.

The examples presented in this paper give a mix picture of “the delimitation strategy”. For example, the community of Pindanhanga (collective license for timber exploitation challenged by several investors and also illegal loggers) has been among the pioneers of the delimitation process with a certificate obtained in 1998 by the SPCG and according to “an on demand strategy” directly by the community (De Wit, P., Tanner, C., Norfolk, S., 2009: 40). On the other hand, the community of Mbonda (Sunbiofuel project, Manica) has clearly opted for a proactive strategy (ibid.) that intends to prepare local people before the investor arrives. The delimitation was indeed approved in 2007, the same year that Sunbiofuel started to ask for the DUAT concession. The community of Chirassica (Sugar cane production, Sofala) is instead an example of delimitation where there are disputes with established investors (De Wit, P., Tanner, C., Norfolk, S., 2009: 41). While Tongatth started to produce in the area in 2009, the community has obtained the certificate of delimitation in 2010, after a dispute with the investor on the extension of the DUAT right transferred (3000 requested officially but, according to the community, at least 10,000 “occupied” by the Company).
Tools Concerning Mandatory Consultation Processes and Benefit-Sharing Arrangements.

Other than the identification of the right-holder and of the nature of its land rights and conditions (first set of tools), another important content of the law is related to the set of tools which deals with the consultation and benefit-sharing mechanisms. According to the article 13.3 of the Land Law and article 27 of the Regulations, consultation with the community affected by the land transfer is compulsory for the investor. It is mandatory irrespective of whether such rights have been registered or not (articles 13(2) and 14(2) of the Land Act). This is again an innovative element of the law. However, it is often underestimated by investors who should better understand what means the concept of DUAT transfer of occupied land. This is true also for communities themselves who should be better educated to know that “their rights are private and exclusive, and that they can say “no” to the investor if they do not want to cede their land. And if they are prepared to cede their rights, they should be able to negotiate with the investor or the State, on the basis of real knowledge of a) the value of their resources; and b) the potential return that the investor can – give – and expect” (Tanner, C., & Baleira, S, 2006: 1).

The examples discussed in this paper show clearly how the most important legal tool (the requirement of consultation and correlated benefit-sharing agreement) is in reality the most weak element of all the “transaction process”. In general, consultation did not work correctly in any of the communities analyzed. For example, in the community of Pindanhanga, where talks between occupants and individual investors for timber are still at the first step (with many forms of illegal exploitations by outsiders), the leader also declared to know of the existence of many investors ready to exploit the area for gold extraction, but for which nobody in the community had been consulted.

As for the others two cases where the Company is already established on the field, community of Chirassicua (Tongatth) and Mbonda (Sunbiofuel), several representatives expressively declared that the consultation process with the investor was complicated and unfair. Both communities have been consulted in at least two consequent steps as it is envisaged by Law. However, the level of participation was very weak, women have been scarcely included and the influence of the customary leader has been determinant, especially in the second case (deal with Sunbiofuel). Moreover, none of them had received minutes of the consultation (not even Ngo ORAM, which helped them for delimitation, could access the minutes). Finally, it was not clear if and which kind of benefits they had negotiated with the investors. While internal division among communities’ members was high and declarations at some moments extremely contrasting (because of job promises), it was evident that no clear benefit sharing mechanism had been put in place for the collaboration between the two sides, and no written “contract” had been prepared for that. Both promised jobs opportunities which scarcely have been realized until the time of the interview (few farmers paid and many only on a seasonal basis). Sunbiofuel also seems to have
promised at the beginning an outgrowing scheme for some small farmers. However, it was not experimented up to the time of the interview. The Company stated the intention to enter in collaboration with small farmers but only at a later date (and not on a small-farming basis but only on a medium-large size) and only once having tested the good production of jatropha plants. Notwithstanding this apparently fair intention, the point is that there has been no written evidence of this declaration. This obviously created confusion to local users, who are “fighting” internally to support or not support the Company and to find alternative livelihood options, while waiting for investor’s decision.

• Tools to Compensate and Minimize Negative Impacts on Communities.

According to the law, communities can in principle decide if ceding or not the land. However, given the reality of a “no objection process” to community land transfer towards big investors, there should be a much stronger mechanism to guarantee that affected communities can be at least fairly and sufficiently compensated. This leads the authors to the analysis of the third and final set of legal tools for vesting rights in the community that is the above mentioned compensation scheme. The minimum legal tools to be considered in this regard are requirements for social and environmental impact assessment and tightening rules on compensation for damaging or taking of property (Cotula, L., 2007).

While the Mozambique Land Law Regulations on EIA (Environmental Impact Assessment) contain a provision which “obliges” investors to submit an assessment before the authorization to the Company is issued, there is no legal instrument that can be “equated” to a SIA (Social Impact Assessment). The only set of social “requirements” that the investor has to comply with are defined in the Guidelines for Agricultural Investments (CEPAGRI, Ministry of Agriculture) which are however not binging and which limit the corporate responsibility of the Company “simply” to the construction of some public infrastructures such as schools, hospitals, roads, etc. Given the severe poverty affecting rural areas and communities “local stakeholders, including local government authorities and community leaders, are very often - encouraged to focus on – these- few potential benefits and to minimize any concerns related to longer-term negative environmental and social impacts” (Nhantumbo, I. & Salomão, A., 2010: 32).

Indeed, the social effect of large scale investments can go beyond these aspects, for example touching the productive structure of families and the relation of work between women and men (especially in the case of bio-fuel cultivation which is considered a male-driven activity).

These dynamics are once again evident in the cases presented in this paper. In fact, none of the communities interviewed was aware of the requirements for the EIA and the respect of basic social “standards”. All declared to have been “persuaded” by the investor with the promise of social services delivery and job creation, thus disregarding potential negative impacts, first of all in terms of
displacement and land use change. In reality, the problem of displacement and land compensation is the most critical and the most underestimated at the moment of the land deal. While the community affected can be compensated by the investor for what is on its land (movable goods, houses, trees, etc.), what is critical for its same future is the offer of a good alternative land to cultivate and the possibility to chose what and how to produce (included the use of common spaces, the respect of rotation systems, etc.).

For example, in the case of Mbonda (Manica, Sunbiofuel), while the majority of people declared to have been compensated, they also said that land given to them in new areas was not sufficiently fertile as the one previously “owned”. Moreover, some farmers declared to have been given smaller portion of land and to have not yet received the payment for the destruction of their trees (mango trees) which were present at the moment of the clearing up for the plantation of jatropha.

To sum up, the examples briefly presented above, do show that different aspects of the consultation process (participation requirement, benefit sharing agreement and compensation) are very often afforded in an unfair and short-sighted way both by the investor but, in some cases, by the community itself. Generally speaking, there is scarce consideration of future land needs and community’s aspirations and, when there is no intention of partnership with the community (all cases here examined), the risk that livelihood options could be altered by the DUAT transfer is concretely very high.

BEYOND LEGAL TOOLS: THE CONTINUUM OF LEGAL EMPOWERMENT

- Going across the different phases of the consultation process.

Legal tools derived from Mozambique land law and regulations are considered among the most innovative on the African continent because of the various options they offer to local users, and especially to communities, for the protection of their land rights. However, “even where “progressive” legislation that seeks to address power asymmetries is adopted, inequalities in the distribution of resources, knowledge and influence affect its implementation and may frustrate its ability to pursue the stated objectives”(Cotula, L., 2007: 21). It is thus necessary to act on the second component of legal empowerment (efforts to strengthen the capacity of disadvantaged groups) and to promote tenure security initiatives which could tackle power unbalances by performing across all “the continuum of legal empowerment“ (Bruce, W. & all/IDLO, 2010: 4). According to this continuum, disadvantaged groups may in fact benefit from legal policies and law if they can rely on 1) favorable legal arrangements (the content of the law, analyzed above) and if they are put in the condition to be 2) informed (understanding law, its procedures and how they can be used by and for the poor); 3) aware of their rights (not only what
they can claim but also how and to whom) and 4) able to interact with outsiders and state agents to claim these same rights (USAID, 2007; Cotula, L., & Mathieu, P., 2008; Bruce, W. & all/IDLO, 2010).

While the first point is adequately developed in Mozambique thanks to the protective nature of land legal provisions, the other three aspects (2, 3 and 4), according to the authors of this paper, are instead not sufficiently encouraged.

In 2006, Tanner and Baleira identified among the main challenges of land law implementation the scarce knowledge by local communities of their land rights and, above all, of the consultation process and its requirements. Nowadays, the need to educate local users - especially in relation to consultation procedures - seems to be still the biggest challenge of all land transactions. Consultation is not only a question of understanding what rights are attributed by law to local users and what this implies in terms of the relation these users have with the state and powerful outsiders. It is also a question of how to use, defend and monitor these rights across all phases of the consultation which are respectively: the preparation, negotiation, decision and monitoring phase (Terrafirma, 2013b: 14) (see Figure 2, p. 21).

The preparation phase is related to the understanding of rights and duties of the communities (and of their leverage in front of the investor’s request for land exploitation). The negotiation phase deals essentially with the moment in which the community discusses the decision to cede or not its DUAT. The decision phase is when the community tries to agree with the investor the terms of the exchange and to possibly fix them in a formal “contract” (minutes of the discussion). The monitoring phase is the last one and it is related to the “Who, How, What, When” conditions (ibid.) necessary to guarantee that the outcomes of the land deal are enforced and respected by different stakeholders.

For Mozambique’s rural communities to be able to deal with the investor across all these steps, it is necessary a capacity to claim and a degree of knowledge of the issue which goes beyond the simple understanding of legal provisions and which needs para -legal tools to be effectively implemented. Paralegal tools are in fact “the range of strategies and tactics for helping marginalized groups make the most of the opportunities offered by the law” (Cotula, L. & Mathieu, P., 2008: 18). They serve to address eventual imbalances in legal entitlements by strengthening local “capacity to claim” through different “empowering instruments” such as: legal literacy training and radio programs; paralegals training, assistance for the decision on the land titling process, or for the negotiation with government or private sector; legal representation, etc..

In Mozambique, support to the implementation of legal instruments has lead to an underestimation of the importance of paralegal initiatives, according to the authors. This is essentially due to the fact that during the last 15 years, the Government has not formulated a clear strategy of national mass “legal
empowerment” and it also committed a minimal budget to the implementation of the land law (WB/FAO Policy Note, 2010; Tanner, C. & Baleira, S, 2006).

The first step in this fragmented and underfinanced process was a phase of literacy training which has been however conducted solely by civil society organizations without the direct engagement of the State. There was just an initial large land campaign, organized by several NGOs and led by Professor José Negrão, (Tanner & Baleira, 2006: 29), which concentrated the message on the main content of the Land Law and on basic understanding of occupants’ land rights.

Starting from 2000, the attention of donors and civil society organizations moved drastically towards the debate on land rights registration. The “delimitation wave” commenced with the issuing of a first tranche of State budget for community land rights registration implemented by the SPGC in 2001 (WB/FAO Policy Note:13). After that, NGOs (such as ORAM) and donors-driven initiatives (ITC- Iniciativa da Terras Comunitárias (iTC); the land component of the Millennium Challenge Account -MCA-) have become – and remained - the key actors in the promotion and development of the Land Law framework for the formalization of occupants and/or communities’ rights (Ibid.). Indeed, according to the visions of several donors, the State resource allocation for delimitations have been ‘inadequate from the beginning’ (WB/FAO Policy Note, 2010:13) . Only in 2008, reacting to continuing concerns by development actors, the GoM agreed to include a fix target of communities’ delimitations (50 per year since 2009) as an annual indicator within the Performance Assessment Framework (PAF) of the Poverty Reduction Strategy & Plan (PRSP) (Ibid.).

The point here is not the number of delimitations but the extent to which these initiatives can concretely help raising the negotiating ability of communities when confronted with outsiders. The process is divided, within the law, in several steps which are theoretically “empowering” because imply a direct engagement of all community’s members during the entire delimitation activity. However, it is essentially a technical application of a legal tool which does not automatically guarantee the protection of communities’ rights once the registration is achieved. The aim of this paper is not to analyze the impact of delimitation. Several studies argued that, overall, the process has been positive for communities’ tenure security and a good example of grass rooted mechanism to secure land rights, especially when it has been adopted as a proactive strategy to prepare the community for eventual partnership with outsiders (De Wit, P., Norfolk, S. & Tanner, C. 2009). Notwithstanding this, evidence provided in this paper in relation to the 4 communities analyzed (all 4 delimited) clearly showed that delimitation has not always and not entirely improved the ability of community’s members to claim and protect their rights “until the end”, especially after the agreement with the investor has been set up.
After many years of harsh debate around the registration issue, the attention is currently concentrated more on challenges of the land deal itself and on the consequences for rural users. Some pilot projects for the so-called community-investor partnership are actually experimented (Terrafirma, 2013a) in order to assist communities for the creation of a good partnership with the investor and to set up a deal that could be more of a compensation for people affected by the land transfer. The support to this process is crucial because it can indirectly act on “hide dynamics” of the agreement, first of all in terms of power unbalances and political pressures over the economic decision for the land transaction. Moreover, these kind of projects can help to overcome the “structural divide” that has always existed between the economic attitude of the investor and that of the community - profit versus subsistence – and to encourage the promotion of effective production schemes beneficial to both sides. Community-investor partnerships are too young to be evaluated and they are not the subject of this paper anyway. However, it should be important to understand to what extent these partnerships can guarantee a long-lasting ability of local communities to claim and safeguard their rights even after the partnership has been set up. In other words, there can be a risk that even these tools will not go across all the four phases of consultation and that they will be effective only until the decision phase, without considering “the post deal” environment and, especially, the monitoring phase, which is still today the weakest step of the process. While in the few pilot projects existing across the country (Terrafirma, 2013a) there are donors who can monitor the correct functioning of these partnerships and the outcomes of the deal, in all other cases, when there is no external support for the setting up of the partnership, who is expected to control that the contract will be implemented and community rights respected? What happens instead to communities which are not entering in partnership with the investor but which are “simply” displaced and compensated? Who is monitoring the terms of benefit sharing and compensation mechanisms during the consultation? Who is monitoring what happens after? Once again, if there is no certainty that the outcomes of the deal will be respected, the ability of communities to maintain benefits acquired can be always very weak.

The difficulty by donors and by the government to combine legal and paralegal tools for improving the functioning of the consultation process across all its phases (monitoring included), has thus created what can be defined as an “halfway empowerment” which has rarely guaranteed the sustainability of agreed deals in the longer term. The examples analyzed during the field work again confirm this point. All communities interviewed had been supported by ORAM during the delimitation process and they had been sufficiently trained on the functioning of the land law and the issue of land transfer. However, the way they had dealt with the investor in relation to the compensation and benefit sharing agreement was very much unclear and they just accepted the “conditions” of the investor (expect for the Park of
Gorongosa Project), thinking that the compensation and few job opportunities could be the most they could get from the exchange with the Company. Moreover, nobody was monitoring the extent to which promises of compensation and of social service delivery were respected by the investor and nobody could make any kind of formal complaint against the company for its poor “corporate responsibility”. This suggests two considerations. Firstly, that the ability to claim rights for communities was very much related to the help directly given by the NGO ORAM. Secondly, that support for raising the community’s capacity to negotiate was ended too early and nobody had the full possibility to use legal tools at community disposal for protecting effectively local land rights during all phases of the deal.

- **Legal Empowerment “from within” the Community: the Way Forward?**

As touched on above, it is quite striking that during the last 15 years, very few initiatives have concentrated the work on the “capacity to claim” component of legal empowerment in Mozambique and on projects that could raise and monitor the transparency of land deals all across the country.

One of the few initiatives which has attempted to bring greater attention to the issue of community’s ability to negotiate in land transactions (and indirectly on monitoring) is, according to the authors, the project sponsored by FAO and implemented by CFJJ (*Centro de Formação Jurídica e Judiciária*) for the organization of paralegals courses. Paralegal trainings have given “guidance to local people on how to use rights in consultations and negotiations with outsiders, and how to use legal support and the courts to defend their rights against both investors and public agencies.” (Tanner and Norfolk, 2007: 30) The project was divided in two components (Cotula, L. & Mathieu, 2008: 64):

- Training for paralegals to provide civic education, legal advice and practical support at community level, managed by the CFJJ;

- Seminars for district officers from different branches of the State (administrators, judges, public prosecutors, police chiefs and directors of economic affairs) on the management of natural resources and its importance for the Rural Development strategy.

The CFJJ component has been studied to train some civil society actors and local administrators on the provisions of the land law, on how to use them, but above all, on how to understand and manage eventual partnerships with an outsider and to access justice in case of disputes. The second component, managed by the DNPDR (*Direcção Nacional da Promoção do Desenvolvimento Rural*), has consisted instead of trainings and seminars just addressed to local public officers in order to teach them all aspects related to the management of land and other natural resources and its development within the broader rural strategy.
The analysis of the impact of this approach is not the aim of this paper. However, it is important to underline how the paralegal training method is, according to the authors, one of the few which really tried to develop all components of the legal empowerment process, improving rural users’ competences both on the security of tenure and on the ability to influence decision-making over land transactions during all the land deal process. The important element of this training is that people who are “educated to their land rights” are persons who come from a particular community and who, once trained, will return to their respective areas and they will be available for the members whenever there is a need for knowledge to settle a land deal and/or dispute. Again, this paper cannot judge the effectiveness of these courses. However, considering the brief experience made by one of the author during a paralegal training course in the city of Chimoio, Manica, it seems that this approach is very much appreciated by the participants but also by the community, which is indirectly touched by this training thanks to the presence of some of its members in the project. People expressly declared their need for the course and affirmed that if the experience could be repeated exponentially across the country, the process of legal empowerment would be surely improved since what local rights users still need is to be educated on their land rights but especially on how to protect them and on how to profit from all legal provisions which, in principle, sponsor communities’ rights. In other words, it seems that thanks this method, rural users can gain “legal knowledge to deal with” the outsider all across the different phases of the consultation process.

Firstly, the training on what are natural resources rights and, above all, on what are the requirements to recognize and maintain these rights, can influence the outcome of the “preparation phase” during which the terms for the eventual land transfer to an outsider are set up. Indeed, the positive impact of the advocacy campaign made during the paralegal course helped many rural users to claim effectively their rights, especially for women taking part to the training (FAO MTE Report, 2011a; FAO/CFJJ, 2012a). For the majority of them the paralegal experience has been “the first occasion in which they have learned about gender equality and women’s rights through a rights based approach” (FAO Progress Report, 2011b: 19). Some of them could also obtain a DUAT title thanks to the support of paralegal “experts”. As Ms Inocência António Xerinda declared during a paralegal training “before the course she did not know that women had rights as men, assuming that as some kind of “special human beings”, rights were entitled just to men.” (ibid.). On the contrary, after the course, many women started to transmit their knowledge to their respective communities. This is still now helping to empower their position and also to protect their specific rights against any eventual unfair claim coming from most powerful actors within the community (husbands, leaders, etc.) and outside of it.

Secondly, the training of paralegal members did not end with the closure of paralegal courses. In fact, after the event, FAO and CFJJ organized all across the country 118 meetings in different areas touched by
the project in order to follow up paralegals’ work and to support their respective communities for eventual deals with outsiders. In many cases, these meetings helped the community to be better prepared for the discussion and decision phase of the consultation process and, possibly, to avoid eventual land disputes with the investor.

Finally, the paralegal method has also prepared the ground for improving the monitoring phase (last one) of the consultation process. This is firstly due to the same presence of the paralegal who, with the knowledge acquired, can guide the community in the enforcement of the land deal eventually agreed with the investor. Secondly, the joint training addressed to district government officials and civil society actors at the community level “has been of key importance in building constructive relations between officialdom and civil society” (FAO Progress Report, 2011b: 18). This has consequently raised the feeling of a mutual responsibility in making the land transactions and compensation and benefit sharing activities a fairer process of exchange among different stakeholders. This cannot guarantee entirely that outcomes of the deal will be positively performed. In fact, the issue of monitoring is the most “political aspect” of all the process and it is not always obvious that local stakeholders could commit themselves transparently without falling in the vicious cycle of the “bottom-up rent seeking” and local level corruption. However, the fact that both sides (civil society and authorities) have acquired the same level of legal knowledge of the issue can help equilibrating the power leverage of different actors and provide rural users with a more open arena of discussion for the decision on how and to whom eventually transfer their land and on what to gain in exchange for this “concession”.

To conclude, the paralegal training course is not a panacea to the malfunctioning of rural land transactions. However, according to the authors, this experiment shows that for rural land users to be effectively empowered and to be able to claim their rights, it is necessary a better combination of legal and paralegal instruments that could improve their “capacity to claim” all across the continuum and to tackle power asymmetries both within and from outside the community. In this perspective, the consultation process can be considered as the main indicator to measure the effectiveness of all tenure security initiatives. In fact, across the “continuum of the consultation” is possible to understand the extent to which: a) State legal providers and development actors are committed to protect rural land rights (through the implementation of legal provisions in support of them); b) local users are able to claim their rights; c) all of them (state, development actors and rural land users) are willing and able to monitor and improve the effective enjoyment of these same rights (helping rural occupants - especially collective entities - to “enter in the system” as empowered stakeholders and not just as passive right-holders). Since the “approach” used to support tenure security initiatives of local users is still very fragmented in rural
Mozambique and it is extensively dependent on “external aid”, there is a urgent need to reconsider what can be the most empowering strategy for helping rural actors to effectively protect and claim their rights and interests.

The National Land Consultative Forum (FCT) is criticized for being not participatory and not effective in its decisions (WB/FAO Policy Note, 2010; Terra Firma, 2013a). Moreover, arguments treated in all the sessions discussed until now (the last one in November 2012) are essentially all biased towards the challenge of community-investor partnership and the issue of land transfer, with few attention addressed to the functioning of compensation and the monitoring of land deal outcomes. Notwithstanding this, the Forum seems to be the only available arena for a continuing national debate on “the land issue”. For this reason, it should be better exploited to propose new approaches for improving the implementation and monitoring of land transactions and for reframing the objectives of tenure security initiatives, in order to spread the legal empowerment of local land users across the entire rural Mozambique.
FIGURES

Figure 1: Tools for Legal Empowerment.

<table>
<thead>
<tr>
<th>Sources of insecurity – e.g. from a legal point of view</th>
<th>Tools for legal empowerment</th>
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<tbody>
<tr>
<td>Rooted in law and administration:</td>
<td>– Sharpening legal and institutional arrangements</td>
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<tr>
<td>– Nature of legally protected claims</td>
<td>– Strengthening government will and capacity to implement</td>
</tr>
<tr>
<td>– Institutions, processes, remedies</td>
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Rooted in “capacity to claim”:
– Awareness of rights
– Know how to navigate procedures
– Confidence, resources, information, social relations

Strengthening local “capacity to claim”:
– Raising awareness (e.g. legal literacy training and radio programmes: paralegals)
– Increasing know-how (e.g. legal clinics, paralegals)
– Supporting exercise of rights (e.g. support through land titling process, or in negotiations with government or private sector; legal representation; public interest litigation)


Figure 2: The Consultation Process.

REFERENCES


Bruce, J. W. & all (2007). Legal Empowerment of the Poor: From Concepts to Assessment. USAID.


