Etc Terra

Assessment of the capacity of the Government of Mozambique to transfer titles over Emissions Reductions

Final Report

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Assessment of the Government capacity to transfer titles over Emissions Reductions

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1 INTRODUCTION

Since Independence in 1975, the concept of State ownership and control over land and natural resources (NR) has been at the heart of the political economy of Mozambique. Since the mid-1990s however, a large body of progressive new legislation has been approved which recognizes acquired rights over land and the right to freely use and benefit from the forest and other NR that exist in local communities.

More recently, Mozambique has adhered to international programs like REDD+, in order to reduce carbon emissions that result from uncontrolled deforestation and forest degradation. New policy and legal documents have been developed to cover this new set of activities, but the framework to facilitate the implementation of a new program is far from complete. One area that is not covered at all in practical terms is the question of how the State (Republic of Mozambique) can sell the Emissions Reductions (ERs) generated by an Emissions Reduction Program (ERP) now under development (the ER Program Document, or ER-PD).

The transfer of title over ERs generated by the ER project is both a strategic objective of the ERP and a condition for its longer-term sustainability. Revenues from selling ERs will feed back into the benefit-sharing arrangements that underpin the changes in land use that are essential if deforestation is to be halted. It is important to get the process and mechanisms of ER title transfer right now, or at least initiate a policy and legislative process to ensure that ER title transfer is legally permissible and guaranteed once the ERs begin to be confirmed against pre-program baselines.

The combination of State ownership of land and NR, and strong constitutionally enshrined rights to access and use these resources, makes this question far more than just a technical challenge. It is also about the complex relationship between 'the State' (commonly conflated with 'the Government'), citizens who already hold land rights (and thus have NR use rights), and investors and others who want to access land and NR for new projects. Deeper structural issues must also be taken into account, relating to local government decentralization; the devolved management of land and NR to local people through the 1997 Land Law and other NR legislation; and the 2004 revision of the Constitution of the Republic of Mozambique (CRM) which introduces the concept of 'community public domain'.

This report looks at the ability of the GoM to transfer title over ERs in this complex landscape. The question of land rights and other rights which arise from them – access to and use of NR being one – is a key underlying factor in the analysis, as is the 'community public domain' concept and what it means for primary and secondary rights over ER titles. And there is the question of who negotiates over and signs off on ER sales on behalf of the State.

The only specific REDD+ legislation to date is Decree 70/2013 (Procedures for Approving REDD+ Projects). This decree does not however say much about rights over carbon and ERs, and does not address the issue of sectoral mandates. It says only that the REDD+ Technical Unit (UT-REDD) is charged with the task to 'develop guidelines for the allocation of rights over carbon, based in national and international legislation'[1], and this has not yet been done. More recently, the new National REDD+ Strategy also fails to clarify the question of title over ERs, and simply repeats the finding of the Nemus/Beta study of the legal and institutional framework[2], that it 'lacks any definition of rights over forest carbon'[3].

Before new laws and regulations are developed to fill this gap, constitutional and legal questions do need to be answered. It is not clear for example, that 'the State' (through its agent the GoM) has the right to sell ERs. Other questions are more political in nature, especially the decision over which sector or sectors control and therefore benefit from carbon trading and ER sales. Several sectors can make good cases for having the legal mandate to act on behalf of the State, through their involvement in land and NR management, the public finances, and energy policy.

When it does come to developing new legislation, the mandate question should not present a problem, as it mainly requires a political decision by the Council of Ministers (CM) which is then actioned through a CM Decree. The other issues are more complex and might require higher level legislative action, to alter or develop new laws and regulations. It will be essential to develop this new legislation holistically, taking fully into account the interplay between any new REDD+/ER legislation, the 1997 Land Law, other NR laws, and the community public domain concept in the 2004 CRM revision.

The 1997 Land Law has a key role here, through its recognition of 'customary norms and practices' as one way of acquiring the State-allocated DUAT (*Direito de Uso e Aproveitamento da Terra*), and the figure of the Local Community with a customarily-acquired collective DUAT over land (and NR) that can extend across large landscapes. Legislation on the environment, forests and wildlife, and other NR, builds on the Local Community concept to extend the Use and Benefit Right (or 'DUA') to the forests and other resources found on land covered by a DUAT. With the Local Community also accorded a

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[1] Decree 70/20103, Article 8 (h)

[2] Nemus/Beta 2015. *Análise do quadro legal e institucional para a implementação do REDD+ em Moçambique – Relatório Final.* Maputo, Fundo do Ambiente; Scott-Wilson 2015. Draft Strategic Environmental and Social Assessment (SESA) Report V5. Maputo, UT-REDD+ and the National Environment Fund (FUNAB). Contract No: 05/C/UGEA-REDD+/FUNAB/14

[3] MITADER 2016:36. Estratégia Nacional para a Redução de Emissões de Desmatamento e Degradação Florestal, Conservação de Florestas e Aumento de Reservas de Carbono através de Florestas (REDD+) 2016-2030. Maputo, Minstry of Land, Environment, and Rural Development. 2 November 2016

measure of public responsibility in the 2004 CRM revision, the ability of the State to freely transfer title over ERs is clearly conditional upon agreements with Local Communities as both a hybrid form of local government and a DUAT holder, as well as with other existing DUAT holders.

1.1 Context

The ability of the GoM to transfer title over ERs arises in the context of a pilot Emissions Reduction program in Zambézia Province, in the north of Mozambique: the **Zambézia Integrated Landscape Management Program (ZILMP),** which is supported by the global Forest Carbon Partnership Facility (FCPF). The ambition of the ER Program is to reduce deforestation in the ER Program area by 15% below the reference level in the first 5 years of program implementation (2016-2021) and by 25% in the following 5 years (2021-2025). This represents a total of 11,122,705 tCO_2e of ER to be achieved by 2025. It will do this in nine districts of Zambézia Province (the 'accounting area'). These districts are:

- Alto-Molocué;
- Gilé;
- Gurué;
- Ile;
- Maganja da Costa;
- Mocuba;
- Mocubela;
- Mulevala;
- Pebane.

The FCPF Methodological Framework requires that the entity managing and operating an ER Program – in this case the GoM – demonstrates to the FCPF Carbon Fund its ability to transfer to the Fund *full legal and beneficial title and the exclusive right to ERs* generated in the Accounting Area of the ER Program and contracted for under an Emission Reductions Payment Agreement with the FCPF Carbon Fund ("Title to ERs"). At the same time, this entity must demonstrate that it is respecting the land and resource tenure rights of the potential rights-holders, including forest-dependent Peoples, in the Accounting Area.

Emission Reductions (ERs) achieved through the project will be purchased by the World Bank under the global FCPF, generating revenue for the GoM in return for demonstrable success in reducing carbon emission generated by deforestation and forest degradation. Such payments are intended to encourage recipient countries and various stakeholders, including forest dwellers, forest-dependent people, and the private sector, to achieve long-term sustainability in financing forest conservation and reduce the negative impact on the global climate from the loss and impoverishment of forests.

The process of securing ER payments has a broader development objective however. In recent years, the focus of REDD+ has widened to include poverty alleviation and rural development objectives. Thus, REDD+ activities that aim to reduce deforestation and enhance carbon stock must also have a positive impact on local livelihoods and human development goals. The 2016 National REDD+ Strategy document underlines how the 'success of REDD+ necessarily depends upon coordination and establishing synergies between activities with the potential to reduce deforestation and forest degradation, nature conservation, and specific sectors, particularly in the areas of agriculture, forestry, conservation areas, and energy[4]'.

This statement underlines the point that this synergy is more than just an expanded objective for REDD+; it is *necessary for REDD+ to work*. A key objective of the ERP is to end or severely reduce the practice of itinerant agriculture, which is responsible for up to 80 percent of deforestation and forest degradation in the ZILMP area, and in this way, achieve the target of a total of 11,122,705 tCO_2e of ER to be achieved by 2025. This goal can only be achieved through an integrated package like the ERP/ZILMP which a) encourages and facilitates new economic activities and more efficient farming; b) builds on these activities to change the way poor rural households use the forests surrounding them; and c) produces measurable ERs that can later be traded.

With regard to the specific question of ER title transfer, several questions arise from this scenario: what is the legal basis for the State being able to sell title over ERs to third parties, and who handles these transactions on behalf of the State?; what rights, if any, do local people have over ERs that are generated in their area and what do these rights do to the ability of the State to transfer title over ERs?; do local people have a right to share in the income generated by ER sales and if so, how should this be managed and by whom? And finally, there is a critical 'enabling' issue: how are ERs converted into 'things' with a property or ownership document (title) attached, that can then be traded on international carbon markets?

1.2 Structure of the report

The issues raised above are discussed in three inter-related contexts:

- Legal: can the State of Mozambique sell rights over carbon and ERs to an external third party?
- Other right and claims: what other rights exist over NRs and ERs, and how do these impacts on how the GoM negotiates the transfer of ER title?
- Processes and mandates: how will ERs be converted into a tradeable commodity, what are the systemic and institutional issues to be addressed; which State agency

[4] MITADER 2016:30

will be given responsibility for setting up, managing and guaranteeing (against international standards) the system and infrastructure to ensure the ERs are indeed tradeable; and which State agency will be given the mandate to act on behalf of the State (Republic of Mozambique) when the transfer of title over ERs takes place?

In the absence of specific legislation, whether or not ERs can be sold is discussed against existing constitutional and legal provisions. Discussion of the link between title transfer and other existing land and NR rights draws on material from the land tenure report. Particular reference is made to the implications of community rights delimitation, and the community public domain concept, for the State's ability to transfer title over ERs that are generated inside, and probably by, delimited Local Communities. These questions are also important when it comes to developing an effective benefit-sharing mechanism.

How to convert ERs into a tradeable, verifiable and guaranteed 'thing' is both a domestic and international question. Mozambique must meet international standards and be able to have its ERs certified by independent assessors and duly registered, if they are to be secure and tradeable. Lastly, the mandate issue is essentially political – the GoM must decide which agency is responsible for dealing with ERs on behalf of the State. Options are discussed within the context of the present institutional structure.

Finally, it will be important from the outset to have a clear plan to deliver the laws, decrees and regulations needed to transfer title of the ERs as they are verified. These new instruments can then guide and regulate how revenues and other benefits are shared between the State and other stakeholders. The report therefore ends with a summary of findings, and comments about how to move forwards; and includes a brief timeline for producing a new REDD+ Decree alongside the other legislative reviews that are underway.

2 CAN THE STATE TRANSFER TITLE OVER EMISSION REDUCTIONS?

2.1 Carbon and Emission Reductions (ERs)

It is important at the outset to distinguish between 'carbon' and 'emission reductions'. The former is a constituent element of the trees and forests over which the State has constitutionally determined property rights. In this context, the trees are the State asset, and by extension their constituent elements – including the carbon within them - are as well. These elements cannot be extracted and used or sold without some kind of transformational process being applied to them (the simplest is cutting the tree down for fuel wood). It is this process that makes the constituent elements marketable.

'Emission reductions' are at once more abstract, and yet also more concrete than the carbon element of the trees, insofar as they are - or should be – identifiable and marketable in their own right, as a 'thing' with value that can be traded - kind of "environmental

commodities". As with cutting down trees for fuel wood, ERs can only be produced by a transformational process of sorts (though in this case it is kind of 'non-process', a decision to do nothing with the trees to reduce emissions generated by deforestation of forest degradation; but it can also be a process of carbon stock enhancement including reforestation activities, among other). Assuming it is possible to measure how much carbon is 'saved' in this way, the resulting emission reduction can be treated as a 'thing', given a value, and traded.

2.2 2004 Constitution of the Republic of Mozambique (CRM)

The Nemus/Beta report on the legal and institutional framework finds that there is no clear definition of rights over forest carbon in current Mozambican legislation, and the question is certainly not mentioned in the CRM. However, what is at issue here is the ability of the State to transfer title over *ERs,* not carbon *per se.* It is important in this context to recognize that ERs are not a natural resource, but are in fact a *product,* the outcome of a decision by the State and/or others with rights over natural resources to transform turn them into something useful and tradeable.

While carbon is scarcely mentioned directly, there is much in the legislation that allows a discussion of rights over NR, of which carbon is a part. This includes the question of how these resources are transformed and subsequently transacted.

The starting point is Article 98 of the CRM (State Property and Public Domain). Clause 1 states that:

> *NR in the soil and the subsoil, in inland waters, in the territorial sea, on the continental shelf and in the exclusive economic zone shall be the property of the State.*

Carbon stocks are constituent parts of these NR, and are therefore also the property of the State. But is the State able to sell these NR (and the carbon they contain)? In fact, NR are treated differently from land in the CRM when it comes to selling them. The CRM is very clear about land in its Article 109, Clauses 1 and 2:

- All ownership of land shall vest in the State;
- Land may not be sold or otherwise disposed of, nor may it be mortgaged or subject to attachment.

This prohibition can be assumed to extend to the State itself – it cannot sell any piece of the national territory to an external third party (another country, or a multilateral entity such as the World Bank for example). However, there is no unequivocal prohibition on the sale of NR. The implication of this is that as 'owner', the State is free to do what it wants with NR; and this could include selling them to an entity such as the World Bank.

In practice, it is difficult to see how 'the State' could sell its radical title in the NR of the country to an external agent like the World Bank. They are a sovereign asset, and as sovereignty is vested in the people (who exercise it in ways determined by the Constitution)[5], the sale of title over NR to an external third party would presumably have to be sanctioned by the representatives of 'the people' (i.e. through some form of approval by the Assembly of the Republic).

Article 102 (NR) of the CRM however, goes on to say that:

> *The State shall promote the knowledge, surveying and valuing of NR, and shall determine the conditions under which they may be used and developed subject to national interests.*

Further, in Article 117 (Environment and Quality of Life), it is stated that the State will:

- promote efforts to guarantee the ecological balance and the conservation and preservation of the environment, with a view to improving the quality of life of its citizens (Clause 1); and
- guarantee the rational utilization of NR and the safeguarding of their capacity to regenerate, ecological stability and the rights of future generations (Clause 2d).

These conditions are also set within the context of the set of Fundamental Principles (Article 11) which include amongst the fundamental objectives of the Republic of Mozambique:

> *the building of a society of social justice and the achievement of material and spiritual well-being and quality of life for its citizens (line b).*

The intention of the Constitution in this overall context is clear: the State as owner shall determine how NR are 'used and developed', and further, this determination can include selling the natural resource once it has gone through this process of 'use and development'. In other words, the carbon can be sold if it is subject to some sort of conversion or transformation into a marketable commodity.

The State determines the use and development, and who does it, through appropriate legislation. The various laws will also determine what rights the 'user and developer' has over the products of this process. These rights may include being able to sell the transformed NR (trees turned into logs or charcoal, for example).

In the specific context of natural forests (which are State property) and which are in the public domain (productive and conservation forests), the key legislation is the 1999

[5] CRM, Article 2

Forest and Wildlife Law (Law 10/99). This law gives mandated agencies in the Government the right to assess requests to 'use and develop' NR. Since the reforms initiated by the current government in early 2015, this function is mandated to MITADER. In carrying out this function, MITADER is also constitutionally obliged to take into account questions of sustainability, national interest and the well-being of citizens.

Two basic forms of use and development are allowed: licenses, and concessions. Each of these allows the requesting entity (a Local Community or an investor/commercial project), to undertake activities that transform these NR into something marketable. Once this is done, this entity – the agent of this transformation - is able to sell the resulting product, provided that they pay the State a share of the returns (taxes, etc.).

The State will approve the request for a license or concession, provided that this does not conflict with the range of conditions that are imposed elsewhere in the Constitution ('subject to national interests', contributing to the 'well-being and quality of life of citizens' etc.). The license or concession holder is then free to sell the resource which they will have 'used and developed' (this principle lies behind the idea that felled timber should not be exported as unprocessed trunks of timber).

The State itself, through its governmental agencies, is also able to undertake projects to 'use and develop' its own resources. In this case, the State owns the products of the process which it can then market, subject to the same constitutional conditions as above. These points lead to several conclusions about carbon, ERs and the State:

- The State cannot simply sell its NR (including carbon) to an external third party (like the World Bank), or at least it cannot do this without the approval of the Assembly of the Republic as the sovereign representative of the people;

- The State is able to determine how these resources are 'used and developed' through relevant legislation, and this 'use and development' transforms them into something that can be transacted;

- ERs are a specific product that results from such a process of *use and development* (or 'non-use' in this case) of a specific set of NR (forests and trees;

- As products of a process of use and development, ERs can be sold by the State *if it has full rights over them and they are converted into a tangible and secure asset;*

- The transformation of carbon into ERs can be done by licensed third parties (local communities, associations, firms) or by the State itself;

- Where licenses are approved for third parties to 'use and develop' the NRs and produce ERs, agreements with the State as owner of the NRs can specify that the ER

products belong to the user and developer (providing the underlying economic rationale behind the investment/project proposal);

- Where the State undertakes the 'use and development' of the natural resource (through a State company for example), it is able to freely market the results of this process (ERs) both internally, and externally to international buyers.

2.3 ER Projects and title transfer

Achieving ERs requires a specific kind of project, regulated where necessary by specific legislation. Decree 70/2013 serves this purpose to some extent, but unfortunately it does not clarify how the State deals with ERs, or which state agency is responsible for negotiating ER titles on behalf of the State.

Decree 70/2013 is also primarily about non-State REDD+ projects. Typically, these projects will aim either to safeguard existing carbon stocks, or create new ones through reforestation and agro-forestry. In all cases, the 'user and developer' – a firm, individual, or a collective entity such as a Local Community or Association – has ownership of title over the ERs that are produced. The user and developer would also be expected to make agreement with any third-party rights holders who might have some claim over the ERs.

The 'user and developer' is also free to ask the State to sell the ERs on its behalf (for example, as part of a batch of ERs that the State wishes to sell to the World Bank). In this case however, a contract between the developer and the State would have to be negotiated and agreed to by both sides.

The State could however retain its rights over the ERs generated by these and other NR projects, as part of the concession or project agreement with the developer (whose primary interest may not be generating ERs, but planting timber for future fuel wood, construction or paper). Thus, the State could agree to the commercial activity but insist that the ERs that result from sustainable forest use are still State property. The State would have to secure agreement with the developer to include ER objectives in his or her project; and is in the case of the private developer, would have to make agreement with any third-party rights holders who might have some claim over the ERs.

The State can also act in the role of user and developer of its own resources. In this case, the ERs that result from a publicly-implemented REDD+ project would be the property of the State. The proposed ER program in Zambézia is one such project, where the State as owner of the NR and the carbon they contain intends to instruct its agents (sector ministries and provincial governments) to carry out activities that will reduce deforestation and thus produce ERs over a specified period of time.

These ERs, as an outcome of the process of use and development, belong to the State and can be sold by it to a third party through a nominated agency. Once again, the State would have to make agreement with any third-party rights holders who might have some claim over the ERs. All agreements to produce ERs – whether with private entities or through state projects – would also have to be guided by constitutional requirements on sustainability, national interest and improving the well-being of citizens imposed by the Constitution.

The proposed ERP is a State project of this sort. It includes activities that will bring about a reduction in the use (or destruction) of remaining forest resources, by changing livelihoods strategies away from unsustainable practices, including itinerant agriculture and unsustainable charcoal production. Those activities are comprised in various projects, including in the Mozbio, MozDGM, MozFIP and *Sustenta* project, which will attract new investment and transform local farming, strengthen local level environmental management, and diversify livelihoods away from direct forest exploitation.

In the ERP, the State retains control over the remaining natural forests and ownership over the ERs that are generated by promoting behavioral change on the part of forest users. It is therefore free to sell the title over these ERs, following the arguments presented above.

In all these contexts, no new legislation is needed to allow the 'State-as-developer' to sell these ERs resulting from publicly-implemented projects (or where the State retains its rights over the ERs generated by non-State projects). However, given the unfamiliar nature of the whole carbon and ER issue, specific legislation could greatly clarify the question of title and ER sales, and how these sales and the wider ERP link to social and economic objectives.

3 OTHER CLAIMS AND RIGHTS OVER NRs AND ERs

3.1 Local community rights and ERs

It is very likely that there will be other claims and rights over the forest resources that are the focus of a program like the ZILMP. Firstly, it is likely that the forest will be within an area covered by a land use and benefit right (DUAT) acquired by customary occupation. These DUATs will either be collectively held, or held individually by households that have acquired their land rights through 'customary norms and practices'[6]. There may also be individual DUATs acquired either by 'good faith occupation' over ten years; or by formal request ot the State (for a new right).

[6] Law 19/97, Article 12

Secondly, Law 10/99 (Forest and Wildlife) makes it clear that local communities have the right to use the forests and other NR for their own consumption and household economy purposes (Law 10/99, Article 1, Clause 9, and Article 9). This right can be equated to a *de facto* 'DUAF', or *Direito de Uso e Aproveitamento Florestal* (the term has not been legally created and regulated, but exists by virtue of the various provisions in the law).

The collective DUATs will include all the resources used by the local population for different elements of their livelihoods strategies. 'DUAFs' over forested areas may be exercised in two ways: extracting raw materials, food and other essentials; or cutting and clearing forest to open new fields for cultivation. In the ZILMP area, this form of slash-and-burn agriculture is the norm and deforestation caused by itinerant farming is by far the major cause of deforestation (and thus of carbon emissions). In other words, not only do local people have strong legal rights of use over the natural forests that exist on 'their land', but their active participation to change the way they use the forest is essential if the ERs sought by the State are to be achieved.

When it comes to assessing the right of the State (or any other 'user and developer' with a concession over forest assets) to sell ERs produced within the limits of a pre-existing DUAT, it is clear that a) these pre-exisiting rights over the forest must be taken into account; and b) the process of negotiating over ERs and their subsequent sale must also take into account the role of the local community in producing them.

3.2 Assessing local community rights

The land tenure legislation[7] is the starting point for determining where 'DUAFs' exist, and for subsequently reaching an agreement over the process of generating ERs and then transferring title over them in exchange for payment. The key instrument in this context is the Local Community, defined in the Land Law as

"A grouping of families and individuals, living in a circumscribed territorial area at the level of a locality [the lowest official unit of local government in Mozambique] or below, which has as its objective the safeguarding of common interests through the protection of areas of habitation, agricultural areas, whether cultivated or in fallow, forests, sites of socio-cultural importance, grazing lands, water sources and areas for expansion"[8]

[7] The principal instruments are the Land Law (Law 19/97), the Land Law Regulations (Decree 66/98), and the Technical Annex to the Land Law Regulations (Ministerial Diploma No. 29-A2000). Other decrees have also been passed relating to the registration of DUATs in the Legal Registry, or *Conservatória do Registo Predial* (Decree 1/2003), adjustments in the fees and land charges paid by DUAT holders to the State (Decree 50/2007), and the conduct of consultations (Decree 43/2010).

[8] Law 19/97, Article 1, Clause 1; and Law 10/99, Article 1, Clause 5)

The definition reflects a production-system analysis of how the local population use a specific territory or landscape to secure their livelihoods, not forgetting that social and other relationships between individuals and households underpin these systems. It makes it clear that the Local Community includes not just immediately visible cultivated areas and fenced in grazing, but also other areas and NRs that are essential for a sustainable land use strategy of multiple resource use and shifting agriculture as soil fertility declines.

The Land Law recognizes this form of occupation as being equivalent to an already-acquired DUAT, which is held collectively by the Local Community. At sub-community level, the allocation and management of rights to individual households and extended families is done through the prevailing customary land management system, and these individualized rights are also equivalent to acquired DUATs in law.

Local use rights over natural forests are closely tied to the DUATs covering the land on which they stand. To underline this coincidence between the spatial dimension of the DUAT, and area over which NR use rights (or 'DUAFs') exist, the Forest and Wildlife Law (Law 10/99) gives 'local communities' and their members the right to use local NRs for household livelihood purposes, and includes the same definition of a Local Community as in the Land Law.

It follows that the 'Land Law Local Community' is the basic unit that must be identified if the State or any other actor wants to reach agreement over producing ERs in 'their territory', and how the Local Community should subsequently participate in and benefit from the sale of these ERs. Identifying a specific Local Community confirms it as the holder of a DUAT over a specific 'circumscribed territory', and the limits of this DUAT indicate which areas of forest and other NRs fall under the community 'DUAF' for purposes livelihoods purposes.

3.3 Identifying the Local Community through delimitation

The land tenure regulations also provide instruments for identifying which communities and individuals enjoy NR use rights over a specific landscape which at first glance may seem to be just a collection of dispersed villages surrounded by cultivated fields and forested land.

The Local Community, is identified on the ground through a process known as community delimitation. The process of delimitation is discussed in the Land Tenure report and in supporting documentation[9]. For the present argument, it is important to note that it can

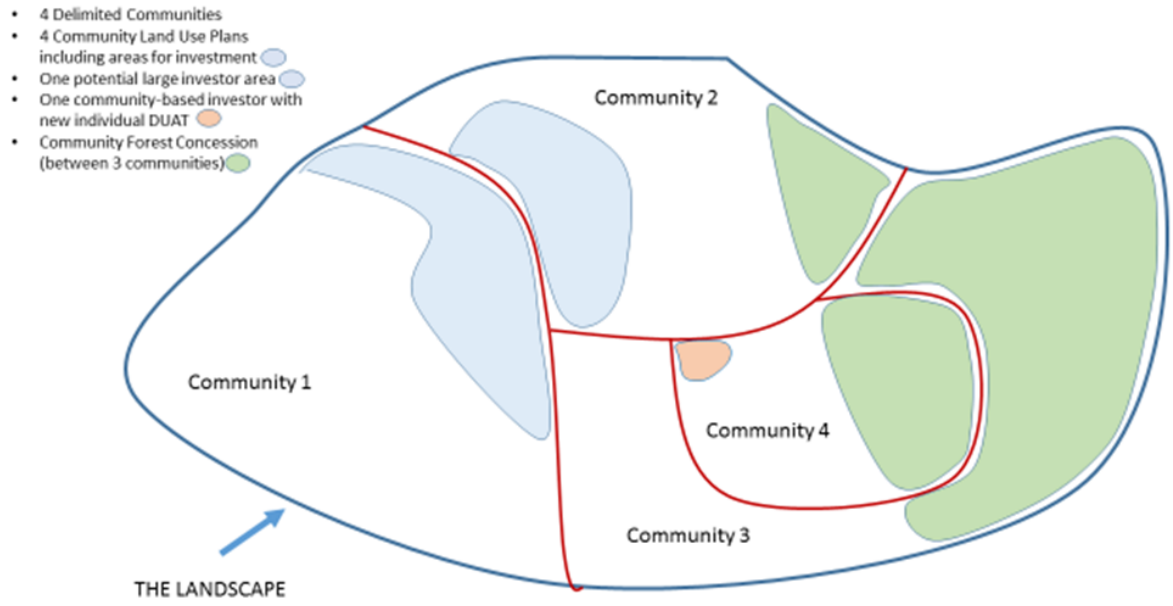
[9] World Bank 2010. Policy Note: Community Land Delimitation and Local Development. Washington DC, The World Bank, Agricultural and Rural Development Sector Unit, Africa Region, November 2010. A report by Simon Norfolk and Paul De Wit. See also Tanner, De Wit and Norfolk 2009. Participatory land delimitation: an innovative development model based upon securing rights acquired through

result in large areas being identified as a Local Community, covering a large range of resources including natural forests that are still within the public domain of the State.

Given the existence of the other more public functions however, delimitation can also be seen as creating an area of jurisdiction when it comes to the management of NR. It also establishes the area over which the Local Community and its members have claims and rights over the NR (forests) inside the delimited borders.

Delimitation can also create a Community Land Use Plan (CLUP). The CLUP can identify areas that can be allocated as investment land (either ceded permanently, ceded temporarily, or shared with the investor), but also areas that warrant special treatment and protection in the environmental context (see diagram below).

Figure 1: Delimitation and Community Land Use Plans



These areas are likely to include natural forests that legally are the property of the State, and make up the 'public domain of the State'. Such forested areas are potentially available for productive use through an agreement with the community or an investor, or can be areas of forest that are harvested and used sustainably by local people. They can also include 'conservation forest' to be set aside and excluded from commercial activity, left standing as '*florestas em pé*'.

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customary and other forms of occupation. Rome, FAO Land Tenure Working Paper 13. www.fao.org/publications

The package of land rights delimitation and 'DUAF' creates an important platform for making agreements with the GoM as 'owner' of ERs that are produced inside a delimited Local Community. These agreements can include both community-based REDD+ projects and/or public projects that require local community support and buy-in to work. Both options could be discussed and built into the Community Land Use Plan (CLUP) that will be part of the delimitation activities being supported by the Sustenta and MozFIP projects in the ZILMP accounting area.

3.4 Community Public Domain

Even before the 2004 constitutional revision, the Local Community exhibited elements of what has been termed a 'hybrid' entity with both a private and public character. The 1997 Land Law attributes DUATs to the Local Community on a collective basis, and these are legally private rights held in the name of the respective Local Community. The same law however also gives the Local Community a series of roles in the management of land NRs, thus:

- Participating in mandatory community-investor consultations when new economic projects are proposed (Article 13);
- The allocation and management of land rights (DUATs) inside its borders, according to customary norms and practices (Article 12 (a));
- The *management of NR within its borders* (Article 24, Clause 1 (a));
- The allocation of new DUATs to outside interests (titling) (Article 24, Clause 1 (c)).

Especially taking into account that all forests and NRs are the property of the State, these management tasks give the Local Community a clear *public character* as well. This public face is given even greater weight by the 2004 CRM revision, which created the related concept of *community public domain*. Thus, Articles 98 and 263 of the CRM state:

> *The law shall regulate the legal regime of property in the public domain, as well as its management and conservation, and shall distinguish between the public domain of the State, the public domain of local authorities and the* ***public domain of communities****, with due respect for the principles of imprescriptibility and immunity from seizure* (Article 98, Clause 3, emphasis added).
>
> And:
>
> *The law shall establish institutional mechanisms for liaison with local communities, and it may delegate to local communities* ***certain functions that are within the powers of the State*** (Article 263, Clause 5, emphasis added).

The community public domain concept allied with the existing public functions specified in the 1997 Land Law introduces an entirely new level of right over NRs and the products of their 'use and development'. These are State resources, and the State therefore has the right to negotiate and transfer the title to ERs that are produced from them. However, as public assets these resources are also within the community public domain, and are managed by the respective Local Community.

Since the community public domain concept was introduced in 2004, no further legislation has been approved relating to how it works in practice. In the absence of detailed legislation however, it is possible to deduce how this constitutional principle can profoundly affect the way that ERs are treated, during ERP implementation and when ERs are sold and transferred to the World Bank:

- The community public domain is a subset of the wider 'public domain of the State', and extends across an area that is identified as 'a local community';
- This area can be assumed to equate to the Local Community of the 1997 Land Law and 1999 Forest and Wildlife Law, as this also has specified 'functions that are within the power of the State';
- The local community referred to in the CRM can then be identified on the ground using the community delimitation instrument laid out in the Technical Annex of the Land Law Regulations;
- As a sub-set of the State public domain, the hybrid 'private-public' Local Community can be deemed to hold and manage the radical property right over 'its' land and NR, on behalf of the State;
- These resources include natural productive and conservation forests within the Local Community that have not been subject to any form of license or concession agreement, either with the Local Community of a private investor;
- The application of the community public domain concept means that the carbon in these forests forms part of the patrimony of the Local Community;
- By extension, the ERs that derive from State-projects like the ZILMP in these areas are also part of the patrimony of the respective Local Community.

Therefore, while the State may be the ultimate 'owner' of the ERs and thus able to transfer ER title to third parties (like the World Bank), the Local Community (duly delimited and certified) is also 'owner' of the ERs insofar as they derive from resources that are part of its community public domain.

The practical implications of this are that even in the case of ERs that derive from a public project and are therefore State property, the GoM agencies empowered to negotiate over and transfer ER title will have to reach an agreement with the representatives of the Local Community over a) their right to freely transfer title over what are in fact community public assets, and b) how the revenue generated is shared with the respective Local Community.

Moreover, the process of community land rights delimitation goes beyond recording the extent of the collective DUAT of the Local Community, to establishing its area of jurisdiction as an entity with delegated public functions and an entity that 'owns' (as a subset of the State) public domain assets that occur within it.

3.5 The Law on Conservation and Biodiversity

The points above about community public domain and ownership of the results of developing and using carbon stocks (which include ERs produced by programmes like the ZILMP) are affirmed in the one piece of primary legislation which does make specific reference to carbon stocks and the rights over them. This is the 2014 Law on Conservation and Biodiversity[10].

While the focus of this legislation is on conservation areas, the principles it establishes regarding the possession of the right to use and benefit from carbon stocks are clear and can be extended to other areas of public domain land. Thus:

> *The right of use and benefit over the carbon stocks existing in a conservation area and its respective buffer zone belong to the entity which manages this conservation area, and the marketing of this right can be carried out in collaboration with other public and private entities* (Decree Law 16/2014, Article 11, Clause 3).

How this is to be done in practice is left for a specific other decree to deal with, with the focus being on which entity is promoting and implementing conservation efforts that include REDD+ projects and the production of ERs (Article 11, Clause 4).

Article 22 of the same law extends this principle explicitly to areas of community public domain, where natural forests in the possession of the State are largely found. These forests in turn are likely to exist within the territory of delimited Local Communities, which as discussed above, have NR management powers attributed by both the Constitution and the Land Law. The implication is that possession of title over carbon credit rights lies with the holder of the DUAT title over the land in question, or in other words the respective Local Community, which has rights and duties associated with its community public domain over public spaces and common land and the NR found there.

These points underline the arguments regarding the need to work closely with Local Communities when determining who holds title over ERs produced in these areas, and what then happens to the financial returns when these ERs are sold.

[10] Approved by Decree No 16/2014 of 20 June

This point is also clear in the Conservation and Biodiversity Law, which contains important provisions on community consultation and prior consent. Community consultation and agreement are required, and it is mandatory to establish formal partnerships that are mutually beneficial between the State, the private sector, and the communities (Articles 9 and 10). This also needs to takes place within an approved planning framework under the Territorial Planning legislation, with restrictions imposed on resettlement programs when appropriate (Articles 39 and 48).

Finally, it is important to note that this law unequivocally reconfirms that the supreme and central objective of the State is to protect the legitimate rights of citizens and to promote sustainable development in Mozambique.

3.6 Other community issues

3.6.1 Delimitation and Benefit Sharing

The Forest and Wildlife Law and subsequent regulations established what has become called the '20 percent system' through which a share of public revenues deriving from the use and development of forest and wildlife resource is devolved to the Local Communities whose resources are directly affected[11]. This distribution of revenues is in effect a recognition by the State of the use rights held over these resources by Local Communities, and the fact that they are likely to be negatively-impacted by the State conceding use and development rights to investors and external projects.

A similar provision has subsequently been applied to revenues generated by tourism in conservation areas and buffer-zones where local people can demonstrate historical rights over the Reserves and Parks, and where the law prohibits any use of the resources inside these protected areas. It is a logical extension of this principle to say that revenues generated by the sale and transfer of ER titles should also be included in this scheme or a similar benefit-sharing mechanism set up specifically for ER payments.

The land and NR legislation provides a set of instruments that can facilitate the effective implementation of this kind of scheme. Delimitation establishes the area of the collective DUAT, and which resources a specific grouping of households have access to and manage on behalf of the State. It identifies and strengthens Local Community land and NR management structures, which can also receive and manage the use of revenue shares on behalf of the community. And is establishes the limits of the jurisdiction of the community public domain,

[11] Details of this scheme are discussed in the Land Tenure Assessment which accompanies this report

and thus identifies the resources that make up part of the Local Community patrimony as public assets held and managed at local level.

On the basis of the delimitation, it is then possible for the State to include the Local Communities in any proposals to sell ER title to a third party, as proposed in the ERP/ZILMP. Note that given the added element of community public domain, any agreement involves more than just a share in revenues, but requires the approval and active involvement of the community as *de facto* holders of the NRs in question. Moreover, an even more important implication is that as the devolved owner of the NRs and the generated ERs, the Local Community *should be able to negotiate for a far larger share of the revenues, allowing a part to be allocated to the central state for its costs instead of the other way around.*

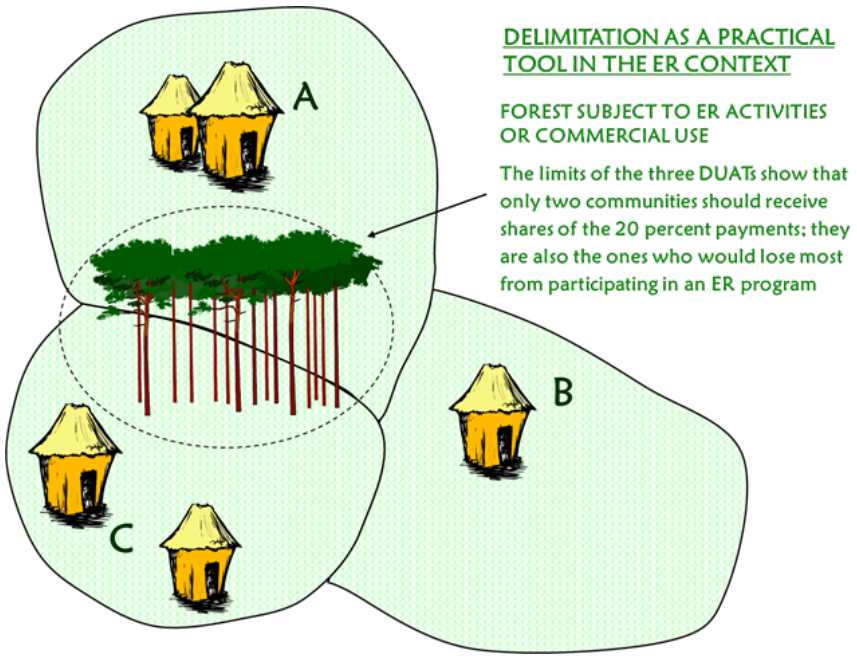
The other way in which delimitation is important is in the case of resources that extend across a large landscape and are likely to extend over several Local Communities. This is very likely to be the case in the ZILMP Accounting Area. Delimitation is then also important to determine which Local Communities should participate in specific benefit-sharing arrangements for revenues generated by forest use and development in their delimited areas. This also allows the State to determine how revenues to local people are distributed as a way of recognizing both their legal rights, and their participation in activities that result in ERs being achieved.

This is shown by Figure 2 below, which presents three communities delimited in a landscape that could equate to part of the ZILMP accounting area. The limits of each community are very likely to be long-defined and well known to local residents and their customary management structures. Without a delimitation process, it is impossible to determine if use and benefit rights over the forest are held by one or all three communities; and it is difficult to determine what share of any revenue payments each community should receive.

With a delimitation carried out, these questions are resolved relatively easily. In this specific case, although Community B has villages relatively close to the forest, it does not in fact have use rights over it in the context of both the Land Law and the Forest and Wildlife Law.

Should the forest be subject to a public ER project, any revenues generated by the transfer of title over ERs to the World Bank should be shared only with A and C. This approach also ensures that even those who do not live near the resources in question, but may still use them (as a kind of 'commons') are included in any consideration of who should participate in and benefit from the REDD+ or ER program that is being planned.

Figure 2: Delimitation and Benefit Sharing



3.6.2 Local community representation

Whatever agreement are made – a REDD+ project by the community or an agreement with local people to support a public ER project – it is important to know who represents the local community and can make agreements on its behalf. This is especially important as well in the context of the community public domain concept.

Following Article 24 of the Land Law, the first level of community representation is the set of customary structures that already exist in each community. These will be the structures that have responsibility for managing land access and rights for community members (Mozambican citizens resident within the jurisdiction of the Local Community); and for managing the NR within the community, 'according to customary norms and practices'.

Customary structures are easy enough to identify on the ground, and will certainly become apparent during the process of community delimitation. They will include land chiefs (*cabos da terra*) who oversee the allocation of land between community families and the use of communal resources (which are likely to include the forested areas within the delimited area of the community). And as mentioned above, the rights allocated through these structures to individuals and extended families within the community are also DUATs under the law and enjoy full constitutional and legal protection.

These same structures are also important in the context of benefit-sharing where some allocation of benefits to the sub-community level is needed to ensure that active participation not just of the wider community, but especially of those most directly affected

by a REDD+ or ER project. They will be able to identify which households hold legitimate acquired rights over the land and NR that are within the ER project area.

The various land and NR laws create other forms of community representation however. In the case of the Technical Annex of the Land Law Regulations (which sets out the methodology for delimitation), a group of up to 9 people who must include women are chosen by the community to represent it in matters relating to the delimitation process[12] (this has evolved into the so-called G-9 term used by many NGOs).

Some programs that have supported delimitation as the starting point for community based development initiatives have also created 'Community Development Committees', which have a wider remit including the definition of a longer-term community agenda for development, defining aspirations and goals over a period of up to 20 years[13]

In the forest and NR context, two mechanisms are commonly referred to: a) the NR Management Committee (CGRN in Portuguese); and b) the Local Council for Participatory Resource Management (or COGEP). The legal origin of the CGRN is not clear: it appears to originate in the law regulating agricultural associations (Law 2/2006 of 3 May), which has frequently been resorted to by NGOs and others who have to have an entity at community level with recognized legal personality when it comes to signing contracts and opening bank accounts. The CGRN was also a key implementing mechanism in the GoM Community Based Natural Resources Management (CBNRM) Program which had its high point in the 1996-earlty 2000s period. It has since become the key mechanism for receiving and managing the 20 percent of public revenues that has been discussed above.

In this context, there is a possible overlap between CGRNs and the G-9 or CDCs created in the Land Law context. CGRNs consist of members elected by the Local Community and have a legal personality; they can therefore act on behalf of the community in the signing of contracts and in the receiving and distribution of the 20 percent funds.

COGEPs have a clear basis in law, created by Article 31 of Law 10/99, and are 'constituted of representatives of the local communities, the private sector, associations, and the local authorities of the State, with a view to the protection, conservation and promotion of the sustainable use of forest and wildlife resources'. As such they exist at a level above the Local Community, and could be said to cover a 'landscape' in the sense of the activity areas that are included in the ZILMP. Where forests that are subject to either private sector REDD+ proposals, or which will be within the ER area, cross into several Local Communities, the

[12] Ministerial Diploma 29-A/2000 of 17 March, Article 6, Clause 3

[13] This was adopted and developed by the PRODER project in Sofala project in the early 2000s, funded by GIZ

COGEPs should serve to bring all stakeholders together around commonly agreed positions and accords over local involvement in the project and the sharing of benefits.

While they are useful for promoting and implementing an ERP, the COGEPs should not be seen as entities that represent the Local Communities in the sense that they can negotiate on their behalf, or receive and manage revenues shares from the State.

The multiplicity of mechanisms also undermines the principle expressed in Article 24 of the Land Law, to build upon legitimate and existing customary institutions and give these a function and capacity in land and NR use and management. Whatever mechanism is selected however must ensure that the collective DUAT of the Local Community is managed in the interests of all it members. The Land Law already specifies that the Local Community should be regulated following the principle of 'co-title', which is to say that all the members of the community are equal co-title holders of the DUAT[14]. The Land Law Regulations go on to specify that the rules of 'co-property fixed in Articles 1403 and following, of the Civil Code, apply to [the exercising of] co-title'[15]. This important principle means that, for example, a CGRN – as a Local Community body - would have to ensure that all members of the Local Community are adequately consulted in decisions, and participate in any benefits that result.

There are also arguments over whether the Local Community itself has a legal personality and can sign agreements (for example, with regard to REDD+ projects and ERs benefit sharing). The view taken here is that by virtue of being a DUAT title holder, and by being created formally in law, the Local Community does indeed have a legal personality and its respective customary structures should therefore be the first point of reference when it comes to its fundamental role in local governance, including decisions over land and NR issues.

Practical and administrative constraints conspire against this approach however. For example, banks do not accept the legal personality of the Local Community and look instead for some other kind of body with clearly recognizable structure and statutes. For this reason, CGRNs are acquiring a key role in the NR governance context. An alternative response to the difficulties of getting banks and others to recognize the Local Community as a legal entity, is to create a Community Associations under the respective associations and cooperatives legislation. In either case, it is essential to ensure that the respective statutes embrace the whole community and that these bodies do represent all community members and channel benefits to them.

[14] Article 10, Clause 3

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

A final comment on the question of representation is needed, in the context of Article 30 of the Land Law (Representation and Activities of the Local Communities). The article states that: 'the mechanisms of representation and what the local communities can do in respect of the DUAT, are to be established by law'. The law referred to has never been developed let alone approved, and the failure to address this question remains a key problem in the wider picture of local community representation and engagement with programs like the ZILMP.

4 PROCESSES AND MANDATES

4.1 Converting ERs into assets with title

The ability of the State to transfer the title over ERs of course requires these ERs to have a title document attached to them in the first place. To get to this stage requires a complex series of steps which at the present time are far from being adequately legislated and prepared for.

ERs generated by projects like the ERP/ZILMP need to be converted into tradeable assets before they can be sold to the World Bank or any other carbon market. This means that they go through a series of steps to become 'Certified Emissions Reductions' (CERs), or in other words, a real asset that has a title document (Certificate) attached to it.

This process has to be verified and monitored at the international level. The Measurement, Reporting and Verification of greenhouse gas emissions by sources and removals by sinks is referred to as MRV. The ERP includes measures to ensure that it is possible to estimate the quantity of forest-related emissions before, during and after the ERP/ZILMP. These measures are being developed in strict accordance with guidelines from the Intergovernmental Panel on Climate Change (IPCC). They are based on a comparison between the historical deforestation and emissions generated during a reference period (baseline), and those generated during the ERP.

Under the UNFCCC, countries are expected to report these estimates to the UNFCCC Secretariat. Reporting is regular and must keep to an agreed schedule. The UNFCCC Secretariat then works with the partner country government to agree and coordinate a process of verification of the ER estimates by independent technical experts in Land Use, Land-Use Change and Forestry (LULUCF). Only after this is done can Mozambique expect its ERs to be converted into the CERs which are then in effect, a form of real property with an attached and verifiable Certificate (or title).

To do all of this, the GoM must have in place the appropriate mechanisms, procedures and infrastructure to ensure that the ERs it is producing are indeed converted into a legitimate

and tradeable asset. If this is not done, then there will be no ER titles to sell and the issue of who has rights over them is irrelevant. There are four essential issues to address in this context:

Verification: As indicated above, the GoM and the UNFCC will identify an acceptable independent third party to certify that the ERs have indeed been produced (compared with pre-project baselines and using appropriate means to measure present and future carbon stocks), and ensure that the ERs are recognized by an approved carbon standard relative to the intended market.

Additionality: It must be shown that the ERs are in fact helping to fight climate change by either reducing or removing greenhouse gas emissions from the environment; it is also necessary to demonstrate how the ERs have been produced, and to be able to prove that marketed ERs have unique identifiers and can be tracked (to avoid questions of double counting and multiple sales of the same ERs) e

Permanence: The GoM must be able to show that the ERs it is producing are permanent and cannot be reversed in the future; this is essential for maintaining the value of the ERs once they are converted. It is important in this context for the GoM to be able to demonstrate that the ERs have indeed happened, and that they cannot be reversed.

Traceability: The GoM must establish a Registry much like a land rights registry, to record and track all ERs produced in the country, and to ensure that they are verified and internationally certified (titled) using the agreed UNFCC mechanism. As with any other form of property title, the CERs that are the end result of this process must have unique identifiers (serial numbers or some other form of identification); and the Registry has to be transparent, efficient, and regularly updated.

This process has to be handled by the State through governmental agencies; no private entity implementing its own REDD+ project will have the capacity to set up the necessary institutions and carry out the process above. The Registry for Mozambican CERs will also have to be legally established, mandated and monitored, and will almost certainly have to be a State body similar to the Legal Property Registry (*Conservatória do Registo Predial*).

In fact, at the time of writing, work is ongoing at the MRV section of the National Sustainable Development Fund (FNDS) to design two registry systems. These are:

1. **A system of data management for all ER programs and ER projects implemented in Mozambique**;
2. **A system of registry of transactions**: ER transactions are capable of generating large amounts which have to be underpinned by certainties over the origin and

validity of the ERs, and safeguards that sales are unique (i.e. that there is no risk of an ER being sold more than once).

While the systems are being designed, there are important institutional and legal issues to resolve. The key question to be resolved in the immediate term is to decide who will be responsible for hosting the two systems, if possible before they are set up with staff, procedures and regulations. Once they are established, they will quickly become institutionalized and difficult to change later. The entities currently involved are the FNDS, the DINAF and the DINAB. Given that the primary concern here is to manage large sums of money coming into the public accounts, and ensure the reliability of the data attached to all the ERs that are transacted, for the moment the MEF is most likely to be responsible.

4.2 Which sector acts on behalf of the State?

The discussion above reveals that while the State is free to transfer title over ERs generated in areas that are the public domain of the State, in most other circumstances its ability to do this is circumscribed by the existence of other claims over the ERs that are produced. This is especially the case in areas where the forests are within the community public domain, and where the ERs are produced by a private or community-run project and are therefore the property of those implementing the project.

In this context, the question of mandates has two elements. Firstly, the State must decide which sector or agency is going to be responsible for establishing and running the system and Registry that will be necessary to convert ERs into CERs and ensure that the destiny of these CERs is fully recorded and verifiable, upholding both their value and their long-term integrity. Secondly, the State must decide which sector or agency will be authorized to negotiate with third parties (buyers) and sign agreements with them in its name.

Moreover, recognizing that in practice no private entity or Local Community is going to be able to negotiate with international negotiations like the World Bank or any other foreign entity, negotiations over even privately-generated ERs will necessarily have to be carried out by the State. It will therefore be important to clarify how the State will acquire the mandate to represent *these* entities when they implement REDD+ projects, as the legal owners of ERs and the resulting carbon credits outside areas of the public domain of the State.

Even within the context of public domain ER resources, it is not clear which sector will act on behalf of the State. While the discussion above shows that in specific circumstances, the State can sell the title to ERs it controls, there is no legislation in place to allow *the GoM* to act for this State. Nor is there any legislation dealing with how the State will act on behalf of other actors who ask it to negotiate and transfer title of privately-held ERs on their behalf.

Enabling legislation is needed to give the GoM the power to sell (transfer title over) ERs to an external third party. Two recent documents – Decree 70/2013 and the National REDD+ Strategy – should have responded to this concern, but the nomination of a specific sector charged with the task of transferring title over ERs to the World Bank (or any other third party), is not mentioned even in the recently approved National REDD+ Strategy. The question of *how the State of Mozambique sells its ERs and through which sector* is therefore still open and requiring a solution.

This decision may well have been constrained by political factors, as it is evident that securing the eventual mandate to represent the State and other national stakeholders will place the respective sector in a considerable position of authority over significant new resources. However, with the ERP/ZILMP now nearing final development before implementation in the near future, and private sector operators shying away from REDD+ projects due to the unclear institutional context and weak capacity of existing State agencies, resolving this issue is now a priority.

Once these decisions are taken, the GoM must initiate a process as soon as possible to develop the necessary legislation for setting up a running an appropriate licensing and registration system, and for attributing the authority to sell ER titles to a defined State agency.

4.2.1 Possible institutional choices

In the case of setting up a system for certification and registering ER titles, there is a clear for choosing MITADER. This ministry already looks after land, the environment and forestry. Appropriate enabling legislation and an investment project to establish and maintain a minimum initial capacity in this area will then be needed.

As for the question of representing the State and others in negotiations and the signing of international agreements, there are three main sector contenders, given their current roles in various aspects of the ER challenge:

- Ministry of Economy and Finance;
- Ministry of Land, Environment and Rural Development.

The Ministry of Economy and Finance is a strong candidate given its role in public finances and in receiving and managing ODA. MITADER is also an obvious choice if its mandated role in land and NR management is taken into account. At the present time, it appears that the GoM is moving towards the first of these, although clearly MITADER will have to have some role in both the promotion and production of ERs, and in their management. Any new legislation will have to spell out the respective roles of each sector, with the financial

transaction and contractual elements probably being assumed by MEF, and managing the Registry and related systems being the role of MITADER.

If this is the case, then the MEF will be responsible for all discussions and negotiations about the funding of REDD+ projects, and the sale of ERs into international markets (or in the case of the ERP, direct to the World Bank). MEF will also have to have an oversight role to ensure that any funds generated from ERs are properly accounted for in national accounts.

The MEF will also have to set up and manage the appropriate mechanisms within the state financial apparatus e-sistafe, through which ER-generated funds can pass down the line to their respective implementing agencies (e-sistafe is the GoM system for dealing with this). Unfortunately, however, e-sistafe and its related distributional systems are notoriously cumbersome and often result in delays in disbursements to implementing sectors.

With its 'super mandate' for land, forests, and the environment, which includes the single, multifunctional cadaster for land and other NRs foreseen in the 1995 National Land Policy, MITADER is the clear choice for the operational element of the ER process. This would include setting up, running and overseeing the two systems discussed above.

In both cases, enabling legislation is needed to get these systems up and running, with appropriate new regulations and procedural manuals and guidelines. These will have to form part of any new REDD+ legislation, or attached to it in the form of Technical Annexes or procedural manuals.

To summarize, the task of negotiating with international partners over the sale of ERs and the subsequent handling of generated revenues, will likely be given to the MEF in any new REDD decree. The executive and technical management of the Registry and certification systems would more naturally reside with MITADER, but new legislation will have to be very clear and detailed about how what each sector does and how they will work together.

There is also the issue of procedural efficiency, with operation of the GoM e-sistaffe system being notoriously inefficient and in impediment to effective and efficient project implementation. These comments point to the GoM having two options:

a) Develop a financial mechanism to allow payments for ERs to go directly to the FNDS, while the MEF does the negotiations, signs the agreements, and ensures that transactions are registered in and form part of national financial records;

b) Insisting that as financial resources emanating from international agreements, ER-generated funds go into e-sistafe and the public account and are managed and distributed accordingly, within sectoral plans and with previously approved annual development plans and budgets.

The question of temporal efficiency is important for any program, but in the context of a program that is selling the idea of having to give up long-standing production strategies in return for a share in ER payments, getting the funds down to local level as fast as possible takes on a specific urgency. In this case option (a) above seems the most sensible, as ER payments would not have to go through e-sistafe. Any administrative delay in getting carbon benefit shares (resulting from the sale of ERs) to them would arguably have serious negative consequences for the success of the program.

5 CONCLUSIONS

5.1 The State's ability to freely transfer title over ERs

The discussion appears at first to support the idea that the State can transfer title over ERs treated as products of a process of 'use and development' of forest resources, either by the State itself through a REDD+ or ER project, or by other actors who agree that the State retains its property rights over any ERs that are produced by non-ER activities.

However, later discussion indicates that the State does not have an automatic right to freely transfer ER title. There are many other rights over the resources in question that must be taken into account, deriving from existing laws and constitutional provisions. These rights are held and exercised by firms and citizens, and by Local Communities as defined and regulated by the 1997 Land Law. The freedom of the State to transfer ER titles generated inside delimited Local Community areas is even more constrained by the 2004 CRM revision, which introduces the concept of *community public domain.* The bulk of State-owned natural forest is found within these community public domain areas, and before it can transfer ER titles relating to these areas, the State must consult and secure agreement with the respective Local Community representational structures.

These points are upheld in the one piece of primary legislation that makes explicit reference to the carbon that exists in the natural resources of Mozambique. This is the 2014 Law on Conservation and Biodiversity which, as discussed above, is clear about the Use and Benefit Right over carbon stocks ('DUAC'?) belonging to 'the entity which manages a given conservation area'. While the law refers specifically to conservation areas, which are all areas of public domain, the fact is that the carbon stock in *all* natural forests is state property, and becomes marketable once it is converted through a process of development and use. Those doing the development and use own the resulting ERs. In the case of a private firm with a concession to do an ER project, the ERs produced belong to the firm. In cases where the generation of ERs is through a public program (like the ZILMP), and involves forests that are in the community public domain, the ERs in effect belong to the respective Local Community.

The Conservation and Biodiversity Law therefore underlines the need to look carefully at the way the State interacts with other public, private and community entities when it comes to REDD+ projects and ER programs. The focus in on participatory management characterized by inclusive decision making and the equitable sharing of benefits that derive from these programs[16].

The way the State intervenes will therefore depend on the categorization of the territory of the areas in question. The State may be able to freely transfer ER titles in specific circumstances, for example when the ERs emanate from forest conservation measures inside national parks and reserves. These are areas of State public domain, and in principle there will be few if any other pre-existing rights or claims over the resources in question.

Outside areas of state public domain, the State (represented by MITADER or another institution), will have to negotiate partnership or intermediation agreements with the holders of DUATs acquired by occupation who are also likely to be the users of forest resources that occur within these DUATs. Alternatively, the State could carry out a process of expropriation (which has to have a national interest justification).

Similarly, where the ERs relate to forest resources that are part of forest concessions or community-based NR projects (a REDD+ project of some kind), state intervention to transfer title over these ERs requires agreements that either give the State the authority to handle the ERs on behalf of the 'owners', or explicitly retain the rights of the State over these ERs. leave control over ERs in the hands of the State.

Privately pursued REDD+ projects – investors or communities – will have the generation of ERs and their potential sale as an investment objective. In this case, it is likely that the State would be excluded from any involvement in the transfer of ER titles, unless it is requested to the investor or community to act on their behalf.

The discussion of certification and negotiations underlines how the State is really the only entity able to enter into international negotiations over ER title transfers, however the ERs are generated. In this case, projects aiming to produce ERs will have to have them certified (through the appropriate State and international channels), and the promoters of these projects (i.e. the owners of the ER titles) will have to reach agreement over delegating to the State the power to negotiate and sell their ERs on their behalf.

The way in which the State, through its authorized GoM agency, handles the sale and transfer of ER titles is therefore determined by the territorial category of the area where the

[16] Decree Law 16/2014, Articles 49 and 50

forest resources in question are located. Thus, the ERP/ZILMP will have to include measures that will address the following:

a) Seeing how the area in question fits into the structure of territorial administrative division, and clarifying which entity has jurisdiction over this area (district, municipality, state line sector, local community structures, etc.);
b) Revisit and integrate the definition of the ecological and economic profile of the area in question (national park, reserve, community forest, sacred area, partial protection zone, etc.);
c) the identification of human settlements (Local Communities) and the rights over land and resources that are associated with these settlements;
d) the identification of economic investments, public and private, that exist in the areas in question, and the rights associated with these.

In this context, Local Community delimitation appears as a necessary and important first step to identify public domain assets that are managed by the community in its public guise, and to determine the extent of DUAFs that exist over forests that will be included in the ERP. The resulting information will determine the position that the State, represented by the Government, should assume not only with respect to the World Bank, but even more importantly, with respect to the holders of the DUATs and DUAFs who it is constitutionally mandated to protect.

5.2 Land tenure and other claims over ERs

The discussion of land tenure and Local Community rights shows that there are significant other claims over NR deemed to be in the public domain of the State, and therefore also over any ERs that are generated by a successful REDD+ or ER project.

The link between land tenure rights (DUATs) and use rights over forested land is very clear. Delimiting a Local Community as defined in the 1997 Land Law establishes an area of jurisdiction within which local land management structures manage the allocation of land to local families, and manage a range of communal and public resources including natural forest. Other laws recognize the right of the community and its members to use the NR that exist in the delimited area; and set out the conditions by which Local Communities (or sub-groups thereof) can request a license or concession with the State to exploit these same resources for commercial gain. This exploitation can extend to projects to conserve the forest and recuperate degraded areas – 'REDD+ projects' as defined in Decree 70/2013.

The 2014 Conservation and Biodiversity Law also establishes a clear link between the DUATs held by Local Communities, both as private rights holders, and as a hybrid form of public entity under the auspices of the constitutional provisions covering community public domain.

Whether a community-based project aims to achieve ERs, or whether the State through its own initiative seeks to generate ERs by implementing a range of activities through the ZILMP program, will determine who owns the ERs. In the former case, the ERs that result from the 'REDD+ project' belong to the Local Community (duly delimited and formally recorded in the cadastral records). However, the assumption of State ownership of the ERs is complicated by factors such as community public domain. This other facet of the Local Community means that the State cannot in fact freely transfer ER titles without consulting and agreeing with the respective Local Community structures. And linked to this is the continuing failure on the part of the GoM to legislate effectively on the 'Representation and Involvement of the Local Communities in respect of the DUATs established by law', as required under Article 30 of the 1997 Land Law.

5.3 Community representation

There are many different representational and participatory mechanisms at local level. The day-to-day management of resources follows customary norms and practices, using local customary management structures (Article 24 of the 1997 Land Law). NR Management Committees (CGRNs) derive from the law on associations, and have a legal personality, but these run the risk of alienating community members who are not part of CGRN or association. The process of delimitation also creates the G-9 and/or CDCs, which often appear to be overlapping with CGRNs. And at supra-community level there are the Participatory Management Councils(COGEPs) which bring together several local communities and other stakeholders within what could be called a landscape, in the terminology of the ZILMP.

This situation creates a lot of uncertainty about how the Local Community is represented in the context of the Land Law (DUAT), and whether or not these other entities replace or exist in parallel with customary structures. Identifying and recognizing the right representational structure is important when it comes to deciding who can negotiate with the State when it comes to reaching agreement over a project to generate ERs and the subsequent treatment of income from ER sales.

5.4 Joined-up thinking

The GoM and its partners must begin to practice 'joined-up thinking' in relation to REDD+ projects (and any other rural development initiative where land and NR rights are central to the success of implementation). The discussion above underlines the linkages between land and NR policies and legislation, and how the Local Community concept intersects with a range of related issues in the context of forestry and wildlife. Unfortunately, there has been a tendency until now to compartmentalize the use of different laws for different areas of activity. Thus, the Land Law applies in the case of agricultural projects, while the Forest and

Wildlife Law is used when forestry is involved. This is in spite of the fact that the Local Community is a key figure in the Forest and Wildlife Law as well.

The fact that doing a community delimitation is not a legal requirement in the forest and wildlife context does not mean that it should not be done. The ERP/ZILMP is a new activity in the context of the Technical Annex list of situations where delimitation should be a priority. Instead, because a project is seen as a 'forestry, or a REDD+ project', the community governance and NR management role is overlooked, along with the important contribution to capacity building and land use planning that a good delimitation exercise can make.

Worse, if the clear and exact overlap between the 'Land Law Local Community' and the 'Forest Law Local Community' is ignored and set aside, attention instead focuses on the resources in question and specific groups of people who organize into associations to use them. 'Delimiting' just these resources in the name of these associations effectively alienates them from the wider community, and can exclude other community members from any benefits generated by projects that seek to use the resources in some way.

Carrying out a proper community delimitation following the legal definition of the community and the methodology in the Technical Annex avoids these problems. It can also establish community structures that are more representative of and respond better to the needs of the wider collective. In areas where the forest resources extend across several local communities, as in the discussion of benefit-sharing above, carrying out delimitations as a first step in an ER project can also help to determine which communities are most directly affected, which are contributing most to the ER process, and how the benefits derived from ER sales should be distributed.

5.5 Converting ERs and mandate issues

A key administrative and institutional challenge is to design a system for converting ERs into a secure, tradeable commodity (CERs). The ERs then have to be registered and any movement or transaction involving ERs has to be duly recorded and freely available to external agents for verification and due diligence purposes.

Two mandate issues are identified. The first is the choice of sector that will negotiate and sign international agreements for the transfer of ER titles, in the name of the State. This also involves deciding how the resources generated enter the country and the national accounts, and are then disbursed to the relevant agencies and stakeholders (including benefit-sharing schemes).

The second mandate issue is which sector has authority to set up and maintain the certification process and manage the new ER Registry. Appropriate legislation, and absolute

confidence in the rule of law and in the transparency of the systems that are established, are both critical requirements for Mozambique being able to guarantee the legitimacy of the ER titles which it is offering to the World Bank and global markets.

6 MOVING AHEAD

Based on the discussion above, it is possible to summarize what is needed (or not needed) for a REDD+ program and the ERP/ZILMP to move ahead in Mozambique. The following list captures the essential points of what already exists, and what is needed in the short-to-medium term:

Ownership (title) over carbon: if carbon is seen a constituent part of all natural resources, then current constitutional and sectoral legislation is adequate for establishing that ownership resides with the State (CRM, 1999 Forest and Wildlife Law, the Conservation Law, other environmental and NR legislation);

Ownership of ERs: The CRM and existing NR laws, and also the Conservation Law, are sufficient for determining ownership of ERs through application of the 'use and development' concept, whereby the 'user and developer' of the NRs (in this case, the carbon in the forests) implements activities that result in ERs being produced.

Existence of other rights and constraints on the ability of the State to 'freely' sell ERs: the existing legal framework for land and NRs is adequate for establishing third party rights over the trees and forests that are the focus of any ERP. Key instruments like community land rights delimitation are important here and are also adequately detailed and regulated.

Determining which entity - private and/or public is 'owner' of the ERs that are generated by a specific REDD+ project: existing legislation (Decree 70/2013) is adequate for deciding this question, when used in conjunction with the CRM, land and related NR laws (depending upon whether it is a privately-implemented project in the context of, or whether it is a publicly-promoted project like that envisaged in the ERP). However, there are complications related to the roles and devolved ownership rights over NRs that are implicit in decentralization laws and in the concept of *community public domain* (CRM, 1997 Land Law, 1999 Forest and Wildlife Law, 2003 Local Government Bodies Law). These require detailed discussion and probably policy debate and consensus, leading to detailed regulations and perhaps laws to clarify the respective positions of the central state *viz-a-viz* its constituent parts.

Ability of the State to sell ERs: this is adequately covered in the constitution and in implementing legislation for natural resources, if ERs are treated as the product of a process of *use and development*; (key laws again are the CRM, and the 1999 Forest and Wildlife

legislation and its regulations). However, for the sake of clarity, this issue should be spelled out in a distinct section of any new legislation covering carbon and ERs.

Institutional responsibilities, new systems and mandates: the selection of which sector handles negotiations and agreements, manages the income of funds, and sets up and runs the ER Registry and the certification system, all need to be included in new enabling REDD+ legislation.

6.1 New legislation

It is evident in the above list that a significant amount of new legislation is needed. This includes:

1) **A new REDD+ decree**, which must include the following areas that are not yet adequately covered:
   a) A section affirming the points above about state ownership of carbon, and of ERs as the product of use and development which are tradeable and can be owned by the State and/or the user-developer (firm, local community, etc.);

   b) Detailed regulations for developing, approving and implementing new REDD+ projects, both private and public;

   c) Sections covering the question of institutional mandates:

      i) Which sector handles all negotiations on behalf of the State *[this must clearly and unequivocally address the need for the 'uncontested ability' of the selected sector to act on behalf of the State – a "legal and regulatory framework stipulating such authority" (as per Criteria 36 of the FCPF MF)];*
      ii) Which sector distributes ER-payments and through which central level mechanism (*e-sistafe* or direct to the FNDS, for example);
      iii) Which sector sets up, runs and oversees the process of ER titling, registration, and the management of ER sales and subsequent movements on national and international markets.
   d) The respective roles and mandates of devolved state bodies with devolved powers and functions over natural resources and other governance issues, when it comes to ER ownership, participation in returns from sales, and local distributional issues (this is also a formal response to the call for a specific decree to implement provisions of the Conservation and Biodiversity Law, in its Article 11, Clause 4);
   e) Benefit-sharing mechanisms and legally-prescribed parameters for determining which share of ER-payments are passed down to stakeholders at different levels, including local community structures.

2) **Regulations for the 2014 Conservation and Biodiversity Law**
   Regulations for this important legislation have still not been developed. These will be critical for putting into practice the provisions of Article 11 discussed above, and to establish the appropriate links and integration with the new REDD+ decree. Both processes must be aligned and integrated within the wider land and NR legal reform process that is now being led by MITADER.

3) **New legislation on local community governance and representation:**
   a) Responding to Article 30 of the 1997 Land Law;
   b) Clarifying and detailing the role and function of Local Communities in their hybrid 'private-public' dimension, and with specific reference to the question of *community public domain* created in the 2004 CRM revision;
   c) Community representation must also be reviewed and clarified, to bring some order to the present chaotic collection of committees and other bodies set up to deal with specific functions relating to the Land Law (delimitation), the management of natural resources (CGRNs), and coordinating issues (COGEPs); in this context primary attention should be paid to identifying, integrating and regulating the role and capacity of *customary land and NR management structures,* before thought is given to creating new 'modern' structures that may complicate internal power and distributional relationships at community level and below;
   d) This new legislation should not be specifically aimed at NR and ER issues, but should instead deal with general governance issues where agreements and contracts are negotiated and signed on behalf of the Local Community with other actors who may be private (investors etc.) or public (sectors and departments of the Government).

A new REDD+ law or decree is urgently needed, if the ERP/ZILMP is to go ahead and successfully produce ERs which can be certified and sold as planned to the World Bank. This legislation will also have to address all the issues of third party rights that have been discussed above, and the very constrained ability of the Mozambican State to freely enter into negotiations over ER title transfer with external third parties. The GoM must also decide once and for all which sectors will represent the State in external negotiations and agreements, and which are going to be responsible for the key activity areas discussed above.

6.2 The wider context

A significant policy development and legislative effort is needed, with appropriate technical and material support. While it is tempting to focus purely on the need for a revised REDD+ decree, *it is essential to keep in mind that the GoM is already revising the forestry legislation, and is about to begin reviewing and revising the Land Law.* These are important over-arching legal frameworks for any new REDD+ legislation and it is essential that the

different processes are well coordinated and fully integrated in policy, conceptual and legal contexts.

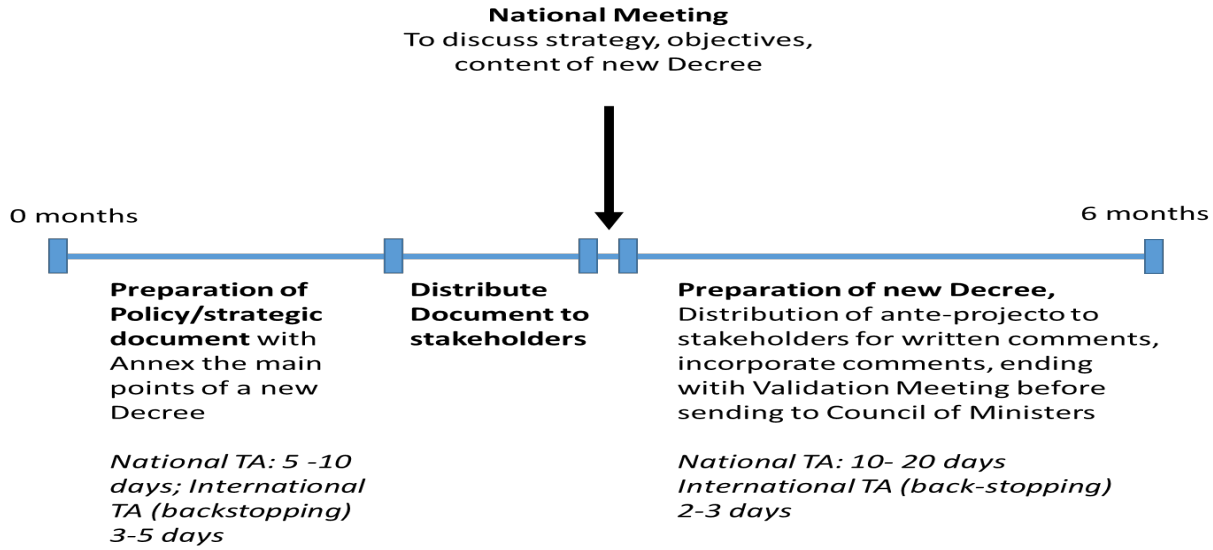
6.3 A possible work-plan

The legislative requirements beyond the immediate context of the REDD+ challenge include:

- The Community representation and powers legislation;
- Review to the Land and Forest and Wildlife laws;
- Other relevant reviews (for example, environmental and ESIA laws and regulations.)

Clearly a project to review existing laws and develop new ones for the purposes of a REDD+ program, cannot also take on these other major challenges. However, there must be coordination between these processes so that the various new and revised laws retain an internal coherence and are mutually self-supporting and reinforcing. Any work plan for REDD+ legislation must establish some form of relationship with these other processes. In this context, the 2014 Conservation and Biodiversity Law establishes an important precedent, insofar as it aligns with the 1997 Land Law over the question of the different levels of institutional competence with regard to the approval of conservation and biodiversity projects. This indicates a willingness and effort by the GoM, albeit still in need of consolidation, to ensure harmonization, coordination, integration and sustainability between the multiple new legal instruments that are being developed at the present time.

That said, a specific work plan for revising the present Decree 70/2013 and probably developing an entirely new and far more detailed Decree, is presented below[17].



[17] The diagram is adapted from a briefing note prepared for the World Bank by the consultants, to guide development of a new REDD+ decree: PROPOSED REVISION OF DECREE 70/2013 (Procedures for Approving REDD+ Projects): Comments and observations on the task, including an indicative Work Plan.

ANNEX ONE: KEY CONSTITUTIONAL PROVISIONS FOR THIS REPORT

Constitution of the Republic (2004)
Article 7 (Territorial Organization) 1. The Republic of Mozambique is organized territorially in provinces, districts, administrative posts, localities and settlements. 2. The urban zones are structured in cities and towns. 3. The definition of the characteristics of each territorial level as well as the creation of new levels and the establishment of their functions in the context of political-administrative organization, are fixed by law.
Article 82 (Right of ownership) 1. The State recognizes and guarantees the right of property. 2. Expropriation may only take place because of public necessity, utility or interest, defined in terms of the law and gives rise to fair compensation.
Article 97 (Basic principles) The economic and social organization of the Republic of Mozambique seeks to meet the essential needs of the population and the promotion of social welfare and is based on the following fundamental Principles: a) in the valuation of work; b) in market forces; (c) on the initiative of economic operators; d) in the coexistence of the public sector, the private sector and the cooperative and social sector; e) public ownership of NR and means of production, in accordance with the collective interest; f) protection of the cooperative and social sector; g) in the action of the State as regulator and promoter of growth and economic and social development.
Article 98 (Property of the State and Public Domain) 1. NR situated on the soil and in the subsoil, in interior waters, in territorial waters, on the continental shelf, and in exclusive economic areas, are property of the State. 2. The following constitute the public domain of the State: a) the maritime area; b) airspace; c) the archaeological heritage; d) nature protection areas; e) the hydraulic potential; f) the energy potential; g) roads and railway lines; h) mineral deposits; i) other assets classified as such by law. 3. The law regulates the legal regime of public domain assets, as well as their management and conservation, differentiating those that are part of the public domain of the State, the public domain of local authorities and the public domain of the Community, respecting the principles of not being taken away by prescription or by lapse of time, and freedom from seizure.
Article 117 (Environment and Quality of Life) 1. The State promotes initiatives to guarantee the ecological equilibrium and the conservation and preservation of the environment, with a view to improving the quality of life of citizens. 2. For the purposes of guaranteeing the right to the environment in the context of sustainable development, the State adopts policies that seek to: a) prevent and control pollution and erosion; b) integrate environmental objectives into sectoral policies; c) promote the integration of environmental values in educational policies and programs; d) guarantee the rational use of NR taking into account the need to safeguard their recuperative capacity, ecological stability, and the rights of future generations; e) promote the ordering of the territory with a view to the correct location of activities and a balanced socio-economic development process.
Article 203 (Function of the Government) 1. The Council of Ministers ensures the administration of the country, guarantees territorial integrity, ensures public order and the security and stability of citizens, promotes development Economic development, implements State's social action, develops and consolidates legality and carries out the country's foreign policy. 2. The defence of public order is ensured by appropriate bodies operating under government control.

Article 204 (Functions)
1. The functions of the Council of Ministers are:
a) guarantee the enjoyment of rights and liberties of citizens;
b) ensure public order and social discipline;
c) prepare proposals of laws to be submitted to the Assembly of the Republic;
d) approve decree-laws through the legislative authorization of the Assembly of the Republic;
e) prepare the Economic and Social Plan and the State Budget and carry them out once they are approved by the Assembly of the Republic;
f) promote and regulated economic activity and the social sectors;
g) prepare and sign international treaties and sign, ratify, adhere to and denounce international accords;
h) direct labor policy and social security;
i) direct the sectors of the State, especially education and health;
j) direct and promote housing policy.
2. Other functions of the Council of Ministers are:
a) guarantee the defence and consolidation of the public domain of the State and the patrimony of the State;
b) direct and coordinate the activities of ministries and other bodies subordinated to the Council of Minsters;
c) analyse the experience of local executive bodies and regulate their organization and functioning, and oversee, in terms laid down by law, local authority bodies;
d) stimulate and support the exercising of entrepreneurial activity and private initiative and protect the interests of the consumer and the general public;
e) promote cooperative development and support family production;
3. The Government has the exclusive right to initiate laws with respect to its own organization, composition and functioning.

ANNEX TWO: MEETINGS AND PERSONS MET DURING THE FIRST IN-COUNTRY MISSION

NOVEMBER-DECEMBER 2016

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