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Regulatory Reform as a Path to Promote Gender-Equitable and Participatory Community Decision-making Processes on Land Investments

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Abstract

Research has shown that negative impacts of large-scale land investments in developing countries are borne disproportionately by women. Disadvantages faced by women, particularly lack of formal land rights and subordinate position in the community, often result in their exclusion from decision-making processes related to land use and allocation. This paper examines opportunities for regulatory reforms for increased participation by women in decision-making related to land investments. The paper stems from the project entitled *Promoting Gender-Equitable and Participatory Community Decision-making Processes on Land Investments* being implemented by the World Resources Institute and partner organizations in three countries: Mozambique, Tanzania and the Philippines. The project included a review of the formal and informal processes of land acquisitions for each country, consisting of the legal and policy frameworks and the practice of land acquisitions described in published reports and case studies. A key finding is that although the legal framework provides for participation of local communities in decision-making processes related to land investments, mechanisms are lacking to ensure that in practice communities are able to participate meaningfully and that women are included in decision-making. The paper identifies gaps in the legal frameworks and presents options for more gender-equitable community decision-making on land investments.

Key Words: Gender, Land Acquisitions, Women, Community Decision- making, Participatory Rights

Regulatory Reform as a Path to Promote Gender-Equitable and Participatory Community Decision-making Processes on Land Investments

I. Introduction

Over the past years, there has been increasing scrutiny on the impacts of large-scale land investments on local communities in the global south. One strand of inquiry pertains to the lack of meaningful participation by local communities in the processes by which land is acquired by investors. Research has shown that within communities, women are particularly vulnerable. Social and economic disadvantages faced by women in most developing countries, especially their general lack of formal land rights and secure tenure as well as subordinate position in the household and the community, have resulted in their historical marginalization from many land use and management decisions (Behrman, Meinzen-Dick & Quisumbing, 2011).

This means that when land deals are proposed, women tend to be excluded from the negotiating table and are unable to voice their concerns and choices. They are unable to assert new entitlements to replace what will be lost in terms of access to land for subsistence farming and access to communal lands from which natural resources—such as water, fuel wood, fodder, wild fruits and medicinal plants, etc.—are collected or gathered. Since women are primary household food providers in developing countries, this impacts not only them as individuals but their families and the community's food security as well. Gender disparity extends to compensation and benefits schemes for land investments, which often sideline women. (Behrman, et al., 2011)

Civil society organizations and international development agencies have given considerable attention to promoting inclusiveness and participation by those directly affected in decisions that carry significant social and environmental consequences, including decisions regarding large-scale land acquisitions and investments. These interventions include calls for transparency and the public release of contracts, the promotion of participation rights, notably the right to “free, prior and informed consent,” and the establishment of international standards such as the Voluntary Guidelines on Responsible Governance of Tenure of Land, Fisheries and Forests and the UN Guiding Principles on Business and Human Rights.

Despite women's specific vulnerabilities around land investments, less attention has been given to strengthening women's engagement in land acquisition and investment processes. One key intervention is through reforms in national regulatory frameworks—i.e., regulations, guidelines, rules and procedures—

governing land acquisitions and investments. In many cases, national laws mandate community participation in decision-making on land investments, but the mechanisms under enabling rules and regulations fall short of what is needed to ensure that participation is meaningful and that women in particular are able to exercise their rights under the law. Reforming the regulatory framework is therefore a critical step in empowering communities and women in communities to have a say in decisions that will impact their lives.

This paper examines opportunities for regulatory reforms for increased participation of women in three countries: Mozambique, Tanzania and the Philippines. The paper stems from the project entitled *Promoting Gender-Equitable and Participatory Community Decision-making Processes on Land Investments* launched in early 2014 by the World Resources Institute (WRI) and the following partner organizations: Centro Terra Viva (CTV) in Mozambique, Tanzania Women Lawyers' Association (TAWLA) and the Lawyers Environmental Action Team (LEAT) in Tanzania, and the Ateneo de Manila University School of Government (ASOG) in the Philippines. The three countries are among the top ten targeted for land acquisitions and investments documented in the Land Matrix database, an independent online database of land investments worldwide.¹ Regulatory reform promoting gender-equitable and participatory decision-making is thus critical for the women in these countries and the communities to which they belong.

In each country, the project involves two phases. The first phase involves research on the processes through which community lands are acquired by agricultural and other investors and its implications for women. This includes formal processes as detailed in the statutory and regulatory framework, and informal processes or practice of acquisitions and investment as described in published reports and as gleaned from case studies undertaken in each country. The objective is to identify gaps within the statutory and regulatory frameworks and between such frameworks and practice, for which evidence-based options and opportunities for reform will be developed and put forward to the relevant government entities. The second phase is outreach and advocacy. This includes pressing for regulatory reforms in the legal and policy frameworks on land acquisitions and investments in community lands, and ensuring implementation and buy-in through outreach and engagement of all key stakeholders—i.e., national and local governments, women and men in local communities, companies and investors, and civil society and community-based organizations—as well as monitoring of practice on the ground.

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

This paper presents the results of first phase. It consolidates the research findings of WRI and the project partners in each country. The next three sections will present the findings for Mozambique, Tanzania, and the Philippines, respectively. This will be followed by a synthesis of findings in all three countries. The final section is a discussion of the way forward, presenting evidence-based recommendations for reform identified by each of the country project partners.

II. Research Findings: Mozambique

In Mozambique, commercial land investments are governed by the 1997 Land Law and its implementing regulations,² and various amendments through the years. The overarching policy behind the Land Law is articulated in the 1995 National Land Policy that preceded it, that is, to safeguard the diverse rights of the Mozambican people over the land and other natural resources, while promoting new investment and the sustainable and equitable use of land. This policy seeks to reconcile the predominance of customary land rights in the rural sector with the need for investment as a motor for development. Under the Land Law, land ownership is vested in the State. However, land use and benefit rights (called “DUAT”³) are granted to local communities and individuals--both men and women--who have been occupying the land under customary law or for a period of at least ten years in good faith.⁴ Individual and corporate investors may also acquire land rights through an application to the state.⁵

The Land Law requires that specific procedures be followed by applicants seeking a DUAT or land use rights for commercial investment. These procedures include the identification and mapping of the plot by the provincial cadaster department and local authorities, and the submission of an exploitation plan or—for foreign investors—an approved investment project.⁶ The district administrator is required to issue a statement or opinion whether the land applied for is “free and had no occupants”, and if so, the terms of “partnership” between the community and the investor.⁷

A pre-requisite for the issuance of district administrator’s opinion is community consultations. This requirement is set forth in Article 13 of the 1997 Land Law and further elaborated on in the 1998 Land

² These are the 1998 Land Law Regulations, 2000 Technical Annex, and 2006 Urban Land Regulations.

³ Direito de Uso e Aproveitamento da Terra

⁴ Art. 12, Land Law

⁵ Art. 12, Land Law

⁶ Art. 11 & 19, Land Law

⁷ Art.13, Land Law; Art. 27(3), Land Law Regulations

Law Regulations, as amended by Decree No. 43/2010 and Ministerial Order 158/2011.⁸ Community consultation is a multi-stakeholder activity that includes the government⁹, the local community (including occupants or owners of adjoining lands), and the applicant/investor or his representative.¹⁰ The 2011 ministerial regulations mandates that two consultation meetings be held—the first to inform the local community about the DUAT application, and the second meeting 30 days thereafter for the community to pronounce whether or not the plot is available for the investment. Additionally, optional meetings may be conducted whenever there is new or more information to be presented to the local community.¹¹

Prior to the consultation meetings, the district administrator is required to publish a 30-day notice to the public about the application at the district headquarters and at the plot location.¹² The ministerial regulations also require administrative authorities at the national, district and local levels to disclose and circulate to local communities the procedures for consultation in order to ensure their effective participation in the management of land and natural resources.¹³ During consultations itself, if the land to be acquired is more than 100 hectares, government representatives shall explain to the community the advantages and or disadvantages of the application.¹⁴ Consultation proceedings shall be recorded, and the minutes signed by the Consultative Councils for Villages and Towns.¹⁵ It is worth noting that under the original regulations, rather than the Consultative Councils the signatories to the minutes shall be the representatives of the local community and the owners and occupiers of neighboring land.”¹⁶ A copy of the minutes and of the opinion of the district administrator shall be delivered to the local community.¹⁷ The DUAT application is then approved provisionally, subject to demarcation of the land and fulfillment of the exploitation plan or investment project.¹⁸

⁸ Decreto 43/2010 of October 20, amending Art. 27 (2) of the Land Law Regulations; Diploma Ministerial 158/2011 “Establishing procedures for consultation with the local communities on the use and property rights of land under Art. 27 par. 2 of the Land Law Regulations.”

⁹ Consisting of the District Administrator or his representative, a representative of the cadaster services, and members of the Advisory Boards of Villages and Towns.

¹⁰ Art. 13 (3), Land Law; Arts. 24 (1) (e), 27 (2) & (3) Land Law Regulations; Art. 2, Decreto 43/2010; Art. 2, Diploma Ministerial 158/2011

¹¹ Art. 1, Diploma Ministerial No. 158/2011.

¹² Art. 27, Land Law Regulations; Decreto 43/2010

¹³ Art. 6, Diploma Ministerial 158/2011

¹⁴ Art. 6, Diploma Ministerial 158/2011

¹⁵ An elective body tasked with explaining governmental policies to local communities and encouraging citizen participation, as well as to foster interaction between communities and the state.

¹⁶ See Art. 27 (2) of the Land Law Regulations. The first amendment to Art. 27 (2) is Decreto 43/2010, which expanded the participants in community consultations from three sets of stakeholders – the cadaster services, the District Administrator, and the local community – to six, to henceforth include members of Advisory Boards of Town and Local Community, owners or occupants of adjoining land, and the applicant, as well as changed the signatories of the minutes.

¹⁷ Art. 2 & 3, Diploma Ministerial No. 158/2011.

¹⁸ Art. 25-27, Land Law

In practice

Although the legal provisions governing land investments are fairly inclusive of local communities, in practice there is lack of real and meaningful participation by local communities during consultations. For instance, an FAO review of 260 land applications across seven provinces in Mozambique (Tanner & Baleira, 2006) indicated that prior to the issuance of the 2011 ministerial regulations, only one community consultation meeting is usually held. In the few instances of more than one meeting, the first is merely a preparatory meeting to set the time and date for the main consultation, with little real information presented to the community. Those who participate are normally the *regulos* (chiefs) and other local leaders, with the opinion of the chief nearly always predominating. Very few community members are involved and consultations are mostly conducted in perfunctory manner, undertaken to give “the whole process a veneer of legitimacy” (Calengo, Monteiro, & Tanner, 2007, 13-4, cited in Knight, 140). Frequently, the views and comments of community representatives are not reflected as part of the agreement between the community and the investor, particularly specific requests or conditions made to the investor.

Another key finding in the FAO report is that women are seldom actively involved in community consultations. Women’s participation in decision-making processes about land is vital, given their critical role in agricultural production and food security in Mozambique. Yet, fieldwork conducted by the project partner, CTV, confirms that women are mostly absent from consultations on land acquisitions.¹⁹ CTV found that many communities practice a top-down approach, where decision-making is the prerogative of community leaders—often made during men-only meetings—who then convey decisions to the rest of the community. In communities that favor a more horizontal approach in which participation extends to all community-members, women are present. For example, in public consultations for a resettlement plan to make way for a liquefied natural gas (LNG) project in Quitupo province, CTV noted that women represented about sixty percent of attendees. Despite women’s relatively high rate of attendance, this did not translate to greater participation during consultations. Meeting extracts show that of the 22 recorded interventions or comments from participants, only two came from women, underscoring the discrepancy between quantitative and qualitative presence of women. In all the communities studied, CTV estimates that out of the total number of comments made during consultations, only about five percent were brought by women.

¹⁹ CTV also found instances of non-consultation, where affected community members were simply called to the district office and informed that their land would be occupied by an investor in exchange for monetary compensation to be given to them. In other cases, owners or occupants of adjoining land were left out of community consultations.

In the few consultations where women managed to raise their concerns, the importance of their inputs can be gleaned. For example, in the resettlement consultations in Tete province for a coal mining project, women specifically asked whether they would receive land not just for housing but agriculture as well, and whether drinking water, a school, and a health center will be provided. In community consultations in Quitupo for the LNG project, a woman member of the district advisory council brought up this concern: *“My husband has three wives. I am one of them. We live in Quitupo. I wonder if the project will allocate separate houses for each of us, because each of us lives in her own home.”* (CTV Country Report, 2014, 13).

On the other hand, the absence of women’s inputs underscored the ramifications on family food security and resettlement conditions. In Tete province, women were left out in the identification of new land for agriculture and for fuel wood extraction. Many resettled lands turn out unfit for agriculture, which impacted on the women’s capacity to engage in subsistence farming to feed their families. One woman reported to CTV that the land where she and her family were resettled four years ago was too rocky, making it impossible for her to cultivate the land.

Examining the Gender Framework

Mozambique’s Constitution enshrines gender equality before the law in all spheres of political, economic, social and cultural life.²⁰ Specific to land, the 1997 Land Law recognizes women as individual title-holders and as co-title holders of community-held land.²¹ The law likewise removes gender distinctions with respect to inheritance and allows both women and men to mortgage immovable assets within individually-held lands.²²

Yet, women remain disadvantaged in terms of control and decision-making over land and natural resources. There a number of reasons cited in various studies to account for the discrepancy between law and practice, among them the lack of awareness and capacity to exercise rights granted under legislation (Kaarhus & Martins, 2012). This lack of capacity can be traced in large measure to women’s lower literacy levels, limited mobility, largely subordinate position in society, and other socio-economic and cultural barriers (Tvedten, Paulo & Montserrat, 2008). Based on the study conducted for the project, it appears to be a function as well of legal barriers, including the lack of policies and mechanisms in the law to ensure that gender provisions are translated meaningfully into practice.

²⁰ Art. 36, Constitution of Mozambique, adopted in 1975, amended and supplemented in 1990 and in 2004.

²¹ Arts. 10 & 13, Land Law

²² Art. 16, Land Law

A starting point is the language of the law. While the 1997 Land Law specifically grants women equal rights to hold land, its provisions regarding community decision-making on land and natural resource use are gender-neutral. The law merely states that “local communities” shall participate in natural resource management, resolution of conflicts, and identification of the boundaries of community lands.²³ In terms of allocating or transferring land rights to commercial investors, “communities” shall be consulted and participate in the process.²⁴ This is iterated in the ministerial regulations on community consultations, where all references to consultation are with “local communities.”

The problem with generic language is that it masks important distinctions within the social group. As the CTV points out, community is made up of men and women, young and old, rich and poor, all with particular and potentially competing interests (CTV Country Report, 4.2). Generally, the use of gender-neutral language favors the dominant social groups within the community while vulnerable groups lose out due to difficulties to assert their interests and concerns. In Mozambique, both patrilineal and matrilineal customary systems revolve around male leadership and decision-making, including in the use and management of land and natural resources (Tveden et al., 2008). Most decisions on allocations or transfers of community lands to investors are made by male chiefs and leaders or in meetings exclusive to the men in the community. Thus, despite their equal rights to hold land and the critical role they play in family food security, women are typically excluded in major decisions around land. For the same reason, recognition in the Land Law of customary norms and practices as a basis for the management of natural resources and for conflict resolution by the community can prove detrimental to women.

Without explicit gender language, not only is it challenging for women to assert their rights, but government agents in charge of community consultations need not be compelled to ensure women’s participation in the process.

III. Research Findings: Tanzania

Land acquisitions and investments in Tanzania are governed primarily by the 1999 Land Act and Village Land Act, and supplemented by provisions in the 1997 Tanzania Investment Act and the 1982 Local Government (District Authorities) Act. These laws form part of the statutory and policy framework signifying Tanzania’s shift from a centrally-planned economy into market-oriented economy beginning in

²³ Art. 24, Land Law

²⁴ Art. 13 & 24, Land Law

the mid-1980s. The period covering this transition witnessed the articulation of new policies on land ownership, use and allocation, and the role of private investment in promoting optimal use of land. Although some tenets of the prior framework were retained, including public ownership of land, vested in the President, and the status of land rights as “rights of occupancy,” the new policy elevated customary occupancy rights to the same level as statutory or formally recognized rights of occupancy. The new framework called for putting land to its most productive use²⁵ and “transform[ing] Tanzania from a rural-based subsistence agricultural economy to a more diversified industrialized one.”²⁶ To this end, “[s]pecial areas for various investments will be identified and set aside for allocation to investors by the Government.”²⁷ Current policies and strategies for national development retain these goals. For example, Tanzania’s Development Vision 2025 aims to transform the country into a middle-income one, enhance the role of the private sector in generating economic growth, and develop Tanzania’s agricultural sector.

The Land Act and the Village Land Act provide the overall framework for land tenure including land use, allocation, and administration. For purposes of administration, the law divides public land into three categories: general, reserved and village land.²⁸ General and reserved lands are under government control and management, while village land—which constitutes 70 percent of land in Tanzania—is managed by the village council, the village governing body established under local government legislation. The land laws, however, grant the President the power to transfer land from one category to another, that is, to reclassify general or reserved land to village land or vice versa.²⁹ There are two primary modes of obtaining land rights or “right of occupancy”: one is through allocation from the state of general or reserved land, called “granted right of occupancy” and regulated under the Land Act; and the other is through customary tenure, called “customary right of occupancy” and regulated under the Village Land Act. All 12,000+ villages in Tanzania have customary rights of occupancy to lands they occupy, either in an informal basis referred to as a “deemed right of occupancy” or formally under a Certificate of Village Land issued by the Commissioner of Lands once village land is demarcated and its boundaries clearly determined and not in dispute.³⁰ The land laws allow holders of rights of occupancy to transfer all or some of their rights and interests in the land to third parties. This can be done by granting

²⁵ Sec. 2.4, 1995 National Land Policy, Second Ed. 1997

²⁶ Sec. 2.1(f), 1996 National Investment Promotion Policy

²⁷ Sec. 4.2.8(i), 1995 National Land Policy, Second Ed. 1997

²⁸ General land is defined as land that is not reserved land or village land, including unoccupied or unused village land. Another definition provided in the Village Land Act... Reserved land refers to areas set aside for conservation and protection as well as reserved for public utilities, land where water resources for a natural drainage basin originate, and land declared by the State as hazardous land. Village land refers to land occupied by the village under customary tenure, including land within the boundaries of the village, lands designated or demarcated as village land under other relevant laws or administrative procedure, and land occupied in whatever manner for at least 12 years prior to enactment of the Village Land Act.

²⁹ Sec. 5 Land Act; Sec. 4-5 Village Land Act (VLA)

³⁰ Customary right of occupancy includes customary tenure formally recognized under a Certificate of Customary Right of Occupancy and customary occupation not formally recognized, called “deemed rights of occupancy.” (Sec. 2, LA; Sec. 2 VLA) Individuals, families or groups of individuals residing within the village may obtain a Certificate of Customary Right of Occupancy for parcels allocated to them for their use and occupation. Villages are defined under the Local Government (District) Authorities Act and other local government legislation.

“derivative rights,” defined as a right created out of rights of occupancy, such as a lease, sub-lease, and license or usufruct right.³¹

Land rights may thus be acquired in several ways, with the caveat that foreigners may only acquire rights of occupancy to general or reserved land, or derivative rights from the Tanzania Investment Center (TIC),³² and only in connection with an investment approved under the Tanzania Investment Act.³³ The processes and procedures to be followed depend on the type of right to be acquired and the category of land. If the land to be acquired is general or reserved land, the investor makes an application to the Commissioner of Land,³⁴ or to the TIC, which manages a land bank reserved for investors.³⁵

Often, however, land identified for investment is village land used and occupied by local communities rather than land reserved for investment under the TIC’s land bank. (Sulle and Nelson, 2009, 38) Thus, the acquisition involves the prior transfer of village land to general land, a process that the investor may be directly engaged in. The land is acquired based on the President’s power to reclassify land for public interest, which includes “investments of national interest.”³⁶ The procedure for transfer for public interest is outlined in the Village Land Act.

Both the village council and the village assembly—comprised of all adult residents of the village³⁷—play a role in the process.³⁸ The village council receives notice of the proposed acquisition; relays the notice to the particular villagers who may be directly affected, hear any representations that may be made to them by such persons, and convene the village assembly to present its recommendations. If the plot is smaller than 250 hectares, the village assembly meets and decides whether or not to approve the acquisition. If the plot is larger, the village assembly makes a recommendation to the Minister of Lands, who acts as the final approving authority. The village assembly meeting shall be attended by the Commissioner or district officials, or the investor upon request by the village assembly, to explain and answer questions about the proposed use of land. The transfer of village land shall be subject to compensation.

³¹ Sec. 32, VLA

³² The Tanzania Investment Center is the government agency charged with coordinating, promoting and facilitating investment in Tanzania. The TIC maintains a land bank of specific plots of land available to foreign investors. It is argued, however, that foreigners may also acquire derivative rights to customary lands under Sec.32 of the VLA, see Nshala, R., 2014.

³³ Sec. 19, LA; Sec. 18[1] [a], VLA.

³⁴ Secs. 25-30 Land Act

³⁵ Secs. 22, 31 & 33, Land Act, also the Summary of Procedures to Obtain Land in the TIC website at <http://www.tic.co.tz/procedure/286/165?l=en>

³⁶ Sec. 4, VLA

³⁷ Art. 55, Local Government (District Authorities) Act

³⁸ Sec. 4, VLA

In practice

Village councils and village assemblies usually approve investors' request for land. However, case studies reveal that this is generally because villagers believe that they cannot say no to the investment (Chachage & Baha, 2011). Lack of capacity precludes participation in any real sense. Low levels of education hamper the ability to fully comprehend the acquisition process, the nature of the investment, rights under the law, and the implications on the village. In many cases villagers do not even fully appreciate the economic value of the land they are ceding (Oakland Institute, 2011). In others, they fail to realize that the acquisition would involve extinguishing their customary rights to the land and its transfer to general land. Due to poverty, they are also drawn to the promise of job opportunities, social services, and infrastructure. The problem is that most promises are mere verbal pledges that are not put into writing as a contract. When they are unfulfilled, as is the case many times, there is little that villagers can do to hold investors to account (Oakland, 2011).

Meanwhile, government agents tend to be on the side of investors and view village approval as an administrative hurdle. Often, project presentations highlight the potential benefits and downplay the potential negative impacts (Sulle & Nelson, 2013). Villagers also typically hear for the first time about the land laws at the consultation meeting (Theting & Brekke, 2010). At other times, government agents want to do the right thing but simply lack guidance and experience to do so (Knight, 2010, citing Cotula et al., 2009).

Another significant barrier to community participation is the provision in the land laws authorizing the President to transfer land from village to general land for purposes of "investments of national interest."³⁹ This provision has been described as essentially compulsory acquisition with some decision-making yielded to the community (Makwarimba & Ngowi, 2012; Knight, 2010). The village assembly has power to approve or refuse a proposed transfer of land less than 250 hectares. But beyond 250 hectares, it can only offer recommends with the final say is placed in the hands of the Minister. It is suggested that the law creates an incentive for investors to request larger areas in order to facilitate approval, particularly as there is no legal limit to the size of the land that can be given to an investor (Makwarimba & Ngowi, 2012). Thus, not only do village communities lose decision-making ability, they also become vulnerable to losing larger tracts of village land.

With respect to women's participation in particular, fieldwork conducted by the country project partners, TAWLA and LEAT, in the villages of Kidugalo and Vilabwa in Kisaware District reveals nominal

³⁹ Sec. 5 Land Act; Sec. 4-5 Village Land Act (VLA)

engagement of women in village decision-making. Tanzanian society is still largely patriarchal; men dominate village institutions and make major decisions regarding land at the household and community level, including land allocations to investors (Tanzania Ministry of Community Development, Gender & Children). Women usually remain in the background with limited opportunities to influence big decisions that will affect the community. Yet, loss of land impacts women's livelihoods more heavily. In Vilabwa Village, for example, the women interviewed by LEAT reported that they had formed a collective to cultivate cash crops, but lost this livelihood opportunity after village land was transferred to an investor. They were forced to revert to subsistence farming and have become worse off.

Examining the Gender Framework

Tanzania's Constitution guarantees gender equality. The land laws uphold this principle. Both the Land Act and Village Land Act accord women equal rights to land and provide strong protections against discrimination of women and other vulnerable groups under customary laws.⁴⁰ In terms of women's participation, Tanzania's laws adopt a quota system to promote gender-inclusive land administration and management bodies. At the village level, 25% of village council members are required to be women. Two bodies created under the Village Land Act, the village land council (a dispute resolution body) and the village adjudication committee (which determines boundaries of individual land parcels), also require minimum membership of women.⁴¹

Notwithstanding the strong provisions and quotas on gender in the legislative framework, women are still largely left out of village decision-making processes. A study of women's access to rangelands in Tanzania indicated the number of women representatives in village governance is limited, and in some cases the women are inactive, reluctant to participate or subordinate to men's interests in the village bodies they sit on (Carpano, 2010). The challenge therefore is how to bridge the gap between law and practice on the ground. This is particularly critical in terms of the village council as it is the primary governing body in the village community, and thus represents an important venue for women to articulate their concerns and perspectives. One way to achieve representation and meaningful presence is obviously through capacity building of women to increase their confidence and empower them to exercise their rights.

Another important aspect that is less examined but no less critical is ensuring that the law provides sufficient mechanisms to ensure that rights provided under it can be fully availed of. In terms of women

⁴⁰ Sec. 3, Land Act; Sec. 3(2), VLA

⁴¹ Sec. 60 (2) & 53 (2), VLA. The village land council must have at least two women out of seven members, while village adjudication committees must have least three women out of nine members.

representation, it would seem that other than provide for the quota, there are no mechanisms in the law to ensure that such quotas translate into meaningful participation of women in the village council. While the Local Government Act requires a percentage of women membership in the village council, the provision on quorum for meetings simply states that quorum shall not be less than half of all the members of the council.⁴² Considering that women constitute at most only a quarter of the council, it is thus easy to muster a quorum without women's attendance. The Village Land Act is more progressive by providing a gender requirement for quorums for meetings of the village land council and the village adjudication committee. It is ironic that ancillary organs for village governance are more gender-equitable than the primary one. Quorum is but one aspect of strengthening women's participation the village council. Other mechanisms could include providing for rotating chairmanship of the council in order to give women increased opportunities for leadership.

Another venue for women's participation in village decision-making is the village assembly. The village assembly approves general policies in relation to village affairs and is responsible for the election and removal of the village council.⁴³ It is also responsible for approving acquisitions of land less than 250 hectares. Again, there is no quorum requirement or any other mechanism to ensure that women and other marginalized segments of the community are able to participate in meetings and in decisions to be made by the assembly. Given the patriarchal nature of Tanzanian society, the findings in the studies that men dominate decision-making with women fading in the background are unsurprising. Unless specific mechanisms are instituted, such as gender quota for a quorum or perhaps women-only meetings held prior to the village assembly meeting, women are likely to remain marginalized in village decision-making.

IV. Research Findings: The Philippines

The Philippines officially recognizes customary or indigenous peoples' land rights in the 1997 Indigenous Peoples Rights Act (IPRA). Indigenous peoples constitute approximately 15 percent of the total population or about 14-17 million people, and are comprised of 110 ethno-linguistic groups dispersed throughout the country (UNDP, 2013). Indigenous peoples' communities are generally located in geographically remote areas that lack infrastructure and social services, but are rich in commercially valuable natural resources, including minerals, timber and water. This has made indigenous lands a target for mining and agribusiness, two sectors pursued by the Philippine government as drivers for economic

⁴² Sec. 105, LGA

⁴³ Sec. 141, LGA

growth⁴⁴ (Philippine Development Plan 2011-2016; Philippine Senate Policy Brief, 2013; Pulhin & Ramirez, 2013).

Land acquisitions and investments in indigenous peoples' lands are subject to the provisions of the IPRA. The IPRA is considered a landmark law, recognizing not only customary land ownership but also indigenous peoples' right to self-determination and the applicability of customary laws for governing property rights and establishing the extent of ancestral domains. A key feature of the law is the requirement of Free, Prior and Informed Consent (FPIC), defined as the consensus of all members of the community, determined according to customary laws and practices, free from any external manipulation, interference or coercion, and obtained after full disclosure of the intent and scope of the activity, in a language and process understandable to the community.⁴⁵ FPIC is mandatory for any exploitation of natural resources within indigenous territories, access to biological and genetic resources, archaeological explorations, and any project that will result in the displacement and relocation of the community outside of their lands.⁴⁶

The government agency charged with implementing the IPRA, the National Commission on Indigenous Peoples (NCIP), oversees the FPIC process. All other government departments and agencies are required to obtain an FPIC compliance certification from the NCIP prior to the grant or renewal of any concession, lease or license pertaining to indigenous lands to investors.⁴⁷ The FPIC process is governed by guidelines issued by the NCIP, which were updated for the third time in 2012.⁴⁸ The new guidelines differentiate between small-scale or non-extractive projects or activities and large-scale or extractive and intrusive projects or activities.

For small-scale projects, the NCIP is required to facilitate two meetings between community elders and leaders and the project proponent.⁴⁹ The first meeting is for presentation of the project—the scope and extent of activities, costs and benefits to the indigenous community and their lands, and probable adverse effects and proposed mitigations measures. The second meeting is for community elders and leaders to convey their consent or non-consent to the project.

⁴⁴ The Philippines does not have a national land use policy.

⁴⁵ Sec. 3(g), IPRA

⁴⁶ Sec. 57, 33, 35 & 7(c), IPRA

⁴⁷ Sec. 59, IPRA

⁴⁸ The original FPIC guidelines formed part of the 1998 Implementing Rules and Regulations of the IPRA. The guidelines were revised in 2002 and subsequently in 2006, and then in 2012.

⁴⁹ Sec. 24, NCIP Administrative Order 2012-03

For large-scale projects, a lengthier process is required. Two community assemblies must be held in a strategic place within the ancestral domain. The first assembly is intended to orient the indigenous community on IPRA and the FPIC process; validate the areas and communities affected (including non-indigenous communities), and the elders and leaders that will represent the community; determine the decision-making or consensus-building process within the community; decide on the involvement of NGOs and independent experts; and establish dispute resolution mechanisms. The second assembly includes an exhaustive presentation of the project plan, a presentation on the results of the environmental impact assessment, the sharing of expert opinions and remarks by NGOs, and an open forum for members of the indigenous community to be able to raise any concerns.⁵⁰

A critical step in the process—whether for small-scale or large-scale projects—is the consensus-building period, during which the indigenous peoples’ community is given time to consult among themselves, using their own traditional customs and processes, whether or not to consent to the proposed project. Non-members of the community are not allowed to participate or interfere in this decision making process.⁵¹ (ASOG Country Report, 2014)

Should consent be given, a Memorandum of Agreement (MOA) is executed between the Indigenous Peoples community, the project proponent, the NCIP and any other party that may be involved in the project’s implementation.⁵² This MOA shall be written in both English and the vernacular, and contain, among other provisions, terms for benefit sharing, benefits to be derived by the community, measures to protect indigenous value systems and conserve the environment in the ancestral domain.⁵³ For large-scale projects, a validation assembly shall be convened within the ancestral domain, during which the MOA provisions shall be explained to the community in a language they speak and understand. On the other hand, if the indigenous community declines the proposed project, it shall issue a resolution on non-consent. Violations of the terms of the MOA may render the responsible party liable in accordance with the customary laws and practices of the indigenous community.

In practice

The new guidelines are intended to strengthen the FPIC process in view of findings of rampant misinterpretation and non-compliance with the rules. A 2013 review of 34 FPIC cases conducted by German Development Cooperation (GIZ) and the Philippine Ministry of Environment indicated that

⁵⁰ Sec. 22, NCIP AO 2012-03

⁵¹ Sec. 22, NCIP AO 2012-03

⁵² Sec. 31, NCIP AO 2012-03

⁵³ Sec. 32, NCIP AO 2012-03

violations occurred in 41.2% of cases (Calde, Ciencia & Rovillos, 2013). Violations included conducting company presentations off site to discourage attendance; inviting only certain leaders and community members to presentations; or using attendance sheets to signify project consent. The most common violation cited in the study was providing inadequate or mis-information, including insufficiently explaining the scope and extent of the activities involved in the project, highlighting of project benefits while glossing over its adverse environmental and social impacts, failing to inform the community that they will be prohibited from conducting traditional livelihood activities and spiritual functions once operations commence, and insufficient information and education on the FPIC process and available grievance mechanisms. Other violations include failure to respect customary decision-making processes, especially the time needed for internal discussion within the community, as well as bribery and coercion of community members.

A recent study conducted on the impacts of large-scale mining investments on women found that indigenous women tend to be excluded from community decision-making processes (Pasimio, 2013). According to the study: “As [women] are not widely recognized as leaders of their communities, even by their own communities, it was not deemed necessary that they be informed, nor given the chance to participate in any form of consultation or consent processes. Thus, their ideas and values are not considered in the whole process. Many women felt that had they been given the chance to be part of the consultations, they would have raised issues of utmost importance to their families and their communities – issues of food, security, environmental protection and peace and order” (Pasimio, 2013, 9). An example cited is the case of the B’laan women in the province of Samlang in the southern Philippines, the site of a large-scale mining operation. Women in the community argue that local leaders endorsed the project without consulting them, and that they were kept in the dark about the issuance by the government of an environmental compliance certificate for the project. In partnership with a local NGO some women in the community were able to raise their concerns about the project, but immediately faced threats of violence (Pasimio, 2013).

Examining the Gender Framework

The Philippine Constitution enshrines the fundamental equality before the law of women and men.⁵⁴ This principle is reflected in the IPRA, which provides that indigenous women “shall enjoy equal right and opportunities with men, as regards the social, economic, political and cultural spheres of life” and that their right to “participation in the decision making process in all levels, as well as in the development of

⁵⁴ Art II Sec. 4, 1987 Constitution

society” shall be respected and given due recognition.⁵⁵ However, while the law calls for gender equality, it also recognizes the primacy of customary rules and practices in the internal decision-making processes. This is where it becomes problematic. The GIZ study noted that “there is rich diversity among indigenous communities in the manner by which community consent is obtained, each with varying degrees of gender participation (Rovillos, 2013). Indigenous groups governed by patrilineal traditions, where ownership and control of land and natural resources is held by male members of the community, bar indigenous women from exercising their rights under the law to participate equally with men in decision-making processes (ASOG Country Report, 2014).

There is a need, therefore, to balance the requirement of gender equality with respect for customary traditions under the law. This can be achieved by specific directives or implementing guidelines that provide for affirmative action in terms of indigenous women’s participation (ASOG Country Report, 2014). This is missing under the current legal framework. Other than pronounce the principle of gender equality, there are currently no mechanisms in the IPRA and the FPIC Guidelines to empower indigenous women to participate in community decision-making processes. All references in the law and the guidelines with respect to community consent are to indigenous communities as whole or to community elders and leaders. Because indigenous communities are often patrilineal with male-centric governance structures, a pattern of women’s exclusion from decision-making processes emerges.

V. Synthesis of Findings

The research in the three project countries—Mozambique, Tanzania, and the Philippines—reveals a distinctive pattern regarding land-based investments in terms of policy, the way the state and communities interact around the issue, how the process unfolds, and the role of women. With respect to state policy, all three countries promote the commercialization of land as part of a macro-economic strategy for growth and rural development. In Mozambique and Tanzania, national land policies enacted by the state specifically call for private sector investment in land-based economic activities, while in the Philippines the national development plan includes land-based investment as a component of the country’s growth strategy. All three countries have investment laws that liberalize the entry of foreign investment into the country.⁵⁶

⁵⁵ Sec 26, IPRA

⁵⁶ Mozambique: Lei n° 3/93 de 24 de Junho de 1993 (Lei de Investimentos), Tanzania: The Tanzania Investment Act, 1997, and the Philippines: Foreign Investments Act of 1991.

This policy of land commercialization is set against a reality of community ownership of most the lands allocated to investors. In Mozambique and Tanzania, land laws recognize customary land rights whether or not formally registered with the state, although radical title to all land is vested in the state. In the Philippines, a special law for the indigenous minority recognizes community ownership of ancestral domains. For this reason, the process of land acquisition requires prior consultation with the affected community to secure its consent to the allocation of its land. The procedure for consultation and the standard of consent differ from country to country, but feature essentially the same methods and engage the government, the community, and the investor. In Mozambique, two meetings are required for consultation, the first for the purpose of informing the community about the land application, and the second for the purpose of obtaining consent. But community consent is simply the determination whether the parcel applied for is unoccupied, and if so, the terms under which it will be ceded. In Tanzania, the village council—the executive organ of the village—considers the land application and convenes the village assembly—all the residents of the village aged 18 and up—to give its recommendations. The village assembly decides whether or not to approve. But village consent is limited to land applications of less than 250 hectares; for larger tracts of land the final approving authority is the minister in charge of lands. Moreover, the President has the overriding power to transfer village land to general land owned by the state for “investments of national interest.”

The Philippines has the most detailed process of the three countries, with separate procedures for small-scale or non-extractive projects and large-scale or extractive projects. Small-scale projects require two meetings with the community elders and leaders, representing the entire community. The initial meeting is for purposes of explaining the project, including cost and benefits and potential adverse effects, and the second meeting is for the purpose of making a decision whether or not to consent to the project. In contrast, large-scale projects require two community assemblies. The agenda of the first assembly includes apprising the community about the law and the consent process, validating the elders and leaders representing the community, and determining the traditional decision-making process and dispute resolution mechanisms to be applied. The second assembly includes exhaustive presentation of the proposed project—including the results of the environmental impact assessment, sharing expert opinion, and an open forum. In both small-scale and large-scale projects, the law requires a consensus-building period during which community members are given time to consult among themselves using their own traditional customs and processes. The standard of consent is “free and prior informed consent (FPIC),” the international standard for community consent.

In practice, case studies and fieldwork conducted in the three countries indicate that community consultations are fraught with irregularities and seldom reflect genuine community consent. Consultations are often conducted in a perfunctory manner, with little real participation by the community. Government agents tend to be on the side of investors; often project presentations highlight the potential benefits of the investment and downplay the negative impacts. There are instances of manipulative practices, such as conducting the community presentation off site to discourage attendance, inviting only certain leaders to the meeting, recognizing false leaders, and using attendance sheets to signify consent. For their part, communities are barely in a position to participate in any meaningful way. Low levels of education hamper the ability to fully understand the acquisition process, the nature of the investment, rights under the law, and the implications of the investment on the community. Because of poverty, community members are induced by the promise of job opportunities, social services, and infrastructure. The problem is, most of the promises are verbal pledges that are not put into writing as legally-binding agreements. Many promises end up unfulfilled. Likewise, many projects fail to get off the ground or founder not soon after. Either way, the communities are left empty-handed.

Deplorable as things are for communities, it is even worse for the women in the communities. The consistent finding across all three countries is that women are mostly absent from consultations on land acquisitions and investments. Many communities practice a top-down approach, where decision-making is the prerogative of community leaders who are typically male. Even in communities that extend participation to all community-members where women are thus able to attend consultation meetings, their presence does not necessarily translate to enhanced or more meaningful participation. In Mozambique, for example, the public consultations for a resettlement plan to make way for a liquefied natural gas (LNG) project in Quitupo province registered 60% of attendees as women. Yet, meeting extracts show that of the 22 recorded interventions or comments from participants, only two came from women.

Customary communities in the three project countries are still largely patriarchal with male-centric governance structures. Women tend to recede in the background with limited opportunities to influence big decisions that will affect the entire community. Women also have lower rates of literacy, more limited mobility, and more care responsibilities compared to men. But they endeavor to rise above these limitations. In the Philippines, some women of the B'laan tribe in the southern part of the country in partnership with a local NGO raised their concerns about the large-scale mining operations in their community. They immediately faced threats of violence but remain steadfast. In Tanzania, Maasai women who received capacity-building trainings from local NGOs were able to increase their influence in village decision-making and successfully mobilized the community against a plan to expropriate their

lands (in Loliondo Division) for the creation of a reserve (Maliasili Initiatives, 2013). Conversely, when women are left out in consultations, the ramifications affect not just them as individuals but their families as well. Rural women in the global South are the primary producers of food for the family.⁵⁷ In Mozambique, women in Tete Province were not consulted in the identification of resettlement areas to make way for a project for coal mining. Many resettlement lands turned out unfit for agriculture, which impinged women's ability to cultivate food for their families. In Tanzania, women in Vilabwa Village had formed a collective to cultivate cash crops, but lost their livelihoods when village land was transferred to an investor, and were forced to revert to subsistence farming.

An examination of the gender framework on land investments of each of the three countries show features that impact on women's opportunities to participate in community decision-making. The laws of each country espouse gender equality. Mozambique's 1997 Land Law explicitly grants women the right to hold land and register it in their own name; Tanzania's 1999 Land Act and Village Land Act explicitly accord women equal rights to land and provide strong protections against women's discrimination under customary laws; whereas the Philippines' IPRA act recognizes equal rights of women in the social, economic, political and cultural spheres of life. However, when it comes to key provisions regarding community decision-making, the language of the law becomes gender-neutral. This is the case in Mozambique and the Philippines. Mozambique's land law simply states that "communities" shall be consulted in applications for land use rights by investors. Similarly, in the Philippines, the rules on FPIC grant FPIC rights to the indigenous peoples' community in general.

As pointed out in the literature, the problem with gender-neutral language is that it favors the dominant social group within the community, while subordinate groups lose out due to difficulties to assert their interests and concerns. This is illustrated in Mozambique, where both patrilineal and matrilineal customary systems revolve around male leadership and decision-making, including in the use and management of land and natural resources. Most decisions on allocations or transfers of community lands to investors are made by male chiefs and leaders or in meetings exclusive to the men in the community. Thus, despite their equal rights to hold land, women are typically excluded in major decisions around land.

In the same way, the legal provision stipulating the use of customary law in community decision-making can work to exclude women in the process. This is the case in the Philippines, where the IPRA calls for

⁵⁷ In sub-Saharan Africa, women provide between 60-80 percent of the food for household consumption, in Southeast Asia, women provide up to 90 percent of the labor force for rice cultivation. See Behrman, et al., 2011.

gender equality at the same time providing that FPIC shall be determined according to customary laws and practices. Women's participation then hinges on whether or not it is allowed by the community's traditional decision-making processes. In communities governed by patriarchal traditions, where ownership and control of land and resources are held by males, and with it control over decision-making, women are left out in the process. Thus, FPIC, while empowering communities may also serve to reinforce male-centric customs. For women it will be akin to giving something with one hand and taking it away with the other.

Finally, the law may be progressive by requiring electoral quotas for women in community decision-making bodies, but lack mechanisms to ensure that numbers translate into effective representation. This is the case in Tanzania, where the Local Government Act requires one-fourth of the membership of the village council to be women. However, the provision on quorum for council meetings simply states that quorum shall not be less than half of all the members of the village council. Since women constitute at most only a quarter of the council, it is easy to muster a quorum without women's attendance. Women may then continue to be marginalized in decision-making despite the mandatory quota.

VI. The Way Forward

The current policy and legal framework on commercial land investments in Mozambique, Tanzania, and the Philippines provides some procedural protections for local communities, in varying degrees in each of the three countries, and albeit beset with issues and irregularities in implementation. But all three countries have largely ignored the gender dimensions. The research has shown that procedural rules for community participation in land acquisitions either employ gender-neutral language, promote customary rules without qualification, or lack mechanisms to ensure that women's inclusion in decision-making bodies (through electoral quotas) translate into actual participation. This is what the present project hopes to address through regulatory reform.

There are various ways to increase women's participatory rights. Strengthening women's land rights and control of productive assets to increase their agency is critical. Rights awareness and capacity-building activities increase women's confidence and empower them to exercise their rights. Another approach less examined but no less critical is ensuring that the principle of gender equality laid down in the law is actually translated into specific rights for women. Otherwise it will remain in the level of principle and women in local communities wanting to assert their rights will have precious little by way of legal basis

with which to ground their claims. In the same vein, government agents charged with implementing the law on community participation cannot be compelled to recognize women as a distinct group of stakeholders. Thus, regulatory reform to address gaps in the legislation plays a key role in the range of interventions to increase women's participatory rights.

Each country in the present project has identified regulatory reforms based on the gaps revealed by the research.

For **Mozambique**, the object of reform is the community consultation guidelines, currently spelled-out in Ministerial Order 158/2011. The country partner has detailed specific reforms to make the guidelines more inclusive. These are:

- Firstly, expand the methods for community consultation to include separate focus group meetings for women, youth, and other marginalized segments of the community. The idea is to draw out the concerns and perspectives of women and other voiceless groups and incorporate them in the process of decision-making. Focus group meetings should be held between the first community meeting in plenary when the project is explained and the second community meeting when the decision is made on the land application.
- Secondly, produce “scripts” for community consultation to be followed by government agents and community leaders charged with facilitating the process. The script shall include as a pre-condition for community decision-making the completion of focus group meetings for women and other marginalized groups, and shall be attached as an annex to the guidelines.
- Thirdly, revise the templates for the minutes of community consultations to include a section recording women's specific interventions or comments as well as the number of women in attendance. Corollary recommendations include conducting social preparation which includes educating the community on the land and natural resources laws, their rights and duties as a community, gender inclusion, negotiation and partnership, compensation and resettlement, etc., as well as providing training to those responsible for conducting community consultations on the proper way to moderate meetings and ensure gender-inclusion. (CTV Country Report, 2014)

Tanzania's proposed reforms target the rules governing the village council and village assembly. The reform shall be two-pronged:

- The first is the enactment of new national level guidelines on gender under the Local Government District Authorities Act. The proposed national level guidelines shall establish mechanisms to ensure that the gender quota on village council composition translates to actual participation in the governance body. The mechanisms shall include, as earlier identified, a quorum requirement and rotating chairmanship of the council in order to give women increased opportunities for leadership.

- The second is the development of model by-laws for village governance. The model by-laws will build upon the existing authority of village councils under the Local Government Act to enact by-laws to govern village affairs, including on land use and management as well as decision-making. The model by-laws will contain gender provisions ensuring that women are empowered to participate equally with men in village decision-making on land investments, such as voting requirements and focus meetings. Other recommendations include providing legal aid to communities in conflict with investors, raising community awareness on land investments and rights under the law, and assisting communities in surveying their land and formulating land use plans. (Tanzania Country Report, 2014)

The **Philippines** has identified for reform the FPIC Regulations, specifically to provide space for women's voices to be heard during community meetings and assemblies facilitated by the NCIP. For large-scale or extractive projects, the proposed reform centers on the second community assembly. As earlier discussed, this assembly is intended for the presentation to the community of the project plan, and includes an open forum for members of the indigenous community to be able to raise their concerns. It is held prior to the consensus-building period wherein the community is given time to decide on the project using its own customary laws. The proposed amendment is to mandate women as among the stakeholders that should speak at the second community assembly to voice their interests, concerns and questions. For small-scale or non-extractive projects, it is proposed that the first meeting between the investor and the community elders or leaders include as an agenda item the gender dimension in terms of costs and benefits of the project and the probable adverse effects and mitigation measures to be carried out. These recommendations are designed to ensure that women's perspectives can be taken into account regardless of customary laws that exclude them from decision-making during the consensus-building period. They can also work to instill awareness of the gender perspective among male indigenous leaders. (ASOG Country Report, 2014)

Corollary recommendations include reforming the existing guidelines on environmental impact assessment to include women as among the stakeholders to serve as resource persons and survey

interviewees, as well as members of the multi-partite monitoring team tasked with monitoring the project holder's compliance with the conditions of project approval. (ASOG Country Report, 2014) Other reforms worth exploring are gender quotas for indigenous political structures, and disqualifying customary rules that discriminate against women in decision-making.

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