

Policy Options for Regulating Community Property and Community Protection Zones in Timor-Leste

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This note was prepared by the World Bank Justice for the Poor Timor-Leste program, in response to a request from the Minister of Justice for advice on regulations under Chapter V of the draft Land Law. The principal author is Dr. Daniel Fitzpatrick of the Australian National University. The note is intended as a work in progress and comments and feedback is encouraged. These should be channeled through Justice for the Poor Timor-Leste Coordinator, Lene Ostergaard, on lostergaard@worldbank.org. The views expressed in this paper are those of the authors alone, and should not be attributed to the World Bank, its executive directors, or the countries they represent.

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A. Executive Summary

I. Background

The Ministry of Justice of the Government of Timor-Leste (GoTL) has requested assistance from the World Bank Justice for the Poor program to develop policy options for the implementation of Chapter V of the draft Land Law.¹ The present paper has been developed in response to this request. It is intended as a work in progress and a contribution to the dialogue on the community land policy of Timor-Leste.

The legal regulation of community land is important to achieve national priorities and goals relating to food security and rural development. The GoTL Strategic Development Plan 2011-2030 sets out a vision for the economy in 2030 in which:

Timor-Leste will be self-sufficient in food, and will be producing a range of agricultural products for world markets.²

Timor-Leste will promote development in both rural and urban areas to prevent regional and social imbalances.³

The strategic development plan also notes the need to reform land laws, including in relation to farm land under customary practices.⁴ The World Bank has identified the need to address land and property issues as a key step in reducing rural poverty and improving food security.⁵

This paper sets out policy options for the implementation of Chapter V of the draft Land Law. Based on comparative research in similar environments, and case-based research and consultations in Timor-Leste, this paper lays out the issues that the regulation implementing Chapter V will most likely need to address, and for each such issue sets out several policy options available to address the issue together with analysis of the strengths and weakness of those options. The paper seeks to identify potential risks relating to the process of formulating and implementing policy for Chapter V, and to describe risk mitigation strategies that have proved useful in other settings. The paper seeks to describe policy options and analyze the bases for those options, rather than recommend adoption of particular options, so as to support a detailed discussion of potential options in Timor.

¹ It is likely that there will be an implementing regulation on Chapter V of the Land Law. The precise form of this regulation – a decree law, administrative order or in fact separate parliamentary law – will be determined by the Government of Timor-Leste.

² On the Road to Peace and Prosperity: Timor-Leste's Strategic Development Plan 2011-2030, Summary: Office of the Prime Minister, April 7, 2010, p. 9.

³ Ibid. p. 5

⁴ Ibid, p. 10.

⁵ World Bank, Timor-Leste Economic and Social Development Brief, August 2007, available at www.worldbank.org, p. 47.

The paper has 2 parts:

- Principles and Processes for Implementing Chapter V.
- Issues and Options for Implementing Chapter V.

II. Principles and Processes for Implementing Chapter V

Timorese stakeholders must lead and participate in the process of developing, selecting and implementing the options for implementing Chapter V.

Comparative experience demonstrates that there are no easy ways to effectively regulate community land in a way that ensures equity in balancing competing interests and conflicting claims. Any attempt to regulate community land will create winners and losers. It has the potential to trigger conflict between different communities and between communities and the state and to disenfranchise marginalized members of society.

There is little doubt that the introduction of a law on community land will have unintended consequences, and will at times fail to meet its objectives. The law will form part of local negotiations and adaptations relating to land, with the potential to benefit individuals with greater information and access to state institutions.

The challenges of land governance are exacerbated in environments where state capacity to effectively enforce legal protections and safeguards and manage conflict is limited. This is a reality that needs to be acknowledged in a new state such as Timor-Leste.

Wherever possible, the guiding principles for legal formulation should involve:

- Minimalist and incremental interventions, with an emphasis on the creation of legal space for longstanding local processes; and
- "Do no harm" principles, with an emphasis on protecting vulnerable groups from risks of exploitation and dispossession.

A regulation or new law, therefore, cannot and will not on its own guarantee certainty and equity in land management. This policy paper draws on international experience and extensive research in Timor-Leste to present some options for the Government to consider that we believe will support the development of a more effective regulation on community property and community protections zones and hopefully mitigate some of the possible risks.

While there are no international best practices in this field, comparative experience strongly suggests that the development and implementation of Chapter V options will not be effective without:

- A further process of stakeholder mapping and consultations, including with affected communities.

- A process of intra-government consultation to ensure understanding, awareness and acceptance of Chapter V processes and to prevent inconsistency with related legislation
- An implementation plan to identify priority areas for training, resourcing and capacity-building for state and non-state stakeholders.
- A funded program to assist with capacity-building, awareness-raising and monitoring and evaluation.

Stakeholder mapping includes (1) identification of constituencies for consensus, and (2) common principles on which to base further discussion among stakeholders.

III. Issues and Options for Implementing Chapter V

Chapter V reflects the Constitution of Timor-Leste, which recognises private rights to property while also protecting rights to cultural heritage, environmental sustainability and non-discriminatory customary practices.⁶

Chapter V establishes a system of community property and community protection zones. In a community protection zone, land can be held by East Timorese citizens or the state, subject to state obligations to:

- Ensure that customary practices are participatory, non-discriminatory and respect gender equality;
- Promote environmental and socio-cultural sustainability;
- Protect the community from real estate speculation; and
- Ensure that economic activity benefits the local community and protects its access to natural resources (Articles 22, 23).

There are three major issues relating to the implementation of Chapter V:

- Community identification - to ensure the establishment of community protection zones, and the protection of community property.
- Community land governance - to ensure sustainable, peaceful and non-discriminatory use of land in a community protection zone.
- Economic activity and community consultation - to ensure community benefits and protections in relation to third-party economic activity.

1. Community Identification

Delimitation of a community involves identification of boundaries and the recording of information on rights to land. The options for community delimitation relate to:

⁶ See further Part 3 below for a summary of relevant Constitutional provisions

- The role of the DNTPSC (either directly, through the Ita Nia Rai process or the activities of the proposed Cadastral Commission where there is a dispute).
- The role of the community (e.g. participatory delimitation as in Mozambique).
- The role of other actors (e.g. a local grouping of state, civil society and customary representatives along the lines of the *Lembaga Kesaksian Hak Adat* in Indonesia).

2. Community Land Governance

The governance of community land concerns issues of access, use, environmental protection, non-discrimination and identification of State land, including:

- Clarification of the status of rights of women and men (e.g. equal rights to land as in Tanzania).
- Restrictions on individual owners in a community protection zone relating to:
 - Sustainable environmental practices;
 - Customary rights of access;
 - Registration of title (e.g. community consultation before registration); and
 - Sale of land (e.g. DNTPSC consent before sale)
- The grant of rights to state land in a community protection zone (e.g. provision of compensation to occupiers (as in Botswana), or requirements that the land be free and have no occupants (as in Mozambique)).

3. Economic Activity and Community Consultation

The requirement of community consultation involves issues of participation, transparency and effectiveness, including:

- Participatory conditions for community consultation (e.g. taking into account the views of women, the disabled, youth, and the elderly).
- Approved reports of community consultation (e.g. through signature of community representatives and/or local government officials).
- The consequences of failure to engage in community consultation (e.g. effects on third-party rights).

The regulation of third-party economic activity concerns issues of community benefit and participation, which may involve:

- Third-party economic activity plans for assessment and approval (e.g. sustainability and community partnership mechanisms).

- Conditions on rights granted to third parties (e.g. ways to define the maximum term of years).
- Grievance and conflict-resolution procedures (e.g. DNTPSC mediation, or an ad hoc body such as the *Lembaga Kesaksian Hak Adat* in Indonesia).

B. Introduction: Policy Options for Community Land Regulation in Timor-Leste

I. Context and Background

On March 10th 2010, the Council of Ministers approved a draft Land Law for Timor-Leste. This draft, which will now be debated in the National Parliament, establishes a legal framework for the recognition and awarding of first ownership rights to land in Timor-Leste.

Chapter V of the Land Law deals with the issue of community land. The Ministry of Justice has requested assistance from the World Bank Justice for the Poor program to develop policy options for the implementation of Chapter V.⁷ The Government of Timor-Leste will determine whether implementation will take place through an administrative order, a decree-law or a separate law on community land. Due to the importance of the issue and the need for strong political consensus for the law to be effective, it could be considered that Community Land be regulated through stand alone legislation.

The paper has 2 parts:

- Principles and Processes for Implementing Chapter V.
- Issues and Options for Implementing Chapter V.

The paper is informed by:

- Comparative research undertaken by the World Bank in post-colonial and post-conflict environments.⁸
- Significant research undertaken by the principal author of this note⁹
- Case based research in Timor-Leste by Justice for the Poor Timor-Leste on community and investor relations.¹⁰

⁷ It is likely that there will be an implementing regulation on Chapter V of the Land Law. The precise form of this regulation – a decree law, administrative order or in fact separate parliamentary law – will be determined by the Government of Timor-Leste.

⁸ This material includes research undertaken by the Justice for the Poor program

⁹ See Fitzpatrick, Daniel and Susana Barnes "The Relative Resilience of Property: First Possession and Order without Law in East Timor", *Law & Society Review*, Volume 44, Number 2 (2010), pp. 205-238; Fitzpatrick, Daniel, Andrew McWilliam and Susana Barnes, "Policy Notes on Customary Land in Timor Leste", *East Timor Law Journal* www.easttimorlawjournal.org, December 2008. These publications are based on research undertaken pursuant to Australian Research Council Discovery Project DP0556531 – "Waiting to Law: Land, Custom and Legal Regulation in Timor Leste" – Principal Investigators: Daniel Fitzpatrick and Andrew McWilliam).

¹⁰ Findings from this research will be published separately in the coming months.

- Consultations in Timor-Leste on Chapter V of the Land Law in the form of several workshops with members of Dili-based Civil Society Organisations as well as several meetings with the Directorate for Land and Property.¹¹

II. The Need for a Community Land Regulation

The Constitution of Timor-Leste recognises private rights to property while also protecting rights to cultural heritage, environmental sustainability and non-discriminatory customary practices.¹² To implement property rights and protections in rural areas, Chapter V establishes a system of community property and community protection zones. Further regulation is required to implement Chapter V.

Regulations on community land are essential to meet the national priorities of the government of Timor-Leste (GoTL), including the top 2 priorities for 2009 and 2010: food security and rural development. The GoTL Strategic Development Plan 2011-2030 sets out a vision for the economy in 2030 in which:

Timor-Leste will be self-sufficient in food, and will be producing a range of agricultural products for world markets.¹³

Timor-Leste will promote development in both rural and urban areas to prevent regional and social imbalances.¹⁴

The GoTL strategic development plan also notes the need to reform land laws, including in relation to farm land under customary practices.¹⁵ The World Bank has identified the need to address land and property issues as a key step in reducing rural poverty and improving food security.¹⁶

There is an urgent need for legal certainty relating to ownership of rural land, mechanisms for investors to seek access to rural land, and safeguards relating to food and livelihoods security in rural districts. This need arises because:

- Most rural land in Timor-Leste is held under customary practices.
- GoTL plans to increase tourism and agribusiness investments in the rural sector require legal frameworks to increase certainty and prevent conflicts or exploitation.¹⁷

¹¹ Minutes from these workshops and meetings are available upon request.

¹² See further Part 3 below for a summary of relevant Constitutional provisions

¹³ On the Road to Peace and Prosperity: Timor-Leste's Strategic Development Plan 2011-2030, Summary: Office of the Prime Minister, April 7, 2010, p. 9.

¹⁴ Ibid. p.5.

¹⁵ Ibid, p.10.

¹⁶ World Bank, Timor-Leste Economic and Social Development Brief, August 2007, available at www.worldbank.org, p. 47.

¹⁷ For example, in 2008-09 over 100,000 ha of rural land was allocated or earmarked for bio-fuel developments under Memorandums of Understanding between foreign investors and agencies of the government of Timor-Leste. But there is no law on ownership and access rights to land allocated for these types of developments.

- The Timor-Leste constitution underlines the responsibility of the State to “promote national investment and establish conditions to attract foreign investment.”¹⁸
- Many rural stakeholders say that they are "waiting for law" to identify rights and responsibilities relating to land, particularly in terms of conflict-management and environmental sustainability.

The legal regulation of community land will help to achieve national priorities and goals relating to food security and rural development. It will assist in the management of rural-urban migration. It can reduce uncertainty and the potential for conflict in some rural districts. It can improve the capacity of local communities to manage their land and engage in sustainable and participatory forms of agricultural development. It can help to ensure secure access to land, so as to provide food and livelihoods security for poor and vulnerable groups.

Risks and potential pitfalls of regulation

While there a number of potential advantages of regulation, there are equally possible pitfalls and risks inherent in the process. These include:

- Implementation of the land law could lead to resettlement and displacement of communities for development purposes;
- Definition of the community could lead to exclusion of groups traditionally marginalized from local power structures, such as women and ethnic minorities;
- Formalization of land title can systematically deny land rights to the same marginalized groups;
- Regulating community land will likely be resisted by members of some communities who see state regulations as interfering with traditional modes of land management.
- The law requires capacity that the state currently lacks. For instance, in the current draft law third-party economic activity on community land cannot proceed without consultation with communities. Capacity will be required to inform communities of their rights and obligations, to ensure that proper consultation is conducted in an inclusive manner. That activity must be sustainable, non-discriminatory and based on respect for ways of life and access to natural resources. State capacity to oversee and ensure these standards are met is limited. This creates the risk of exploitation of community land by third parties. The capacity and mandate of DNTPSC will be critical to a successful land management regime.

¹⁸ Section 140

- If the implementing regulation is too complex, it will likely increase processing time and reduce transparency and accountability.
- A regulation including specific requirements prior to third party intervention may deter private investors in engaging with communities.

It should also be noted that there is not yet an overall land policy for Timor-Leste and that inter-ministerial coordination will be required to ensure that regulations are compatible and mutually supportive.

C. Principles and Processes for Implementing Chapter V

I. Consultation Requirements and Principles

Comparative experience strongly suggests that Timorese stakeholders must lead and participate in the process of developing, selecting and implementing the options for implementing Chapter V. The implementation of Chapter V will not succeed without effective processes of consultation and participation, which must involve landholders, community groups, civil society and relevant agencies of the government. This section provides some suggestions on principles and processes relating to development and implementation of community land regulation in Timor-Leste.

The following guidelines provide a framework for further public participation and consultation in relation to community land policy:

- Consultations should be both inclusive and conclusive
- The aim of all consultations should be to first identify the options over which there is the most consensus.
- The trust generated by the previous step can then be deployed to ensure successful negotiations over more contentious options.
- Getting administrative procedures right will be as or even more important than drafting "best-practice" legislation.

II. Stakeholder Mapping and Identifying Common Principles for Discussion

The process of participation and consultation should include stakeholder mapping of points of agreement and disagreement on the implementation of Chapter V. Stakeholder mapping includes identification of (1) constituencies for consensus, and (2) common principles on which to base further discussion among stakeholders. Identifying common principles for stakeholder discussion may begin with the following Constitutional provisions:

- Every individual has the right to property (Article 54).
- The resources of the soil, the subsoil... which are essential to the economy, shall be owned by the State and shall be used in a fair and equitable manner in accordance with national interests (Article 139 (1)).
- The exploitation of natural resources shall preserve ecological balance and prevent destruction of ecosystems (Article 139 (3)).

- The economic organisation of East Timor shall be based on a combination of community forms with free initiative and business management... (Article 138).
- Everyone has the right to cultural enjoyment and the duty to preserve cultural heritage (Article 59(5)).
- The State shall promote actions aimed at protecting the environment and safeguarding sustainable development of the economy (Article 61(3)).
- The State shall recognise the norms and customs of Timor-Leste that are not contradictory to the Constitution and any legislation dealing specifically with customary law (Article 2 (4)).
- Every citizen has the right to participate in the political life and in the public affairs of the country (Article 46 (1)).
- Direct and active participation by men and women in political life is a requirement of and a fundamental instrument for consolidating the democratic system (Article 63 (1)).

1. Areas of Stakeholder Agreement

These Constitutional provisions suggest areas of agreement relating to the regulation of community land. In particular, there appears to be broad agreement that:

- All rights to property should be secure, and include access to land for the poor.
- Food security and rural development should be a national priority.
- Rural land development should be based on principles of environmental and cultural sustainability.
- The regulation of rural land should be based on principles of participation and democracy.
- State land should be used in a fair and equitable manner in accordance with national interests.
- The management of rural land should include reference to traditional norms and customs.
- A local community may act as a form of business organization.

2. Areas of Stakeholder Disagreement

Based on consultations and discussions to date, there appear to be significant points of disagreement relating to the regulation of community land. These points of disagreement include the following:

- There are cases of land claimed by both the State and a local community in Timor-Leste. Some groups have expressed concern that the State may lack incentives to define and demarcate areas of state land with sufficient precision to prevent further disputes.
- The process of consultation and participation has been criticized by some civil society organizations, particularly in relation to seeking the views of rural landholders themselves.
- Some grants of land for agribusiness have been controversial, without a clear calculation of community costs and benefits. There have been calls for a moratorium on commercial development in rural districts.
- The legal status of the relationship between individual and community rights to land is not necessarily agreed upon, with some stakeholders continuing to suggest recognition of individual rights only.
- Women's rights to land in most customary systems appear to be subsidiary to those of men, and as yet there are no clear practical proposals to implement obligations to ensure non-discriminatory forms of custom.

3. Stakeholder Consultation: the Way Forward

The following steps may be useful to confirm areas of agreement, and to reduce the scope of disagreement in relation to community land policy.

- Audit of previous consultations. The Ita Nia Rai process has engaged in a consultation process across a number of districts. There have also been a number of workshops relating to the implementation of Chapter V of the Land Law. An audit of these consultations will highlight further areas of agreement and disagreement, and potential mechanisms for compromise and consensus.¹⁹
- Formation of a consultation plan. A consultation plan may include translation and dissemination of this policy option paper, preparation of an alternative options and discussion paper by an adequately resourced civil society consortium, development of informational material for dissemination by appropriate media to all target audiences, and mechanisms to obtain and incorporate feedback from all stakeholders.

¹⁹ The Haburas Foundation, for instance, is currently implementing the Matadalan ba Rai project identifying community concerns over land and supporting community land advocacy in 40 *suco*.

- Provision for financing for the consultation plan. It is important that all plans be fully costed and the contribution of the government of Timor-Leste in kind and in cash be identified. A consortium of donors should be convened to fund any implementation shortfall.
- Provision of expert advice. Advocates and critics of the models presented in this and alternative policy options papers should be invited to Timor-Leste to give public lectures and provide advice to stakeholders, including officials and political leaders. Timor-Leste customary and formal legal experts should be engaged to advise stakeholders, officials and politicians as appropriate.
- Identification of priority issues. The identification of priority issues may focus on (1) the definition and demarcation of state land, (2) the processes and capacity for delimitation of community property zones, and (3) the sanctions and incentives required for effective community protections under Chapter V.

4. Developing and Implementing Chapter V Options: the Way Forward

There are limits to the effectiveness of laws, particularly in environments where the state's enforcement capacity is limited, as in new states like Timor-Leste. In our opinion, the development and implementation of Chapter V options will not be effective without:

- A further process of stakeholder mapping, and planned consultations as outlined above.
- A process of intra-government consultation to ensure understanding, awareness and acceptance of Chapter V processes and to prevent inconsistency with related legislation
- An implementation plan to identify priority areas for training, resourcing and capacity-building.
- An implementation plan to identify priority areas for training, resourcing and capacity-building for state and non-state stakeholders.
- A funded program to assist with capacity-building, awareness-raising and monitoring and evaluation.

There is little doubt that the introduction of a law on community land will have unintended consequences, and will at times fail to meet its objectives. The law will form part of local negotiations and adaptations relating to land, with the potential to benefit individuals with greater information and access to state institutions. Wherever possible, the guiding principles for legal formulation should involve:

- Minimalist and incremental interventions, with an emphasis on the creation of legal space for longstanding local processes; and

- "Do no harm" principles, with an emphasis on protecting vulnerable groups from risks of exploitation and dispossession.

Because the regulation of community land involves deep-seated social and political consequences, it is also suggested that a parliamentary law rather than an implementing regulation may provide a more suitable vehicle for effective consultation and consensus-building.

D. Issues and Options for Implementing Chapter V

I. Introduction

Under the Constitution of Timor-Leste every individual has the right to property (Article 54). Everyone has the right to cultural enjoyment and the duty to preserve cultural heritage (Article 59(5)). The State shall promote actions aimed at protecting the environment and safeguarding sustainable development of the economy (Article 61(3)). The State shall also recognise the norms and customs of Timor-Leste that are not contradictory to the Constitution and any legislation dealing specifically with customary law (Article 2 (4)).

Chapter V of the Land Law recognises rights to property in a community protection zone, while protecting rights to cultural heritage, environmental sustainability, and non-discriminatory customary norms. The formulation and implementation of Chapter V is aimed at reducing the risks that state-supported development will occur in rural districts without the support or agreement of local landholders. A regulation to implement Chapter V would benefit from drawing on comparative experience and lessons learned, while also taking into account the distinctive cultural and social features of Timor-Leste itself.

Key Timorese stakeholders should be familiar with the background and underlying concepts of options developed from comparative contexts. Two countries in particular may be useful sources of policy options and lessons learnt for Timor-Leste:

- Mozambique, because it is a former Portuguese colony emerging from war and including widespread forms of customary land management. It is part of the international Lusophone community and housed a number of Timorese exiles during the Indonesian occupation. Chapter V includes elements and definitions derived from the Land Law of Mozambique.
- Indonesia, because Timor-Leste land officials either were trained, or may be trained, in Indonesian forms of land administration. It is also a key neighbour and trading partner.

This paper includes a number of references to laws on community land in Mozambique and Indonesia. It draws on comparative experiences from South Africa, Botswana, Tanzania, Papua New Guinea and Fiji. It also identifies circumstances specific to Timor-Leste that may require adaptation of comparative options or the development of new options.

II. The Identification of Community Protection Zones and Community Property

The draft Land Law provides for both community protection zones and community property, while making allowances for differences in the scale and attributes of these.

Although the distinction is conceptually clear in the Land Law, putting the concepts into practice will be one of the more difficult aspects of implementing the law.

Issues of who gets to be a “community”, what does/does not qualify as “community property” and a “community protection zone” and who decides these issues will be a point of contention. In an environment of limited state capacity, there is a risk that the regime established to implement Chapter V will result in the dispossession of individuals or groups.

1. Definition of a community.

The draft Land Law does not define a community for the purposes of Chapter V. The options for community definition include:

(a) A broad definition (as in Mozambique). For example, the 1997 Land Law of Mozambique provides the following definition:

A community is a grouping of families and individuals who share common interests relating to residential areas, agricultural areas, either cultivated or fallow ground, forests, culturally relevant sites, areas of ritual significance, pastures, water springs, areas for expansion or areas with natural resources that are shared by the population and necessary for its subsistence.

(b) A definition limited to customary groups (as in Indonesia). For example, Ministerial Regulation 5/1999 of Indonesia on customary rights of common property (*hak ulayat*) defines a customary law community as:

A group of people united by a customary law structure as equal members of that legal community through a communal place of residence or through descent.

(c) No definition at all. Strictly speaking, the implementation of Chapter V does not require a definition of community because it includes definitions of community protection zones and community property.

Having no definition at all may create uncertainty as to the scope and application of Chapter V. A broad definition would reflect the diversity of Timor-Leste, and avoid unintended limits on community protection.²⁰ While customary groups are likely to be the focus of Chapter V, a limited definition may create conflict with newcomers in customary districts, and prevent groups such as farmers from negotiating collectively with outside investors. Any loss of certainty arising from a broad definition may be counter-balanced by a precise methodology for community delimitation (see further below).

²⁰ The definition of a community may not be limited to a territorial area that is at the level of a village or below, as is provided for in Mozambique, because customary areas in Timor-Leste can cross *suco* boundaries and are often non-contiguous.

2. Acquisition of Legal Status as Community Property or a Community Protection Zone

The regulation will need to confirm the manner of recognition of a community protection zone, or an area of community property. The options include recognition by automatic implication of law, and recognition by community delimitation and/or administrative approval.

(a) Recognition by automatic implication of law provides legal status to a community protection zone or an area of common property before any process of delimitation or administrative approval. For example, the 1997 Land Law of Mozambique provides that the absence of title issued by the Public Cadastre Services shall not prejudice the right of land use and benefit acquired by a community through occupancy in accordance with customary practices (Articles 12, 13).²¹

Recognition by automatic implication of law avoids potential prejudice to community rights should economic activity take place prior to delimitation of a community property zone or an area of community property. It also avoids the possibility that community delimitation will not take place in a timely manner.

(b) Recognition by community delimitation and/or administrative approval provides legal status to a community property zone or an area of community property once it is demarcated and appropriate community details are recorded.

Recognition by community delimitation reduces the possibility that third-party economic activities will commence without knowledge that the area in question includes community property or a community protection zone.

Recognition by automatic implication of law may be combined with procedures for community delimitation and/or administrative approval.²² This option has the advantage of avoiding prejudice to a community that has not been subject to delimitation or approval, while also providing for legal certainty through a process of delimitation or approval.

3. Timing and Proof of Community Property or a Community Protection Zone

There is a risk that third-party economic activity, or public purpose development on state land, will take place in rural areas before identification of a community protection zone or an area of community property. The legal status of an economic activity or public purpose development may be affected if protective obligations under Chapter V are not fulfilled because community property or a community protection zone was not identified in a timely manner. It is important to investment

²¹ See also Article 9 of the 1998 Land Law Regulation of Mozambique.

²² For example, the Land Groups Incorporation Act 1974 of Papua New Guinea allows the Registrar to refuse to register an incorporated land group if he is satisfied that the group characteristics are so temporary, evanescent or doubtful that the group does not have a corporate nature (§5).

certainty that the implementing regulation for Chapter V establishes strong procedures for timely identification of community property and community protection zones.

Potential regulatory options in response include:

- A presumption that all land outside town boundaries falls within a community protection zone unless proven otherwise.
- A requirement that outside town boundaries any third-party economic activity, or development on state land, must be preceded by a community protection zone and community property delimitation process.

The existence of a community protection zone does not affect rights to immovable property. It only triggers protective obligations relating to consultation, sustainability and non-discrimination. A presumption is not necessarily inconsistent with the Constitution of Timor-Leste, including the provision that “the resources of the soil, the subsoil... which are essential to the economy, shall be owned by the State” (Section 139). The presumption has consequences in terms of protective State obligations, and not in terms of rights to land or natural resources.

Mandatory requirements for delimitation to precede third-party economic activity, or public purpose developed on state land, could produce the same effect as a presumptive approach, provided that the burden of proof does not fall on the applicant community. Mandatory delimitation requirements may be limited to those areas subject to development, with the regulation leaving open the possibility of a broader community property or community protection zone.

In practice it is likely that the fulfilment of protective obligations under Chapter V will depend on questions of (1) sanction and enforcement, and (2) institutional capacity, acceptance and resources, rather than the precise formulation of triggers for community property or community protection zone delimitation. The need for timely delimitation must be understood and accepted by all relevant government agencies if Chapter V is to be implemented in an effective manner. In the current implementing context, both sanction and enforcement mechanisms and the institutional capacity of the Ministry of Justice, and in particular the DNTPSC, as well as inter-ministerial coordination and support need to be strengthened for effective implementation.

This paper favours a combination of presumptive and procedural requirements for delimitation of community property and community protection zones in the context of third-party economic activity or public purpose developments. It suggests a targeted program of awareness-raising and training in order to incorporate delimitation mechanisms into government procedures for investment and public purpose development approvals. Training and capacity-building for civil society organizations to play an intermediary role between government and communities will be of particular importance.

4. Eligibility to Apply for Community Protection or Community Property Delimitation.

While the regulation may provide for mandatory delimitation to precede third-party economic activity or public purpose developments, it should also define eligibility to apply for the act of delimitation itself. Broadly, the options include applications by a community, or the DNTPSC. Hence the regulation could state that:

Applications for delimitation of a community protection zone or an area of community property shall be made by a community, or by the National Directorate of Land, Property and Cadastral Services.

The regulation may also include reference to application by "any interested party", in order to allow for civil society organizations or an investor to act on behalf of a landholder community. This option may not be necessary as a civil society organization may advise and assist a community to bring its own application. An application should only be possible if the community is in agreement with it.

5. Prioritisation of areas for delimitation.

Prioritisation of areas for community protection zone or community property delimitation could be useful to avoid over-burdening institutional capacity, while also meeting current demands for third-party economic activity in certain areas. The options include prioritisation:

- (a) On request from a community;
- (b) Outside town boundaries where the State or a third-party investor intends to initiate new economic activities or development projects or plans; or.²³
- (c) Outside town boundaries where there are conflicts over the boundaries of land.

Extending prioritisation of community delimitation to areas where there are conflicts, as is the case in Mozambique, may not be appropriate given the potential in Timor-Leste for certain intra-community conflicts to be caused or aggravated by community delimitation procedures. Prioritising delimitation on request, or for anticipated areas for development, would allow DNTPSC and other relevant actors to focus their resources and increase the chances of timely delimitation. There will need to be mechanisms to ensure transparency, consultation and accountability in the prioritisation process.

6. Procedures for community protection zone or community property delimitation.

Article 23 (4) of the draft Land Law provides for the system and demarcation process of community protection zones to be regulated by separate statute. For the sake of consistency, the regulation may confirm that delimitation procedures apply both to

²³ Similar provisions are to be found in the 1998 Technical Annex to the Land Law Regulations of Mozambique.

community protection zones and community property, while making allowances for differences in the scale and attributes of community protection zones and community property.

The procedure for delimitation may be state or community-driven, or include a combination of state and community actors. The options include:

(a) Delimitation by a state agency. For example, the Native Lands Act of Fiji provides that:

The Native Lands Commission (constituted by the Minister) shall determine what lands are the rightful and hereditary property of native owners... The Native Lands Commission shall determine the boundaries and situation of lands claimed as well as the names of members of the community making the claim (s12).

In Tanzania, the Commissioner of Lands issues a certificate of village land in a prescribed form to every village in which the boundaries have been demarcated (s 7 Village Land Act 1999).

(b) Delimitation by participatory community-based techniques. For example, the 1998 Technical Annex to the Mozambican Land Law Regulations sets out a process of participatory appraisal, which is defined as:

*The collection of information given by a local community regarding: (a) its history; culture and social organisation; (b) the use of the land and other natural resources and the mechanisms for its management; (c) spatial occupation; (d) population dynamics; (e) possible conflicts and the mechanisms for their resolution... (Article 2 (6)).*²⁴

The Mozambican Technical Annex also includes provisions relating to:

- Initial meetings to explain the purposes and process of demarcation.
- Agreement on payment of the costs of demarcation.
- Preparation of maps of community land use and occupation, and identification of boundaries with neighboring communities.
- Preparation of a sketch map and report with the assistance of a technical adviser with a basic knowledge of survey.
- Presentation and approval of the sketch map and report in a meeting involving the community, local administrators and representatives of neighboring communities.
- Verification of the sketch map and report by the Land and Property Directorate.
- Survey by the Land and Property Directorate based on the sketch map and report.
- Entry into the National Land Cadastre.²⁵

²⁴ In Timor-Leste the definition of participatory appraisal could include collection of information relating to areas of common interest (i.e. a community protection zone) and areas of common and shared use (i.e. community property).

²⁵ See Articles 5-13, 1998 Technical Annex to the Land Law Regulations of Mozambique.

In Indonesia, the State Minister of Land Affairs/Head of National Land Agency Regulation No. 5 of 1999 on *ulayat* land provides that the realisation of community rights to customary land is to be undertaken by the customary law community in accordance with legal regulations for the area concerned (Article 2)

Community delimitation should not be restricted to identification of cadastral boundaries alone. The advantage of community delimitation through participatory appraisal is that it supports the State's legal obligations to promote environmental and socio-cultural sustainability in the uses of natural resources and the way of life of each local community (Article 22, Land Law). Participatory appraisal also allows for identification of areas essential to food security and cultural sustainability, while facilitating mechanisms for partnerships where appropriate with outside investors.

There will need to be an appropriate program of training, support and awareness-raising if the regulation adopts participatory delimitation techniques. The best option may be participatory delimitation by adequately trained and resourced DNTPSC staff, acting in conjunction with Ita Nia Rai or a similar program. The process could also include CSOs trained in participatory processes in a facilitating role for the community.

7. Distinguishing between Community Property and Community Protection Zones

The distinction between community property and community protection zones will be one of the more difficult aspects of implementing Chapter V. The scope of areas that should fall within the definition of community property will be affected by the strength of the protective mechanisms relating to community protection zones. Broadly speaking, the stronger the safeguards that apply to a community protection zone the less the need for a broad definition of community property.

Chapter V sets out definitions of community property and community protection zones. Community protection zones cover areas of common interest to a community. Community property requires common and shared use, and organization in accordance with local practices and customs. Chapter V does not provide a list of areas that may fall within the definition of community property.

The options for further distinctions between community protection zones and community property include:

- No further elaboration in order to maintain the flexible and inclusive nature of the definitions in Chapter V.
- An indicative list of the types of areas that may fall within the definition of community property. For example, the regulation could state that:

Community property areas may include, but are not necessarily limited to, the following areas of common and shared use organised in accordance with local practices and customs:

- *Land used for grazing.*
- *Forest areas used for harvesting of timber and non-timber forest products.*
- *Areas used for shifting/swidden agriculture (including fallow areas).*
- *Ponds and streams used for fishing and aquaculture.*
- *Water sources used for drinking water or irrigation (including catchment areas).*
- *Burial areas and other sites of ritual significance.*

An indicative list of potential areas of community property would enhance understanding and certainty in relation to the distinction between community property and community protection zones in Chapter V. It is essential that further targeted consultations be undertaken to test distinction between community property and community protection zones in different local environments.

8. Community Delimitation Conflict Management and Resolution

The regulation could set out mechanisms to manage conflict arising from community protection zone or community property recognition. This may include the identification of areas in dispute and local conflict resolution mechanisms through participatory delimitation techniques. One option is that the regulation provides that areas in dispute shall not be subject to cadastral delimitation. For example, recent reforms to the Land Act of Papua New Guinea allow for survey and registration of incorporated land group boundaries where there is no dispute as to those boundaries (after a period of notice). Only undisputed areas may be the subject of assignment to third-parties of rights to land.

In addition, or as an alternative, the regulation may establish a regulatory discretion not to proceed with community protection zone or community property delimitation where delimitation will cause or aggravate undue social conflict. The decision not to proceed with delimitation may be made by the National Directorate of Land, Property and Cadastral Services. The decision may be appealable, or otherwise subject to review. All decisions made by the DNTPSC can be appealed to the Minister of Justice.

Alternatively, the regulation could provide that the parties to a dispute, in an area for community delimitation, shall be offered mediation and in consultation with the DNTPSC agree on a mediator. Should the mediator certify that mediation has proved unsuccessful; the parties may choose to submit the dispute to a Court within 90 days of the certification. Upon resolution by a Court the area will proceed to delimitation. Due to the still limited capacity of the Courts, a relevant and flexible dispute resolution mechanism such as mediation could be crucial to reducing the number of court referred cases. There is currently limited independent mediation capacity in Timor-Leste, so this would need to be developed.

The potential for community delimitation conflict in some parts of Timor-Leste is high, and therefore it is appropriate to provide for decisions not to proceed where delimitation is causing, or may cause, community conflict. If the legal status of a community protection zone or area of community property arises by automatic

implication of law, the fact that delimitation does not proceed will not affect community rights arising under Chapter V of the draft Land Law.

9. Identification of Community Members

Comparative models vary in relation to the identification of community members for the purposes of Chapter V. The Mozambican land regulations do not require preparation of a list of community members. Other jurisdictions - including South Africa, Papua New Guinea and Fiji - require a list of members as part of the community recognition and delimitation process.²⁶ Community membership can be determined by communities themselves, or through prescribed rules of affiliation.

In the context of Timor-Leste community membership can be particularly difficult to determine in some cases due to the forced movement of people during Portuguese and Indonesian rule resulting in communities comprising people with very differing backgrounds for affiliation. If there are to be prescribed rules of affiliation, they will need to reflect this legacy of relocation, or risk dividing communities.

Once established, the advantage of a membership list is that it reduces the potential for conflict over membership eligibility, particularly in the context of proposed third-party economic activity. The disadvantage is that it requires a degree of institutional capacity to facilitate preparation and updating, and has the potential to crystallise long-standing conflicts over membership and status within a group in a manner that could exclude some groups.

An alternative - or supplement - to membership lists is the preparation and maintenance of genealogies (as in parts of Papua New Guinea). The preparation of genealogies, rather than a list of members, may be more appropriate to Timor-Leste given the potential for conflict over community membership, and the capacity requirements to develop and maintain membership lists. The preparation of genealogies will require a sustained program of training and capacity development, most likely on a partnership basis between DNTPSC and local kinship groups.

Given the difficulties of DNTPSC reach into remote communities at the *aldeia* level, it may be appropriate for the regulation to state simply that the delimitation of community property may involve collection of ethnographic and genealogical material. Whether or not to embark on genealogical mapping can then be left to further consultation and a subsequent technical assessment. This assessment should include a conflict analysis.

10. The Powers and Legal Status of a Community

A community has a right of ownership to community property. The DNTPSC shall issue the ownership title to community property in the name of the local community (Article 25, draft Land Law). The Land Law does not adopt the incorporated association approach of Papua New Guinea and South Africa, the community land

²⁶ See Communal Property Associations Act 1996 of the Republic of South Africa (§5).

trust approach of Vanuatu, or some former British colonies in Africa. A community that fits the statutory definition is a juridical entity in relation to community property.

The options for definition of the powers and legal status of a community in relation to community property include:

- No further definition of powers and legal status, as the community is an owner of immovable property with rights and status under the draft Civil Code.
- Confirmation that a community is a legal entity, for the purposes of holding rights to community property, with powers that includes a capacity to enter into contracts and assign rights to community property in accordance with law (noting that community property itself is inalienable).

In order to increase certainty the regulation could confirm that:

A community is a legal entity, for the purposes of holding rights to community property, with perpetual succession and may sue and be sued, enter into contracts other than contracts to alienate community property, and otherwise may acquire, purchase, possess and enjoy movable and immovable property and may transfer rights to movable and immovable property except by way of alienation of community property.

If a community purchases land the land does not become community property unless it meets the statutory definition.

The assignment of rights by a community to community property is subject to the procedures and restrictions set out in Part IV below (concerning third-party economic activity). Potentially, a community may also be granted powers to manage land in a community protection zone according to local practices and customs, subject to conditions relating to equality, non-discrimination and sustainability (see further Part III below).

The regulation may establish provisions relating to the liability of community members in the event of inability to pay debts incurred by a community in relation to community property. One option is for members not to be liable at all for community debts. Another is to limit the amounts payable by members in the event of community property debt default. For example, the Land Groups Incorporation Act 1974 of Papua New Guinea provides that:

The liability of a member on winding-up is limited to the amount of his interest in property and any amount owing to him (s17).

III. Governance of Community Land

The Land Law provides that in community protection zones the State has the responsibility to:

- a. Ensure that all customary practices conform to the Constitution and are participatory, non-discriminatory and respect gender equality;
- b. Promote environmental and socio-cultural sustainability in the uses of natural resources and the way of life of each local community; and
- c. Protect immovable property in the community from real estate speculation (Article 22).

The principles and procedures to enable the state to fulfill its protective obligations in relation to community protection zones would need to be included in the regulations.

1. The Legal Rights of Individual Owners of Immovable Property in a Community Protection Zone

One option is to leave the rights of holders of immovable property to the general provisions of the Civil Code. Another option is to confirm that individual owners of land in a community protection zone have rights of access and exclusion in relation to their property. For example, the Mozambican Land Law Regulations 1998 provide for holders of rights to immovable property, including those who acquire by way of possession, to have rights:

- a) to defend their rights, in accordance with the law, against any encroachment by another person;*
- b) to have access to their parcel of land and to public water resources through neighbouring parcels, and to create the servitudes necessary for this purpose.*

This type of provision would clarify that individual owners of immovable property have a right of veto over third-party economic activity on their land. An adapted version of this provision could also serve to protect customary rights of access from restrictions or prohibitions asserted by individual owners in a community protection zone.

2. Acquisition of Ownership on the Basis of Special Adverse Possession in a Community Protection Zone

Many rural districts in Timor-Leste have large numbers of relocated peoples living on the "community land" of a customary group. Some occupy the land on the basis of some type of usufruct or "non-transferability" agreement. Others occupied the land during chaotic periods of displacement in Indonesian times, without necessarily obtaining agreement from the local customary group. Any attempt by relocated peoples to claim ownership of customary land in a community protection zone, particularly in the sense of a right to sell that land, is likely to create conflict with customary landholding groups.

The determination of ownership will also be complicated by difficult distinctions between those who acquired possession under agreement with customary landholders (and are therefore not eligible for ownership), and those who acquired "adversely" (i.e. without agreement) and are eligible to be recognised as owners under the Land Law.

Can the implementation of Chapter V restrict or modify rights to land in a community protection zone, particularly so as to minimise the risk of conflict should relocated persons seek to be identified as owners of land? Article 24 of the Land Law states that:

The characterization of an area as a Community Protection Zone does not affect the ownership of immovable properties of private persons, legal entities and the State located in it or the rights of their respective owners, with no detriment to the limitations resulting from the protective legal regime.

If the implementation of Chapter V takes the form of a Parliamentary law, then it would amend article 24 to the extent of any inconsistency.

One option is not to restrict claims to land in a community protection zone on the basis of special adverse possession. Those who meet the criteria in the Land Law will be owners with rights under the Civil Code. Another option is to adapt Article 15 (1) of the Mozambique Land Law Regulations, which deals with a similar situation:

"The partitioning of land in a community protection zone for the purposes of recognising the ownership of an individual on the basis of special adverse possession shall only take place after consultation with the local community."

This type of provision would help to satisfy the state's obligation to promote the way of life of each local community and to protect immovable property in a community "from real estate speculation" (Article 22, draft Land Law).

3. Restrictions on Ownership of Immovable Property in a Community Protection Zone

There may be uncertainty relating to the exercise of rights to immovable property in a community protection zone, particularly in the light of the protective obligations and conditions of Chapter V. As noted, one option is to allow owners of immovable property to exercise their rights in accordance with the Civil Code. Another is to adapt s. 29 (2) of the Village Land Act 1999 of Tanzania:

Rights to immovable property in a community protection zone shall be subject to implied conditions, including obligations to engage in sustainable agricultural practices, to comply with local practices and customs in accordance with law, and to retain and keep safe or boundary markers (s29 (2)).

This type of provision would help to satisfy the state's obligation to promote sustainable environmental practices and non-discriminatory practices.

A further option is to adapt s. 26 of the Tribal Land Act of Botswana:

Rights to immovable property in a community protection zone shall not be transferred to any other person by any voluntary act of such persons or of his agent, or others

acting on his behalf who have control of his estate, without the written consent of the DNTPSC.

This type of provision may help to satisfy the state's obligation to prevent real estate speculation in a community protection zone. However, it would require substantial strengthening of DNTPSC resourcing and capacity, and accompanying accountancy and transparency mechanisms. It may be preferable to limit the safeguards against community conflict, arising from the sale of ownership rights in a community protection zone, to requirements that (1) community consultation precede registration of ownership rights on the basis of special adverse possession in a community protection zone, and (2) holders of rights to immovable property in a community protection zone shall comply with local practices and customs in accordance with law.

4. The Legal Status of Customary Rights to Immovable Property in a Community Protection Zone or an Area of Common Property

There are a number of rights to immovable property in a community protection zone that do not fit the criteria for ownership under the draft Land Law. These rights include rights of access, occupation, use and exclusion. They can include rights of a ritual nature, which may include the authority to make decisions relating to the use and allocation of land and natural resources. Typically the nature of customary rights in a community protection zone varies according to the status of its holder, which is usually determined by the proximity of relations with sources of customary authority.

One option in relation to customary rights is to limit legal recognition to rights that meet the criteria for possession and special adverse possession under the Land Law and the Civil Code. Another option is to state that:

Rights to immovable property acquired according to local practices and customs, in a community protection zone or community property area, shall be valid except as provided in law.

To avoid uncertainty and protect local ways of life, it is important to recognise the various types of customary rights in a community protection zone or an area of community property, provided those rights are consistent with the Constitution and with rights to immovable property recognised by the Land Law. It is also important to recognise future customary rights, which may not be registered in the national land cadastre, including those acquired through inheritance or customary grant.

5. The Status of State Land in a Community Protection Zone

The draft Land Law provides for the existence of state land in a community protection zone. There is a risk of conflict should the identification of state land overlap with community perceptions of community property or authority. There are a number of local conflicts in Timor-Leste involving claims to state land, or the grant of rights to state land.

The draft Land Law defines state land to include land utilised by the Portuguese public administration until December 7, 1975 and by the Indonesian administration until October 19, 1999, belonging to the respective States within the territory of East Timor. The definition requires the use of land by the Portuguese or Indonesian administrations, not simply cartographic acts of claiming land through, for example, the *Carte de Lei* (Portugal) or the notion of state right of control (Indonesia).

While the definition does not encompass all the land claimed by the Portuguese or Indonesian administrations, because of the requirement of utilisation, the definition of state land is still likely to conflict with some community perceptions and claims relating to community land. It is important to provide incentives and sanctions for the government to identify and demarcate state land, in order to minimise the potential for conflict and uncertainty. Options canvassed above include presumptions relating to community protection zones, and requirements to demarcate state land as part of community protection zone or community property delimitation.

The draft Land Law allows for state land to exist within a community protection zone. It also requires community consultation to precede third-party economic activity in a community protection zone. This suggests the possibility of adapting Article 13 (3) of the 1997 Mozambican Land Law, to the effect that:

In a community protection zone the grant of rights to third parties in an area of State land shall include a statement by the local administrative authorities, preceded by consultation with the respective communities, for the purpose of confirming that the area has no occupants.

In the context of Timor-Leste, it may be appropriate to expand the concept to include confirmation that the area is not a source of primary livelihood for local communities; even should it have no occupants.

An alternative approach is to provide for compensation should the identification of state land in a community protection zone affect local or customary rights of use. A de facto compensation of this kind operates in Indonesia. Another example is provided by the Tribal Land Act of Botswana (s33), which provides for the payment of compensation to holders of customary rights to land that had been granted to the State for public purposes. The World Bank's guidelines on involuntary resettlement also set out comprehensive provisions relating to resettlement assistance.²⁷

The Mozambican requirement for rights to be granted to state land only if the area is certified as having no occupants is simpler and easier to administer than the Indonesian or Botswanan models of compensation. On the other hand, the Mozambican approach may be abused through the use of pro forma certification by self-interested actors. Landholders and officials familiar with the Indonesian system will also adapt more readily to the compensation model.

²⁷ See the World Bank, Operational Policy on Involuntary Resettlement OP 4.12 Involuntary Resettlement, December 2001
<http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/toc2/CA2D01A4D1BDF58085256B19008197F6?OpenDocument>

It is suggested that the implementing regulation for Chapter V be drafted in a way that does not allow the displacement of people from land used for residential, economic or cultural purposes, as a result of the identification of state land in a community protection zone. The implementing regulation could adopt the Mozambican approach, with more precision in its wording and procedures, and stronger sanctions for non-compliance with certification requirements.²⁸

Should the demarcation of state land in a community protection zone in fact result in displacement of people from land used for residential or livelihood purposes, the implementing framework for Chapter V could provide for a system of compensation and/or livelihood assistance to ensure that effected persons are not made worse off by the displacement.

6. Authority to Manage Land and Natural Resources

Clarifying authority over the management of land and natural resources is important to promote sustainable, non-discriminatory and protective practices in a community protection zone. While holders of immovable property will have the ordinary rights and incidence of land ownership under the Civil Code, including in relation to the use of land, further regulation of land use practices may be necessary to implement the provisions of Chapter V. For example, customary prohibitions in Timor-Leste - in Tetum *lulik* or *tara bandu* - often relate to the sustainable use of water sources, old-growth forests and other areas of environmental significance.

One option is to provide that:

The management of land and natural resources in a community protection zone, or an area of community property, shall take place in accordance with local practices and customs, except as otherwise provided in law.

Another option is to adapt s. 8 of the Village Land Act 1999 of Tanzania:

Management of land and natural resources in a community protection zone, and an area of community property, shall have regard to principles of sustainable development, equality and non-discrimination and the need to consult with and take account of the views of local authorities having jurisdiction in the community protection zone or area of common property.

Timor-Leste should support environmentally sustainable features of customary notions of *lulik* and *tara bandu*, which means that direct reference to local practices and customs except as provided in law, would be a more appropriate model than simply referring to the need to "take account of the views of local authorities".

²⁸ Note that Law No. 1/2003 establishes procedures for the eviction of occupants from state land.

7. Principles of Nondiscrimination and Equality

The regulation may adopt further provisions relating to the non-discrimination and equality provisions of Chapter V. One option is to adapt s. 3(2) of the Village Land Act 1999 of Tanzania:

Women and men have equal rights to acquire, hold, use and deal in rights to immovable property in a community protection zone (s3(2)).

Another option is to adapt the Communal Property Associations Act 1996 of the Republic of South Africa, which requires inclusion of principles relating to equality and non-discrimination in the Constitution of a communal property association (s9). In Timor-Leste this requirement could be adapted by reference to the management of community property (i.e. it must take place in accordance with principles of non-discrimination and quality of equality).

8. Dispute Resolution

The regulation may set out procedures for dispute-resolution in relation to community property or a community protection zone. One option is to confirm the legal authority of DNTPSC to mediate disputes relating to land.²⁹ DNTPSC has a relatively successful program of mediation in relation to land conflicts in most, although not all districts. DNTPSC staff has received training in mediation techniques.

Another option is to adopt the Indonesian model of ad hoc groups of state, civil society and customary representatives to engage in localised conflict resolution (i.e. through the *Lembaga Kesaksian Hak Adat* process).

The current DNTPSC mediation model allows for inclusion of state, civil society and customary representatives on an ad hoc basis. It is generally preferable to confirm the application of existing approaches rather than to impose a new approach. This argues for regulation that confirms the authority of DNTPSC to undertake mediation, pursuant to Law No 1 of 2003, in a community protection zone.

Generally speaking, disputes that reach the DNTPSC have already undergone attempts at resolution through customary mechanisms. It is likely that the *chefe de aldeia* and *chefe de suco* have also been involved. It is important that the regulation create legal space for first instance attempts at dispute-resolution through local or customary mechanisms. For example, the regulation could provide that:

The resolution of disputes relating to rights to immovable property, in a community protection zone or an area of community property, shall take place in accordance with local practices and customs except as provided in law.

In South Africa, under the RSA Communal Property Associations Act 1996, the Director-General may appoint a conciliator acceptable to the parties to a dispute (§10). The regulation may similarly provide that the DNTPSC may appoint a

²⁹ This authority is set out in Law Number 1 of 2003.

mediator acceptable to the parties to a dispute, in a community protection zone or an area of community property, where the dispute cannot be resolved in accordance with local practices and customs.

It may be appropriate to establish a specialist body to arbitrate or adjudicate disputes in a community protection zone, in the event that mediation fails to secure agreement. This body would potentially avoid the delays currently associated with the general Court system. Needless to say, any separate adjudicatory body would require adequate training and resources.

IV. Economic Activity and Community Consultation

1. Obligations to Engage in Community Consultation

The draft Land Law states that:

All economic activities performed by third parties in Community Protection Zones shall be preceded by consultation with the local community (Article 23(3)).

The law does not identify the obligation-holder in relation to community consultation. The implementing regulation may provide that the State is under an obligation to ensure community consultation. It may also provide that third-parties must cooperate with the State to ensure community consultation in relation to third-party economic activity.

The law is also silent as to community consultation in relation to public purpose developments on state land, or the assignment of rights to community property. One option is not to extend or clarify the scope of the consultation requirement. In this event, the assignment of rights to community property is subject to the procedures set out below, and the grant of rights to state land for public purpose developments is subject only to the identification of state land set out above. Community consultation requirements may be extended to apply for private purpose developments on state land.

Provided that consultation take place in a timely manner, it is desirable that consultation requirements extend to community property, and public purpose developments on state land, in order to minimise the risk of conflict, while perhaps exempting small-scale public purpose development such as the upgrade of roads or infrastructure in a community protection zone.

2. Procedures for Community Consultation

The regulation may set out procedures and requirements for community consultation. The options relate to:

- The locality of consultations (e.g. requiring consultation take place at the affected *aldeia* level).
- Participatory conditions for community consultation (e.g. taking into account the views of women, the disabled, youth, and the elderly).
- Approved reports of community consultation (e.g. through signature of community representatives and/or local government officials).
- The consequences of failure to engage in community consultation (e.g. effects on third-party rights).

Based on similar provisions in the Land Law regulations of Mozambique, it is suggested that community consultations shall:

- take place in affected *suco* and *aldeia*;
- ensure the participation and take into account the views of all affected members of the community, including women, the disabled, youth, and the elderly; and
- result within 120 days in a public report of community consultations.

3. Community Representation in Community Consultation

In Mozambique the report of community consultations must be signed by between 3 and 9 representatives of the community, as chosen by the community. In some cases in Mozambique, there have been allegations of abuse of power by community representatives in the consultation process.

In Timor-Leste the draft Land Law states that a community shall represent itself in accordance with local practices and customs. To minimise the risks of abuse of power, and discriminatory treatment of residents who are not members of the local customary group, the regulation could state that:

The community consultation report shall be signed or marked by chefe de aldeia, chefe de suco and community representatives for the area or peoples concerned.

It is important to refer to the peoples concerned, as the concept of *suco* and *aldeia* in Timor-Leste is not necessarily a territorial one. In many cases, people retain affiliation with a particular *suco* and *aldeia* even though they have lived in another area for a large number of years.

Alternatively the regulation could provide that a community that does not wish to be represented in accordance with local practices and customs may choose to elect its representatives by public vote.

It is preferable that the regulation not require new practices, such as appointment by public vote, as these practices may not be adopted at the local level. It is better to broaden the scope of signatures required for the community consultation to reduce the

risk of abuse or grievance. A focus on mandatory consultation procedures will also take account of relative difficulties in enforcing the general law duties of agents.

The regulation may also provide that a copy of the community consultation report shall be made available in the offices of the *chefe de suco* of the area concerned.

4. Failure to Engage in Community Consultation

There are several options for setting out sanctions and consequences for non-compliance with the community consultation requirement. One option is to provide that:

*Third-party rights to immovable property in a community protection zone shall be void if they are not preceded by community consultation and an economic activity plan in accordance with law.*³⁰

Another option is to provide for a monetary fine.

It may be appropriate to provide for the legal invalidity of third-party rights, in the event of failure to undertake community consultation, because of the fundamental role consultation will play in ensuring fulfillment of the protective obligations under Chapter V. The importance of community consultation, in the scheme of Chapter V, necessitates as strong sanction as possible. If the implementing regulation requires third-parties to cooperate with the State, to ensure community consultation, but on balance the regulation could include provision for the legal invalidity of third-party rights in the event of failure to undertake consultations as required.

5. Fees and costs

Community consultation mechanisms may be expensive, and it is important that the regulation provide a sustainable framework for funding the consultation process. One option is for the State to pay for all consultations. Another is to impose costs on the third-party applicant. A possible wording of this option is:

The costs of community consultation may be borne by the third-party applicant for rights to community property, or immovable property in a community protection zone, or by the State in cases of public purpose development on state land.

³⁰ See further below for options relating to third-party economic activity plans.

6. Third-Party Economic Activity Plan

The regulation should set out procedures to ensure that third-party economic activity meets the protective requirements set out in Chapter V. One option is to provide for sanctions should the economic activity fail to meet the requirements of Chapter V. Another option is to provide mechanisms to ensure that the planning and implementation of economic activity take into account requirements relating to sustainability, non-discrimination and benefit to the community. Based on equivalent parts of Mozambican law, this paper suggests the following provisions:

A third-party applicant for rights to community property, or to immovable property in a community protection zone, must prepare and lodge an economic activity plan with the DNTPSC, the relevant investment approval authority and the chefe de suco and chefe de aldeia for the affected area or peoples concerned prior to community consultation.

The third-party economic activity plan must identify mechanisms to ensure inclusivity, non-discrimination, sustainability, and respect for ways of life and access to natural resources.

The third-party economic activity plan must include mechanisms for partnership with an affected community, including by way of employment, provision of infrastructure and/or distribution of benefits.

Subject to the provisions set out below, it could be considered that the content and status of third-party economic activity plans be determined through preparation of technical guidelines. The technical guidelines may establish distinctions relating to different scales and types of economic activity in a community protection zone.

7. Obligations to Take into Account Community Consultation

A further option in relation to third-party economic activity is to establish links between the process of community consultation and the economic activity plan itself. For example, the regulation could state that:

The third-party economic activity plan must include responses to the matters contained in the report on community consultation, including recommendations for partnership with an affected community.

8. Assessment and approval of a Third-Party Economic Activity

The regulation will need to establish procedures for assessment and approval of a third-party activity plan. One option is to adapt provisions of the 1998 Land Law Regulation of Mozambique relating to:

- identification of land subject to a third-party economic activity;
- the issue of a technical assessment of a third-party economic activity plan;

- publication of an opinion by the district administration of the proposed third-party economic activity, including a statement as to the existence or otherwise of rights to immovable property in the area subject to the proposed third-party economic activity.

The technical assessment may be provided by DNTPSC or by an accredited civil society organisation. A civil society organisation is a better option, due to its relative independence, provided that a sustainable programme of capacity-building and resourcing is established. The proposed technical guidelines may provide that technical assessments are not required for defined small-scale economic activity.

Specific regulations on third-party economic activity will need to be developed in conjunction with the ongoing process of revising the requirements of business procedures in Timor-Leste.

9. Rights of Third Parties

The regulation should provide for the grant of third-party rights to community property (where the community so desires), or to land in a community protection zone. The Land Law states that community property may not be seized or alienated. One option is for third-party rights, either to community property or in a community protection zone, to be governed by the Civil Code alone. Another option is to provide that:

A third-party may obtain a surface right or a usufruct right, in accordance with the Civil Code, in a community protection zone or in relation to community property, for a maximum period of 15 years subject to rights of renewal in accordance with law.

It is preferable for the regulation to clarify the maximum term of years of third-party rights in order to increase certainty and ensure compliance with the protective obligations of Chapter V. This said, further consultation is required to ensure that the maximum term of years is sufficient to encourage sustainable forms of investment. Longer term rights might be recommended for specific industries, such as plantations.

10. Procedure for Renewal of Third-Party Rights

A further option is to provide for renewal of third-party rights, with mechanisms to ensure compliance with the protective obligations of Chapter V. For example, the regulation may adapt Article 19 of the 1998 Land Law Regulation of Mozambique:

Third-party rights to immovable property in a community protection zone may be renewed in accordance with the provisions of applicable law and the terms for the renewal of the investment authorisation. In this event, the third-party applicant shall request for renewal and demonstrate that the economic activity is still being carried out.

The regulation may also include provisions to ensure transparency and accountability in relation to renewal of third-party rights. These provisions may include automatic

renewal should be third-party be fully in compliance with the conditions of grant or authorisation.

11. Assignment of Rights to Community Property

The regulation should establish standards for community consent to the grant of third-party rights to community property. One option is to provide for a majority vote of community members. Another option simply states the need for consent, without establishing prescriptive or uniform mechanisms for the obtaining of consent. The latter option is to be preferred given the importance of not imposing new structures or requirements on local community practices. The potential for abuse of power, arising from a non-specific requirement of consent, may be limited by mandatory requirements relating to community consultation and third-party economic activity. The regulation could provide that:

The assignment of rights to community property shall be made with the consent of the community, which shall be confirmed by the report of community consultation.

The requirement of community consent is directed at limiting the potential for abuse of power by community representatives in the assignment of rights to community property. However, there will be a need for signatures on written agreement to assign rights to community property. Where the number of community members exceed a certain level, for example 50, the regulation could provide that written agreement to assign rights to community property may be signed by community representatives, chosen in accordance with local practices and customs, and also the *chefe de suco* and *chefe de aldeia* for the affected area or peoples concerned.

12. Mandatory Provisions

Comparative experience in places such as Papua New Guinea, where a significant amount of resource development has occurred on customary land, is that community landholders benefit from mandatory requirements relating to agreements with third-party investors. These mandatory requirements serve to protect against risk of abuse, and can also minimise the risk of conflict between the community and the investor.

One option is to set out a list of mandatory requirements in the regulation itself. Another is to list them in the proposed technical guidelines, which will be shaped to the different sizes and types of third-party investment in Timor-Leste. These guidelines could include references to international certification schemes. If this latter option is preferable, the regulation could provide simply that:

Agreements with a third-party in relation to community property, or immovable property in a community protection zone, may be the subject of mandatory provisions to ensure inclusivity, non-discrimination, sustainability, and respect for ways of life and access to natural resources.

The regulation may also provide that no person alleging to hold rights in relation to community property, who is not a member of the community, shall receive no greater

rights than may lawfully be conferred under the terms of this regulation. A similar provision may be found in the Tribal Land Act of Botswana (s29).

13. Prohibition of Assignment and Subleasing

There are risks of conflict and uncertainty if a third-party is allowed to transfer or sub-lease rights to immovable property in a community protection zone. One option is to allow transfer or sub-lease in accordance with the Civil Code, provided there is community agreement to the transfer or sub-lease. The sub-lease should be subject to no less stringent requirements as the original lease. Another is to allow lessees of community property to transfer or sub-lease, but not lessees of state land in a community protection zone. A further option is to provide that:

Third-party rights to community property, or immovable property in a community protection zone, may not be assigned or sub-leased.

14. Expiry of Third-Party Rights to Community Property or Immovable Property in a Community Protection Zone

Third-party holders of rights to community property, or immovable property in a community protection zone, are likely to make improvements to the land. At the expiry or cancellation of third-party rights, there can be uncertainty or conflict over rights to compensation for land improvements. This type of uncertainty has been the source of conflict in places such as Vanuatu.

The regulation may provide that there is to be no right of compensation for improvements, or any right of retention for improvements, and that all improvements are to vest in the owner of the land. A similar provision may be found in s 25 of the Tribal Land Act 1968 of Botswana. Another option is to provide for a form of "tenant's fixtures", where items attached to land by a third-party for commercial purposes may be removed at the expiry of the term, where the removal would not damage the land. A further option is to allow compensation on the basis of the depreciated present value of improvements rather than their replacement cost or the cost of the capital outlay.

The Botswana rule is simpler and easier to administer.

15. Cancellation of Third-Party Economic Activity

The regulation may provide for cancellation of third-party economic activity in a community protection zone. Based on s. 15 of the Tribal Land Act 1968 of Botswana, the options for cancellation include circumstances where:

- The third-party is no longer eligible to hold land in accordance with the law.
- There has been a failure to observe restrictions on the use of land.
- The land has been used for a purpose not authorized by customary law or that the holder thereof has contravened any customary law relating to its use.

- In case of agricultural land, for 2 years the land has not been cultivated without sufficient excuse.

The 1998 Land Law Regulation of Mozambique also provides for termination of rights to immovable property, acquired for the exercise of economic activities, in the event of failure to fill the exploitation plan (Article 19).

It is suggested that the regulation adopt all the bases for cancellation set out in the laws of Mozambique and Botswana. Cancellation may be ordered by the DNTPSC, subject to rights of appeal, or by Court order. In cases of breach of non-essential conditions of grant, the appropriate remedy may be an order to pay compensation rather than to require cancellation.

16. Grievance Procedures and Appeals.

The regulation could address procedures for the resolution of grievances and conflicts. One option is to build on the existing model for DNTPSC mediation discussed above. Another is to adopt the ad hoc Indonesian model, also discussed above. The existing DNTPSC model is preferred, and hence the regulation could provide that:

Persons affected by a third-party economic activity may request appointment of a mediator, by the DNTPSC, to mediate disputes arising out of a proposed third-party economic activity.
