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FINAL REPORT

**ON ANALYSIS OF UNMIK REGULATIONS AND PRE-EXISTENT
YUGOSLAV LAWS RELATED TO AGRICULTURAL LAND
PRIVATIZATION/COMMERCIALIZATION IN KOSOVO**

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Deliverable for TOR Specific Task No. 5. "Complete a short final report that extracts the essence of the assessment paper, including a general summary of findings, conclusions and key recommendations."

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EXECUTIVE SUMMARY¹

The terms of reference required an analysis of Yugoslav laws prior to 22 March 1989 (hereinafter referred to as “pre-existent Yugoslav laws”) and UNMIK regulations to determine whether socially-owned agricultural land may be privatized or commercialized. This report focuses exclusively on state- and socially-owned agricultural land and does not extend to the privatization, commercialization and ownership of other state- and socially-owned assets.

The following are our main conclusions:

MAIN CONCLUSIONS

- i. Pre-existent Yugoslav law generally precludes the transfer or transformation of socially-owned agricultural land into private ownership;
- ii. UNMIK regulations have created a serious legal gap as to who owns certain agricultural land associated with SOEs;
- ii. Current Yugoslav/Serb law appears to (a) fill in the gap as to the ownership of agricultural land in Kosovo and (b) allow for privatization and redistribution of certain agricultural land associated with SOEs; and
- iii. Commercialization is legally permissible in the current legal environment in Kosovo.

For UNMIK to privatize and redistribute state- and socially-owned agricultural land, any one of the following situations must take place prior:

- Kosovo becomes empowered to enact its own laws to privatize and/or redistribute agricultural land;
- UNMIK decides to privatize and/or redistribute the agricultural land and issues a regulation accordingly; or
- UNMIK utilizes relevant, non-discriminatory Serbian or Yugoslav laws enacted after 22 March 1989 (hereinafter referred to as “post-Markovic laws”) to resolve ownership issues and to privatize agricultural land associated with socially-owned enterprises.

The current legal/regulatory framework for Kosovo contains restrictions that serve to preclude or outright prohibit the transformation of socially-owned agricultural land into private ownership and creates a legislative gap as to the ownership of such land. We, thus, attempted to extend our analysis beyond the UNMIK regulations and pre-existent Yugoslav laws to encompass current Yugoslav and Serbian laws, since Section 1.2 of UNMIK Regulation No. 2000/59 permits reliance on non-discriminatory post-Markovic

¹ For a more comprehensive of analysis of UNMIK regulations, pre-existent Yugoslav laws and some relevant post-1989 Yugoslav/Serbian (i.e. “post-Markovic) laws, see *Assessment of Laws and Impediments to Privatization and Commercialization of Socially-Owned Agricultural Land*.

laws to fill in legal gaps in the UNMIK-established legal environment. Given the time constraints and physical unavailability of most of the current Serbian and Yugoslav laws in Kosovo, we were unable to ascertain fully whether and how agricultural land associated with SOEs could be privatized within this extended legal/regulatory context. However, as described in the *Assessment* and in this report, our field trips and analysis of certain post-Markovic laws reveal the following most probably took place in Kosovo in the 1990s:

- Vast amounts of socially-owned agricultural land that SOEs acquired through confiscation have been returned to previous owners;
- Remaining socially-owned agricultural land was transformed into the social capital of SOEs;
- The entire process of returning to previous owners and transforming into social capital the socially-owned agricultural land was to have been completed no later than December 31, 1997; and
- Sales and other forms of disposal of transformed and restituted land are permissible, but subject to a relatively insignificant right of first refusal by the state.

Virtually none of the legal advisors with whom we met from the various donor and UNMIK departments had post-Markovic laws that touch upon agricultural land. In addition, after some research, certain comments and statements of fact by various foreign legal experts turned out to be incorrect regarding the substance and recent implementation of post-Markovic legislation. It is very likely that Serbia has begun privatizing socially-owned agricultural land in one manner or another, according to non-discriminatory post-Markovic era laws; whereas, UNMIK Regulation No. 2000/59, which restricts Kosovo's legal/regulatory base to the socialist-era legislation, may be hindering the development of a legitimate agricultural land market in Kosovo. This, of course, is subject to further verification and analysis; but ignoring the current Yugoslav legal and situational context might be doing a disservice to the development of an agricultural land market in Kosovo, let alone its economic development.²

Our main recommendations are listed below:

1. Resolve ownership claims: Independent, neutral extra-judiciary body. It is important that ownership issues be resolved post haste to minimize the risk of claims against the commercial right or private ownership right to agricultural land. This is not only sound policy, but also is a legal requirement, since Section 6.2 of UNMIK Regulation 2000/54 requires UNMIK to administer state and socially-owned assets in a manner that would not prejudice the property rights of future claimants. For reasons articulated below, it is recommended that those individuals whose agricultural land was taken by the state in accordance with the Law on Agrarian Reform and the Regulation on

² For an informed perspective on the issue regarding impediments caused by UNMIK's broad exclusion of post-Markovic law, it is highly recommended that USAID meet with Mr. Robert Muharremi, a Kosovar Albanian property law expert, who heads the legal division of the Department of Public Services. His Email is rmuharremi@hotmail.com and phone number is +381/38-504-604, ext. 6561.

the Nationalization of Agricultural land and who have received or were supposed to receive the agricultural land in accordance with the post-Markovic restitution regime, be recognized as lawful owners. It is also advisable to allow potential claimants the opportunity to file contesting ownership claims, within a set time period, before an independent, extra-judiciary commission. The independent extra-judiciary commission should be established as soon as possible (i) to encourage people to make claims within a reasonably short time period, (ii) to adjudicate boundaries and other physical attributes of the property in question, and (iii) to make final determinations as to the property rights in agricultural land. The commission should be a neutral, objective panel of international legal and land registration experts. A UNMIK regulation would be necessary to elaborate the authority, procedure, and functions of such an independent commission.

2. Determine size of agricultural land fund and what land could be quickly privatized free and clear of disputes and ownership claims. A team should examine the most current registry records in Kosovo and, if possible, those removed to Serbia to determine what amount of agricultural land associated with socially-owned enterprises has been transformed into state ownership and subsequently returned to previous landowners whose land was confiscated during the socialist regime. This is a necessary step in determining the amount of agricultural land that could be privatized free and clear of claims by previous owners. This situational assessment should consider: (i) how much agricultural land in Kosovo is clearly in social or state ownership, private ownership, private possession, private usage, or cooperative possession; (ii) how much of the agricultural land in Kosovo was confiscated during the socialist Yugoslav regime, how much of the agricultural land was returned to the previous owners and how much remains to be returned. This necessitates an attempt at cooperation with the Serbian authorities, which have the recent ownership and cadastral data with them in Serbia.

3. Situational assessment concerning post-Markovic applications. In concert with Recommendation Nos. 1 and 2 above, the team should also conduct a comprehensive situational assessment in Serbia to perform the following tasks: (i) determine the method and manner by which agricultural land was returned to previous owners in Serbia, especially in the areas with a high concentration of non-Serb minorities, such as Sandjak and Vojvodina; (ii) ascertain how agricultural land, if any, was privatized or commercialized in Serbia; (iii) learn first-hand how legal rights to land are being registered and recorded in Serbia's legal registry offices, i.e. cadastre and courthouse offices; and (iv) assess how much legal/cadastral information Yugoslav or Serb authorities possess that would shed light on the Kosovo situation. The team should consist of a legal and cadastre expert and spend approximately one month on the situational assessment.

4. Assess post-Markovic laws. In concert with Recommendation Nos. 1 and 2 above, the team should undertake an assessment of relevant post-Markovic laws to determine whether and how agricultural land associated with SOEs might have been privatized in Serbia and how it could be privatized in Kosovo within this extended legal context. This legal assessment should involve a comprehensive study of all Yugoslav and Serbian laws, regulations, decrees and official departmental instructions that might touch upon

agricultural land ownership, usage, administration, privatization and commercialization. Based on this assessment, the team should determine whether certain socially owned agricultural land may be privatized in Kosovo within the current Yugoslav or Serbian context. This task should involve one expat lawyer and at least one local lawyer, consuming approximately one month.

5. Pilot project for agricultural land privatization. Subject to the findings and conclusions from the legal and situational assessments above, a pilot project should be undertaken whereby agricultural land associated with an SOE is privatized in a manner that is free of claims by previous owners in accordance with suitable post-Markovic laws and UNMIK regulations. This may involve passing a new UNMIK Regulation or amending a previous regulation.

6. Establish a commercialization procedure. A clear procedure should be established in a UNMIK regulation that guides DAFRD in implementing commercialization transparently and fairly in a manner that facilitates investment in and development of agricultural land but that does not deprive current landowners of their property rights in the land being commercialized. DAFRD's use of commercialization procedures from DTI, though an excellent first step, should be regarded as provisional. Matters strictly related to agricultural land should be explicitly covered in such a regulation to ensure commercialization free of potential property rights claims by third parties. The regulation should, inter alia, (i) introduce procedures on notifying the public of the pending commercialization, including a description of the location and specific parcels to be commercialized; (ii) allow a reasonably short period of time for previous and current landowners to file claims against the commercialization, while the independent commission described in Recommendation no. 2 adjudicates and makes final determinations as to property rights; (iii) disclose to investors the possibilities of ownership claims against the agricultural land about to undergo commercialization; (iv) establish an escrow account from which successful claimants could receive compensation for lost income upon proving deprivation of property rights due to the commercialization; and (v) provide guidance for relevant survey, registration and cadastral work to allow for determination of ownership data, boundaries and other relevant parcel features.

Other Recommendation: Section 1.1 of UNMIK Regulation No. 2000/59 should be amended or repealed to include all non-discriminatory post-Markovic laws. As discussed elsewhere, to the ignorance of the vast majority of UNMIK officials and lawyers, various post-Markovic laws allow for the development of an agricultural land market in Kosovo. Thus, it is recommended that a neutral, independent commission be established to review all post-Markovic legislation to determine which legislation is suitable in accordance with UN Security Council No. 1244. Clear definition and criteria should be established as to what is discriminatory, relying on principles of international law.

TERMS OF REFERENCE

The terms of reference for this assignment were originally as follows:

Specific Tasks:

1. A detailed regulatory analysis of existing agricultural land and commercialization laws to include both pre-existent Yugoslav law and UNMIK laws and regulations.
2. The above analysis will be incorporated into an assessment paper on the existing laws that identifies and discusses the impediments for privatization and commercialization, and provides recommendations on how to remove the impediments.
3. Review draft with USAID, UNMIK and IFDC.
4. If time permits, on a best effort basis, develop a legal framework for the commercialization of socially-owned land that can be applied quickly without jeopardizing future privatization.
5. Provide a round table presentation of analysis and recommendations for selected personnel from UNMIK, donors and the Alliance.
6. Complete a short final report that extracts the essence of the assessment paper, including a general summary of findings, conclusions and key recommendations.

General Tasks:

1. Stewart Information International will provide the services of Mr. Robert Cemovich for a total lump sum payment basis six-day workweek for the period 6/15/01 until 7/6/01.
2. IFDC through the KADP project will supply office, communication, and local transport services and the services of two local lawyers, to be selected by Mr. Cemovich, and a translator/interpreter.
3. The specific tasks are based on the availability of translated laws and regulations being available from the UNMIK authorities. In the event that translation is required and time has to be devoted to this then the scope of work will be modified on a best effort basis by the consultant after discussion and agreement with IFDC Chief of Party and USAID/Pristina.

Specific Tasks 1 and 3 of the terms of reference were slightly modified to place greater emphasis on privatization, since IFDC has recently worked on a procedural framework for commercialization of agricultural land.

I. OWNERSHIP ISSUES

I.A. According to pre-existent Yugoslav law, the state owns land associated with SOEs.

Pre-existent Yugoslav law generally regards socially-owned agricultural land as state-owned. According to pre-existent Yugoslav legislation, as Aleksander Dardeli, Legal Advisor of DTI, indicated in his May 25 2001 Memorandum to USAID, social ownership

of land actually masks state ownership in Kosovo. We reached the same conclusion as Mr. Dardeli and find more compelling that the state owns agricultural land associated with SOEs, according to pre-existent Yugoslav laws, since the laws give ultimate authority over disposal of such land to the state's local organs, the municipalities. Pre-existent Yugoslav law seems to regard SOEs more as trustees, who are given enhanced usage and possessory rights, and who may buy, sell and modify the usage of agricultural land, only with the written approval of the municipalities.

The Law on Registration of Real Properties in Social Ownership (SAPK 37/71) provides SOEs only have a right to use real property. That SOEs may only use agricultural land is echoed throughout the Law on Agricultural Land (SAPK 21/84). Articles 5 and 15 of the Law on Transfer of Real Property (SAPK 45/81 and 29/86) more clearly provide that municipalities are authorized to approve transfers and exchanges of socially-owned agricultural land, while SOEs act more as entities with enhanced usage rights to the agricultural land.

Furthermore, pre-existent Yugoslav law generally precludes the transfer or transformation into private ownership of that land regarded as socially owned. Article 6 of the Kosovo Law on Agricultural Land (SAPK 21/84), Article 2 of the Law on Basic Property Relations (SFRY 6/80) and Article 4 of the Law on Transfer of Real Property all provide that socially owned agricultural land cannot be transferred from social ownership.

I.B. According to post-Markovic law, socially-owned agricultural land was supposed to be transferred to those individuals from whom it was confiscated, with the remainder being transferred into the social capital of the SOEs.

Post-1989 Yugoslav law might offer some clarity with regard to who owns socially-owned agricultural land. In particular, the Law on Transformation of Socially-Owned Agricultural Land Into Other Types of Ownership (RS 49/92 and 54/96) provides that the “[s]ocially-owned agricultural land acquired by a legal person [presumably an SOE] on the basis of a legal act . . . constitutes the social capital of the company.” Article 11 of the same Law provides that socially-owned agricultural land may be “transferred according to market conditions,” but gives the Serbian Ministry of Agriculture the right of first refusal for a term of thirty days, after which the entity may sell its socially-owned agricultural land. By transforming the socially-owned agricultural land into an asset of the SOE, this Law grants SOEs ownership rights over the agricultural land. Furthermore, Article 1 of the Law on Social Capital (RS 84/89, 46/90), as well as Article 1 of the Serbian Ownership Transformation Act, allow for the sale of social assets, which now include agricultural land in all parts of Serbia, with Kosovo having become a possible exception.

Prior to transforming the socially-owned agricultural land into an asset of the SOE, Article 1 of the Law on Transformation transforms into state ownership that land that was confiscated in accordance with the Law on Agrarian Reform and the Regulation on Nationalization of Agricultural Land. Article 3 obligates the Serbian Ministry of

Agriculture to return that state-owned land to its previous owners no later than 31 December 1997. If the relevant Serbian authorities complied with this law, then post-Markovic laws most probably have already transferred vast amounts of socially-owned agricultural land to the individuals whose land was confiscated and to the SOEs, which now may be privatized in accordance with other post-Markovic laws. Though further verification is still necessary, we believe, **in accordance with post-Markovic legislation, vast amounts of socially-owned agricultural land were transformed or transferred to the ownership of individuals and SOEs.**

Thus, the aforementioned Law transforms or transfers socially-owned agricultural land to two classes of owners: (i) the people who lost their agricultural land to the state in accordance with the Law on Agrarian Reform and Regulation on Nationalization of Agricultural Land; and (ii) the SOEs who acquired the land through an ordinary contract or other legal arrangement.

One must be aware that we only began to scratch the surface of the post-Markovic laws. Further study, analysis and situational assessment is needed to determine exactly what the post-Markovic laws require and permit and how they have been implemented in Serbia and Kosovo.

Note

In a March 2001 meeting, Mr. Vladimir Vasiljev, Head of the Yugoslav Cadastre Agency, explained that Serbia has returned approximately 90% of the nationalized agricultural land to its previous owners or heirs. Similarly, on page 7 of his June 20 2000 report "Development Strategy on Land Administration in the Balkans and Especially in Kosovo", Mr. Jarmo Ratia also noted that "90% of nationalized farming land has been returned to its owners." Meetings in Kosovo with various head of agrokombinats, legal officers at municipal cadastre offices and discussions with other sources indicate that the vast majority of nationalized land in Kosovo was returned to its owners, as in the rest of Serbia, in accordance with post-Markovic legislation.

At a minimum, however, one can be certain that post-Markovic laws have transformed socially-owned agricultural land into an asset that could be privatized.

I.C. Why Restitution should not be ignored

The former socialist regime nationalized agricultural land that it assigned to SOEs. In those cases where agricultural land was confiscated, the farmers or their heirs may have legitimate property rights or claims. Until the status of previous owners is resolved, securing any long-term solutions to the ownership of state and socially-owned farmland will be impossible. For political and legal reasons, UNMIK cannot avoid addressing this issue.

Much legal debate focuses on the impact of UNMIK Regulation 1999/24, as recently amended by 2000/59. Regulation No. 2000/59 recognizes only those laws enacted prior to 22 March 1989 as presently in force in Kosovo. Laws after 22 March 1989 are

applicable only in those cases where there is a gap in the pre-existent Yugoslav legislation and UNMIK regulations. After 22 March 1989, Serbia undertook a major restitution campaign throughout the country, including Kosovo. As discussed above, we have been informed that approximately 90% of all farmland was returned to previous owners in the whole of Serbia. In addition, it is estimated that around 75% of all nationalized farmland in Kosovo has been returned to previous owners already. The legal dilemma here is whether the resulting ownership rights are now valid in Kosovo, given that such rights are legally valid in the rest of Serbia, including places with a high concentration of minorities, such as Vojvodina and Sandjak.

Because the returning of the agricultural land took place in accordance with laws after 1989, the resulting ownership has been placed into question by the adoption of UNMIK Regulation Nos. 1999/24 and 2000/59. This begs the following questions:

- Is de-recognition of restituted property rights tantamount to re-nationalization by UNMIK?
- Did the UNMIK regulations re-nationalize that agricultural land and de-restitute it, thereby, returning it into social ownership?
- What are the current rights farmers have in the land in accordance with the UNMIK-established legal framework?

If UNMIK did indeed re-nationalize or take the land by abrogating the post-Markovic era laws, then such action could open UNMIK to voluminous charges of violations of international law, as well multiple property rights claims. There apparently has been no open, clear discussion on this matter.

The following best summarize our findings with regard to this issue:

- Section 6.2 of UNMIK Regulation 2000/54 provides that “Administration by UNMIK . . . shall be without prejudice to the right of any person or entity to assert ownership or other rights in a competent court in Kosovo, or in a judicial mechanism to be established by a regulation.” UNMIK is, therefore, required to address, as a part of its administrative and restructuring policy, the original owners’ property rights and claims.
- In its list of functions, DAFRD shall “. . . [f]ormulate and implement a land use policy aimed at protecting agricultural land, including criteria for re-allotting public land and modifying land use *without confiscation*.” (emphasis added) (Section 2.2d, UNMIK Regulation 2000/27). It appears UNMIK refers to “public land” as state- and socially owned. It is unclear what could constitute a “confiscation,” but many Western countries regard deprivation of property rights, as a result of a legislative action, the equivalent of confiscation.
- Restitution has been applied previously in Kosovo and will still be an issue in Kosovo. At this stage it is unclear how much agricultural land in Kosovo was

already returned to its previous owners and how much remained to be returned in accordance with post-Markovic legislation.

- On the other hand, it is possible that restitution may not be a major issue in Kosovo, since the situation might be one where most of the nationalized agricultural land has already been returned to the previous owners, possibly leaving large amounts of agricultural land free of claims from previous owners. UNMIK will have to address this issue, since it would entail recognizing ownership rights granted in accordance with post-Markovic legislation.
- The mechanism for ownership resolution in Kosovo would not be difficult to elaborate, if the restitution during the post-Markovic era is recognized and allowed to go forward, while allowing objections and claims to be filed within a reasonably short time period against such restitution.

RECOMMENDATIONS:

- 1. A one-month comprehensive assessment should be undertaken to determine how much agricultural land in Kosovo was supposed to have been returned to previous owners in accordance with post-Markovic laws and how much of this land was actually returned. The purpose of such a study is to determine the level of potential claims previous owners may have on agricultural land associated with socially-owned enterprises. Most, if not all, of the cadastral and ownership data related to restitution, is available in Serbia. It might become in the Serbs' interests to relinquish that data to UNMIK, since many Serbs would also benefit from having their ownership rights recognized.*
- 2. A team of experts should travel throughout Kosovo, Vojvodina, Sanjak and central Serbia to examine how restitution was implemented in fact. This would necessarily be part of a one-month situational assessment in Serbia.*
- 3. UNMIK should immediately recognize the restituted ownership rights of those who had their land confiscated according to the Law on Agrarian Reform and Regulation on the Nationalization of Agricultural Land, as has been done throughout Serbia. Moreover, a UNMIK regulation should be adopted that provides for procedures and the establishment of a neutral, independent extra-judicial body that would adjudicate conflicting property rights claims to the agricultural land that was returned to the previous owner. The regulation should necessarily provide for public notice and a reasonably short time period within which parties may object or dispute the ownership rights of the previous owner. If no one objects to the restitution within a reasonably short time period, then the previous owner should own the land free and clear of any clouds on his ownership right. If a party objects, claiming the land belongs to him and not to the recipient, then the independent extra-judiciary body should hear such claims and be empowered to make a final determination as to the ownership and technical description of the agricultural land parcel. Such a process would be much quicker, cheaper, efficient and fairer than if UNMIK were to begin a*

whole new process of re-restitution, especially since most of the technical work may have already been completed.

I.D. UNMIK regulations create a wide legal gap as to land ownership

The legislative dilemma here focuses squarely on UNMIK Regulation Nos. 1999/24 and 2000/59. Much legal debate has centered on whether UNMIK Regulations, by de-recognizing the post-Markovic laws, have actually re-nationalized certain agricultural land in Kosovo that was returned to previous owners in accordance with post-Markovic laws. Some individuals argue that, by abolishing those laws that called for the transformation and restitution of socially-owned agricultural land, UNMIK has effectively re-nationalized this land from the people to whom it was restituted in the 1990s and must now re-restitute it in a way its advisors find appropriate. Others argue that Regulation Nos. 1999/24 and 2000/59 were an oversight on the part of the drafters of the regulations, who did not intend to re-nationalize the land that was previously nationalized during the socialist era. This group relies on (i) Section 6.1 of UNMIK Regulation 2000/54, which provides that “Administration by UNMIK [of socially-owned property]. . . shall be without prejudice to the right of any person or entity to assert ownership or other rights in a competent court in Kosovo, or in a judicial mechanism to be established by a regulation,” and (ii) Section 2.2d of UNMIK Regulation 2000/27, which establishes DAFRD and obligates DAFRD to set “criteria for re-allotting public land and modifying land use without confiscation.”

However, the first group argues that by de-recognizing the ownership of the land that was restituted to previous owners, that land reverted back into social ownership, and, hence, has become “public land,” which could be re-allotted in accordance with Regulation No. 2000/27. In any case, the UNMIK regulations have created a gap that places in limbo those ownership rights restituted in the 1990s.

The Gap

Regulation No. 2000/59 nullifies post-Markovic laws, under which previous owners throughout Serbia, including Kosovo, received agricultural land, while Regulation Nos. 2000/54 and 2000/27 protect ownership rights and even prohibit confiscation.

The GAP: WHO NOW OWNS THE AGRICULTURAL LAND THAT WAS RESTITUTED TO PREVIOUS OWNERS IN THE 1990s?

RECOMMENDATIONS: UNMIK should quickly make a policy decision regarding the property rights of those individuals whose land was taken by the state in accordance with the Law on Agrarian Reform and Regulation on the Nationalization of Agricultural Land. The Yugoslavia-wide situational and legal assessments recommended above should shed light on the manner and magnitude of land restitution throughout Serbia during the 1990s, including areas with a high concentration of minorities, such as Kosovo, Sandjak and Vojvodina.

II. PRIVATIZATION OF AGRICULTURAL LAND ASSOCIATED WITH SOEs

MAIN IMPEDIMENT:
Prohibitions and gaping holes in the current legal environment of Kosovo hinder the development of agricultural land market

Below, we discuss the legal and regulatory impediments to privatization of socially-owned agricultural land and provide recommendations on ways to remove the impediments to allow for a private agricultural land to emerge in Kosovo in a manner that is fair, speedy and legally valid.

II.A. PRE-EXISTENT YUGOSLAV LAW: Can UNMIK privatize certain state- and socially-owned agricultural land within the current legislative framework created by 1999/24 and 2000/59? NO.

As noted above, pre-existent Yugoslav law generally precludes or outright prohibits the privatization of socially-owned agricultural land. Article 6 of the Kosovo Law on Agricultural Land (SAPK 21/84) provides that socially-owned agricultural land cannot be transferred. Article 2 of the Law on Basic Property Relations (SFRY 6/80) essentially precludes private property rights over objects that can “only be under social ownership,” while the Law on Transfer of Real Property (SAPK 45/81 and 29/86) states that “[a]gricultural land . . . may not be transferred from social ownership, unless otherwise provided by law.” Furthermore, UNMIK regulations do not contain the language necessary that could be interpreted to authorize UNMIK to privatize socially-owned agricultural land, though the regulations more explicitly provide UNMIK the power to enter into interim usage arrangements, including leases and management contracts. The power to privatize or transfer of state- and socially-owned agricultural land is conspicuously absent in the regulations. UN Security Council Resolution 1244 also does not contain language that could be reasonably interpreted to grant UNMIK or a related department the authority to effect the change of ownership of state- or socially owned agricultural land in Kosovo. At any rate, UNMIK is probably unwilling to privatize or transform state and socially owned agricultural land in a political environment rife with complex ownership issues.

However, Section 6.1 of UNMIK Regulation 2000/54 clearly grants UNMIK the authority to “administer movable and immovable property which is in the territory of Kosovo, including monies, bank accounts and other assets, where UNMIK has reasonable and objective grounds to conclude that such property is (a) property of, or registered in the name of, the Federal Republic of Yugoslavia or the Republic of Serbia or any of their organs; or (b) socially owned property.” Thus, regardless of whether agricultural land is

socially- or state-owned, UNMIK is clearly authorized to administer the land. The question then turns to whether the power to administer could be stretched to encompass the power to divest state and socially-owned agricultural land, given that privatization of such land is basically prohibited under pre-existent Yugoslav legislation now in force in Kosovo.

UNMIK Regulations specify UNMIK's authorities with respect to the administration of state- and socially-owned assets, including the right to lease, to enter into management contracts, and to reorganize socially- and state-owned assets. Divestiture, privatization or ownership transfer of state- and socially-owned assets are not provided in the regulations or in UN Security Council Resolution No. 1244. Moreover, Section 6.2 of Regulation 2000/54, in relevant part, provides that "[a]dministration by UNMIK of [state and socially-owned property] shall be without prejudice to the right of any person or entity to assert ownership or other rights in the property . . ." This serves to preclude UNMIK from undertaking any measure of privatization of agricultural land, until current (if one regard them as such) and previous owners' interests are addressed.

II.B. POST-MARKOVIC LAW: Can UNMIK privatize certain state- and socially-owned agricultural land in accordance with post-Markovic law? YES, subject to further study and verification.

A strong policy argument could be made -- subject to a legal and situational assessment in Serbia -- that agricultural land privatization and restitution are permissible in the whole of Serbia, and should be so in Kosovo. Much of the privatization may have been already accomplished by end-1997 under the Serbian restitution campaign. If post-Markovic laws have provided for restitution and possible privatization of agricultural land in a non-discriminatory manner, then such privatization could and should be recognized and facilitated in Kosovo with greater legal clarity and minimal political risk to UNMIK.

As discussed in Parts I.B, I.C, and ID of this report, post-Markovic laws have restituted much socially-owned agricultural land to previous owners and transformed the residual land into the social assets of the SOEs. According to discussions held with various directors of cooperatives and agrokombinats, the process was substantially advanced prior to the recent war. The land associated with SOEs may be sold separately or privatized along with the SOE in accordance with the post-Markovic Law on Transformation of Socially-Owned Agricultural, Law on Social Capital, and Ownership Transformation Act. Of relevance here is that UNMIK should seriously review and consider work completed to date under the extended legislative context. However, cooperation from the Serb authorities, which have most of the recent information, will probably be necessary to provide for a more complete situational assessment.

In essence, much privatization could be completed by recognizing restitution and other forms of transformation and transfers that were performed in a non-discriminatory manner, and allowing privatization to continue as elsewhere in Serbia and former Yugoslavia. Indeed, as mentioned above, a paradox is emerging in which UNMIK may be causing Kosovo's agricultural land market to revert to social ownership or to a limbo

status, in a legal sense, while the rest of Serbia appears to be transforming and transferring vast amounts of agricultural land from social to private ownership. Recognition of useful post-Markovic legislation and issuing a new UNMIK regulation accordingly could help mitigate this emerging disparity.

RECOMMENDATIONS:

1. Current Yugoslav/Serbian legislation should be examined to determine whether and how privatization of agricultural land might be conducted in Kosovo under the extended legal framework. Perhaps, certain gaps and prohibitions in the UNMIK regulations and pre-existent Yugoslav legislation could be adjusted by current Yugoslav laws that meet UNMIK standards to effect privatization of agricultural land in a manner that is fair, transparent, and resulting in free and clear ownership.

II.C. Availability of Legal, Technical and Statistical Information

Even if UNMIK were to decide to use post-Markovic law to effect the development of a private agricultural land market in Kosovo, a major impediment is the lack of recent legal and technical information on properties located in Kosovo. Because the Serbs removed most of the recent ownership and cadastral data to Serbia, ascertaining ownership and boundaries according to any legal framework is nearly impossible at this time. At one point, the Republic of Serbia may realize it is in her interests to relinquish this information to UNMIK, as the political situation in Serbia improves rapidly.

The following are our findings with regard to ownership, technical and statistical information:

1. For purposes of commercialization and privatization, it is important to determine how much agricultural land exists in Kosovo, how much land was registered in private ownership and how much land could be subject to claims by previous owners. Data from the various institutes varies. The total number of hectares of agricultural land in Kosovo ranges from 577,000 to 845,000, depending on what source one consults. Although there seems to be some consensus that about 70,000 hectares of agricultural land are socially-owned, some sources have informed us that 42,000 of the 70,000 hectares are comprised of that land that was taken from private owners during the socialist era and scheduled to be returned. Other sources state that all the land was already returned, possibly reducing the number of hectares of agricultural land associated with SOEs to around 30,000.

2. Cadastral information is generally available only up to 1987 in most municipal cadastre offices throughout Kosovo. Pristina and some other municipal cadastre offices are exceptions in that they have some cadastre information up to 1993 and many legal records up to 1997. Many of the above problems could be solved if this information were made available. Based on conversations with various officials from cadastral offices and the Kosovo Cadastral Authority, it is certain the Serbs have most of the recent ownership, cadastre and other data. Such statistical data could and should be ascertained as soon as possible.

3. Legal evidence of private ownership of agricultural land is abundant, as supported by existing courthouse documents and extracts from land registry/cadastral offices. Transfer documents approved and registered at various courthouses recognize private ownership of agricultural land. The Albanian word “pronar” and Serbian word “vlastishstvo”, which mean ownership, appear in many documents transferring agricultural land among private parties. Previous reports that individuals only had possessory rights to agricultural land seem to be exaggerated. We have concrete examples that individuals can have ownership rights in agricultural land, and based on our visits with four municipal cadastral offices, we learned that vast amounts of agricultural land are privately *owned* and registered as such. However, more work is needed to determine the description and amount of agricultural land parcels that are privately owned.

4. In most of the municipal cadastral offices visited, the SOEs were registered as the owners of that agricultural land remaining after certain of its land was restituted to previous owners. In such a case, the land remaining with SOEs should be privatized quickly, since it could be regarded as the property of the SOEs and should be free and clear of conflicting ownership claims. Regarding nationalized agricultural land that was not yet returned to previous owners, the state is registered in some cadastral offices as the possessor or owner.

5. Some documents evidencing acquisitions and expropriations during the several waves of nationalization, exist in the municipal cadastral offices, allowing for a distinction between those individuals who received land as previous owners and those who received land as settlers.

6. Courthouse documents are registered by date and jurisdiction, with copies given to the cadastral office for registration, which links parcel numbers and ownership data to a parcel map. Once updated information becomes available, speedy adjudication, confirmation and privatization of rights in land could be accomplished.

7. It is expected that there will be cases where legal and technical information presently located in Serbia and that remaining in the municipal cadastral offices are inconsistent. In such a case, the independent commission should make a final determination as to what information is legally valid.

RECOMMENDATIONS:

1. Inventorization of agricultural land in Kosovo should be quickly undertaken. Registration records should be examined to determine how much agricultural land can be regarded as privately owned, state owned, and socially owned. Assessment of Kosovo’s municipal cadastral offices’ records should be undertaken systematically to identify immediate informational needs for privatization purposes.

2. Updated records should be obtained to determine current ownership and boundary information. This may require obtaining the records and cadastral information from the Serb authorities that removed them from Kosovo.

3. Legal ownership and property descriptions – be they from the removed cadastre records in Serbia or those located at a municipal cadastre office in Kosovo – should not be accepted on their face, until a reasonable amount of time has elapsed, allowing for potential claimants to file ownership claims and for the independent commission to adjudicate such claims in the event of inconsistencies.

III. COMMERCIALIZATION: A WORKABLE INTERIM MEASURE

According to current UNMIK Regulations and pre-existent Yugoslav laws, UNMIK appears to be curtailed from privatizing agricultural land associated with socially owned enterprises. Hence, the only immediate option is leasing the land directly or placing the entire SOE structure, including its agricultural land, under a management contract (i.e. “commercialization”).

Section 2.2.d of UNMIK Regulation No. 2000/27 authorizes DAFRD to set “criteria for re-allotting public land and modifying land use without confiscation.” In addition, though specifically applicable to DTI, Section 2.2. of UNMIK Regulation 2000/63 sheds some light on UNMIK’s position on commercialization by providing that: “Where the Special Representative of the Secretary General has determined pursuant to section 6 of UNMIK Regulation 1999/1, as amended, that an enterprise in the territory of Kosovo shall be administered by UNMIK for the time being without prejudice to its future status, the Department may, subject to section 2.4 below:

- i. Act as administrator or trustee, with respect to such an enterprise, including administering monies, bank accounts and other assets, separately from the Kosovo Consolidated Budget, and granting concessions or leases with respect to such property:
- ii. Set fees, as may be required, for departmental services provided to the public.
... [and] ...

(f) enter into arrangements for the lease, management, reconstruction or reorganization of the enterprise in the interest of Kosovo.”

Although this regulation does not apply directly to DAFRD, it does show that UNMIK regulations allow for commercialization of agricultural land associated with SOEs. We learned that DAFRD has already initiated a tender for the commercialization of more

than 2, 400 hectares of agricultural land associated with an agrokombinat. Thus, commercialization of agricultural land is beginning to take place on an official scale.³

One major problem with the present commercialization scheme regarding agricultural land is that it fails to address clearly the ownership of the land undergoing commercialization. There is a considerable risk that the commercialization may take place over privately owned land without the owners' knowledge or consent. In such cases, previous owners could file claims against the successor-entity or UNMIK on the grounds that the commercialization is depriving them of their property rights – tantamount to a taking in some countries. Indeed UNMIK Regulations prohibit confiscation and require UNMIK to administer the agricultural land in a manner that would not prejudice ownership claims. Foreign or local investors may be reluctant to enter into long-term commercial contracts, knowing that previous owners could take affirmative steps to encumber, challenge or otherwise burden the commercial right to a given land parcel. It is, therefore, very important that DAFRD provide notice to all potential claimants of the agricultural land it plans to commercialize and allow claimants to produce evidence that the land is theirs. In the event of disputes, the independent commission should adjudicate the ownership and physical features of the parcel in question. If claims are made but not yet settled, DAFRD should be required to notify the entity desiring to enter into a commercialization agreement for agricultural land that there may be claims against the agricultural land.

RECOMMENDATION

The present method lacks sufficient structure and could result in abuses and deprivations of individual property rights in the agricultural land undergoing commercialization. A separate UNMIK regulation or an administrative order should be issued to establish clearer procedures and authority in DAFRD to commercialize agricultural land. In addition to other provisions, the UNMIK regulation should:

- (i) address relevant cadastre issues, requiring updated land information and boundary descriptions of the parcels scheduled for commercialization;*
- (ii) require the implementing agency to notify workers, managers, potential claimants and other stakeholders, prior to the commercialization tender, about the name, place and description of the land parcel scheduled for commercialization; ensure that the notification is conducted in such a manner that reaches all possible stakeholders;*
- (iii) provide potential claimants a short, but reasonable, amount of time to file a claim against the land scheduled for commercialization; and*
- (iv) address the procedures for establishing and maintaining escrow accounts out of which commercialization proceeds would be paid to claimants who prove their land was used for commercialization.*
- (v) Encourage settlement of property claims as quickly as possible to pave the way ultimately for free and clear ownership of the land.*

³ Although the legality of such lease contracts is open to question, various SOEs are leasing farmland to private local farmers and farm workers under one-year terms.

DOCUMENTS CONSULTED⁴

Below are only some of the documents and individuals the Team consulted in preparing this report and the legal/regulatory assessment.

Laws

- UNMIK Regulations
- UN Security Council Charter 1244
- Rambouillet Accords
- Law on Basic Property Relations (SFRY 6/80, 36/90)
- Law on Transfer of Real Property (SAPK 45/81, 29/86)
- Law on Registration of Real Properties in Social Ownership (SAPK 37/71)
- Law on Expropriation (SAPK 21/78, 46/86)
- Law on Expropriation (RS 70/84, 53/87, 22/89, 15/90, 6/90)
- Law on Land for Construction (SAPK 14/80, 42/86)
- Law on Construction of Facilities for Investment/Commercial Purposes (SAPK 5/86)
- Law on Forestry (SAPK 10/87)
- Law on Measurements and Land Cadastre (SAPK 12/80)
- Law on State Measurements, Cadastre and Information Regarding Ownership Rights (RS 83/92, 53/93, 67/93, 48/94, 12/96)
- Law on Housing Relations (SAPK 11/83, 29/86 and 42/86)
- Law on Enterprises (SFRY 77/78, 40/89, 46/90)
- Law on Social Capital (SFRY 84/89, 46/90)
- Law on Ownership Transformation, (RS 32/97)
- Law on Transformation of Socially Owned Agricultural Land into Other Forms of Ownership (RS 49/92 and 54/96).
- Law on Agricultural Land (SAPK 21/84)
- Law on the Agricultural Land (RS 52/89, 2/90)
- Law on Returning Wastelands and Pastures to Villages for Use (SFRY 16/92)
- Law on the Manner and Conditions for Acknowledgment of Rights and Returning of Land Which was Transferred into Social Ownership on the Basis of the Law on the Agricultural Land Fund and Confiscation Because of Unsettled Obligations From the Obligatory Acquisition of Agricultural Products (RS 18/91, 20/92)
- Decree for Implementation of the Law on the Manner and Conditions for Acknowledgment of Rights and Returning of Land Which was Transferred into Social Ownership on the Basis of the Agricultural Land Fund and Confiscation Because of Unsettled Obligations From the Obligatory Acquisition of Agricultural Products (RS 41/91)
- Law on the Conditions and Manner of Returning Property Generated From the Work of Cooperatives and Cooperative Members After 1 July 1953 (SFRY 46/90)

⁴ Note that many of the documents were not translated into English but utilized in their original Albanian or Serbian texts by the local lawyer working with the foreign consultant.

- Law on the Land Fund of People's Property and Agricultural Land Alienation to the Agricultural Organization (RSFJ 22/53)
- Law on Exploring of Property Relations Created During Arbitrary Usurpation of Land in National Property (SAPK 46/47)
- Law on Obligations (SFRY 29/78)
- UNMIK Constitutional Framework for Provisional Self-Government in Kosovo
- Constitution of the Federal Republic of Yugoslavia (1974, 1992)
- Constitution of Republic of Serbia (1990)

Selected Reports and Papers Reviewed

“Land Rights in the Privatization Regulation” (Memorandum to Paul Davis and Magdalena Kouneva), Aleksander Dardeli, May 25, 2001

“Promoting Effective Use and Protection of State and Socially Owned Farm Land in Kosova”, Dan Themen, IFDC, April 2001

“Status of Technical Work on Agricultural Policy and Recommendations for a Policy Framework for Kosova and Status of Technical Work on the Privatization/Commercialization of Agricultural Assets in Kosova,” Rifat Barokas, IFDC (Oct. 16 – Nov. 10 2000)

“Feasibility Study for Non-Residential Property and Ownership Rights-Draft Final Report” EAR Kosovo, SOFRECO (April 2001)

“Reconstruction Concept for Kosovo Agriculture” Halim Gjigjizy

“Kosovo Cadastre Support Programme: Inception Report”, Kosovo Cadastre Agency

“Development Strategy on Land Administration in the Balkans and Especially in Kosovo” ECE, Jarmo Ratia

“The Commercialization of Socially Owned Enterprises in Agriculture” Menderes Ibra, DAFRD

“The Creation of the Social Property in Kosovo: A Short Historical-Legal Overview,” Bajram Polozhani

Textbooks and Treatises

Zbirka Propisa Republike Srbije o Nepokretnostima Sa Sudskom Praksom (Composition of Provisions of Republic of Serbia on Real Estate For Judicial Procedure), Radmila Petakovic (Belgrade 1991)

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