

ROUNDTABLE ON LEGAL ASPECTS OF
COMMERCIALIZATION AND PRIVATIZATION
OF AGRICULTURAL LAND

SUMMARY OF PROCEEDINGS

JULY 2001

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**ROUNDTABLE ON LEGAL ASPECTS OF
COMMERCIALIZATION & PRIVATIZATION
OF AGRICULTURAL LAND**

Agenda

Date: Monday July 2nd 2001

Location: Conference Hall, IFDC, Fabrika e Plastikes, Lakrishte, Pristina

9.00-9.40 Registration

9.40 Opening Remarks:
Robert Wilson, Program Manager, USAID

9.45 Speaker 1:
Daniel Themen, Policy Advisor, IFDC
‘Setting the Scene – Comparative Experience of Land Reform in Eastern Europe’

10.00 Speaker 2:
Alexander Dardeli, Acting Head Commercial Law Development, DTI
‘The DTI Commercialization Initiative and Prospects for Privatization’

10.15 Speaker 3:
Binak Krasniqi, Co-Director Policy and Statistics, DAFRD
‘The DAFRD Approach to Reform and Protection of Agricultural Land’

10.30 Coffee Break

11.00 Roundtable Discussion, lead by:
Robert Cemovich, Legal Advisor on Land Reform, IFDC

- assessment of UNMIK regulations and pre-1989 legislation;
- commercialization of state and socially-owned agricultural land;
- privatization of state and socially-owned agricultural land;
- further legal/regulatory work required for privatization of state and socially-owned agricultural land.

12.45 Conclusions

**ROUNDTABLE ON LEGAL ASPECTS OF
COMMERCIALIZATION & PRIVATIZATION
OF AGRICULTURAL LAND**

Summary of Main Discussions

Introduction. On Monday July 2nd IFDC, in conjunction with the Alliance of Kosova Agribusinesses (AKA), held a Roundtable on Legal Aspects of Commercialization and Privatization of Agricultural Land at Fabrika e Plastikes, Pristina. The roundtable brought together 30 participants including leading legal specialists and key decision-makers to air their views and to discuss some new research conducted on the subject. The roundtable was chaired by Robert Wilson, USAID Program Manager, who opened with an acknowledgement of the importance of agriculture for Kosova and of the key nature of the resolution ownership rights to land, which would allow some of the best land in the territory to return to efficient production.

Comparative Experiences of Land Reform in Eastern Europe. The first presentation, by Daniel Themen, Policy Advisor at IFDC, explored the various approaches to privatization adopted by a number of countries of Central and Eastern Europe and drew some conclusions as to the most suitable approach for Kosova. Through the experiences of the countries analyzed there was a clear conflict within and between the more efficient procedures (sale/distribution of vouchers) and those that address distributional issues such as restitution to former owners and redistribution to current members of non-private farms.

Four primary factors are found to influence government choices of privatization procedure: the post-collectivization ownership structure, the length of communist rule, the asset distribution between ethnic groups and the pre-collectivization ownership structure. The presentation concluded that the situation in Kosova demands a more balanced approach than in a number of the countries examined, accommodating the claims of the different interest groups and communities and protecting the economies of scale and infrastructure provided by the few large farms remaining in the territory.

The DTI Commercialization Initiative and Prospects for Privatization. The second presentation was made by Alexander Dardeli, Acting Head of Commercial Law Development, at the DTI. He initially outlined the commercialization procedure being implemented by the DTI for industrial and commercial SOEs, owned primarily by their workers and secondarily by the society at large. The commercialization is a lease or concession by UNMIK to an investor who is responsible for protecting enterprise assets from degradation, paying wages, injecting liquid capital into the SOE, and making lease payments to an escrow account, for distribution once the ownership of the enterprise has been established.

The second part of the presentation focused on the three privatization strategies currently under development by the DTI.

- The first ‘spin-off’ approach involves the establishment of a Newco., to which all the productive assets of the SOE are transferred. This Newco. can then be either sold or enter into a joint venture with foreign or domestic investors. The Kosova Trust Agency (KTA) would be

established to hold the proceeds of any sale or shares issued, which would be transferred to the rightful owners once they have been identified.

- The second ‘Markovic’ approach uses the 1989-90 laws and develops a formula for SOE ownership, granting 60% of shares in SOEs to its workers and reserving 40% for the population at large. The workers would be entitled to form a JSC with the KTA managing the 40% stake until sold or transferred to its rightful owners.
- The third ‘liquidation’ approach would conduct bankruptcy proceedings according to a forthcoming UNMIK regulation on SOEs with no realistic hope of future activities. Any proceeds from the liquidations would be passed to the KTA for repayment of debts and wage arrears.

The presentation also defined ownership as understood in Yugoslav law as comprising rights to use, possession and disposal. With regard to urban land, it was suggested that despite the general prohibition on transferring land out of social ownership, urban land was effectively transferred, its use over long periods of time was possible, and the scope of such use was very broad. This, it was argued amounts almost to outright ownership, and as this was the accepted practice in Yugoslavia, it might form the basis for new regulations allowing ownership of such land. Agricultural land was seen as more complicated in that the scope of use of such land was more limited than for urban land and because some agricultural SOEs owned land outright, having purchased it directly from private owners.

The DAFRD Approach to Reform and Protection of Agricultural Land. The third presentation was made by Binak Krasniqi, Co-head Policy and Statistics at the DAFRD. He initially reviewed the post-1989 history of non-private farms in Kosova, outlining the destruction that took place on such enterprises during the recent conflict and the change in workers and membership of the agrikombinats as a result of redundancies implemented during the 1990s. He then explained why the DAFRD was currently focusing its efforts on commercialization rather than full privatization as UNMIK has not yet permitted the latter. Commercialization has been initiated, in conjunction with the DTI, the first tender, for the 2,400 hectare farm *Produkti* in Skenderai, closing for bids that same day. He explained that the 100 workers of the farm had approved the plan to lease the farm by signing the agreement and that interest was being shown by Albanian/American investors.

The second part of the presentation was dedicated to the pressing issue of protection of agricultural land from usurpation. This process, involving the illegal transfer of parcels of land for building and other uses, is threatening to complicate the resolution of the ownership question even further. He stated that such land was already protected legally under 1984 Yugoslav legislation, but that it needed to be enforced more rigorously by the municipalities. In conclusion he stated that the DAFRD priorities lay in protecting existing socially owned farmland and in proceeding with commercialization. On the issue of privatization he warned caution, stating that much land was unfairly restituted to dubious former owners during the 1990’s by municipal courts administered by the Belgrade regime.

The Legal Framework and Outlook for Land Reform in Kosova. The main discussion focused on the findings of Robert Cemovich, a leading land reform lawyer conducting analysis on the possibilities for commercialization and privatization of agricultural land for IFDC. The conclusions of his analysis of ownership of state and socially owned land were that de facto the state appeared to be the owner of land associated with SOEs, exercising its rights to transfer use of such land to

different SOEs through the municipal authorities. He underlined the difficulty in ascertaining exactly how much land falling into each ownership category given the conflicting data provided by the various departments and organizations involved.

On privatization, he concluded that current UNMIK regulation, pre-1989 Yugoslav legislation and the political situation, preclude the privatization of agricultural land. He nevertheless stressed that restitution could be addressed and that other property rights needed clarification prior to privatization. He further suggested that post 1989 Yugoslav legislation be examined in case there were laws that could be used to further privatization in Kosova. Moreover, he underlined that commercialization should also be conducted as an interim measure, although he considered a clear procedure necessary for land, building on the blueprint developed by the DTI.

As the next steps toward the goal of full privatization he suggested the establishment of an independent commission authorized to make final determinations of property rights and to adjudicate parcel locations and boundaries so as to free continuous tracts of land of potential claims. He further called for a full examination of the ownership composition of agricultural land and the extent to which restitution had already taken place. And finally he suggested that the authorities consider assessing post-1989 Serbian and Yugoslav legislation to determine whether and how land in Kosova might be privatized within this extended legal framework.

Open Discussion. Comments and questions from round table participants, notably from representatives of Riinvest and the Alliance of Kosovar Agribusinesses, underlined the impatience of many in the agricultural community with the slow pace of land reform in Kosova compared with that in the rest of the former Yugoslavia, where similar patterns of ownership had been found prior to 1989. Tardiness in the resolution of ownership issues, it was claimed could only undermine the process of democratization of society. They also expressed the fear that effort was being wasted on the halfway house of commercialization. Particular concern was voiced about the abuse of SOEs by investors committed only to running enterprises for the 10 years of the lease, and calls were made for stricter monitoring of commercialization agreements by UNMIK.

Conclusions and Recommendations. The following overall conclusions can be drawn from the presentations and subsequent discussion:

- i) Protection of agricultural land from usurpation and illegal transfers should be halted as a priority;
- ii) Privatization of agricultural land is not currently permitted under the UNMIK administration.
- iii) There are nevertheless a number of steps toward resolution of ownership issues that can be taken while the question of privatization debate continues.
- iv) Commercialization can proceed according to the DTI developed procedure, although certain amendments and additions should be considered to adapt it for use on farmland.
- v) Commercialization should be seen as a merely temporary means of returning state and socially owned land to production and as such should not be allowed to hinder the development and advocacy of full privatization strategies for agricultural land.

IFDC's Agribusiness Policy Support Unit, part of the Kosova Agribusiness Development Program sponsored by USAID, will follow up the roundtable by distributing, three papers: on legal obstacles to privatization, on comparative experience in land reform and on the strategy for land commercialization.

Presentation 1: Comparative Experience of Land Reform in Eastern Europe¹

Daniel Themen, Policy Advisor, IFDC

- Estimates vary for the precise amount of land held by state and socially-owned farms in Kosova. There is consensus, however, that it amounts to some 70,000 hectares of farmland in the territory. Although this may appear a small fraction, it comprises some of the most productive land in Kosova and the only farming units than can benefit from economies of scale.
- Without immediate action, however, many such farms are in danger of total collapse. State and socially-owned farms in Kosova are in urgent need of restructuring. Such farms are cultivating as little as 20% of their land, employing only one quarter of their pre-1990 employees and operating a fraction of their pre-war machinery. Changes are already taking place on many of these farms with respect to use rights, which will, without effective intervention, reduce the availability of prime agricultural land and restrict options for fundamental restructuring irreversibly.
- This presentation explores the various approaches to privatization adopted by a number of countries of Central and Eastern Europe and draws some tentative conclusions as to the most suitable approach for Kosova.
- Through the experiences of the countries analyzed there is a clear conflict within and between the more efficient procedures (sale/distribution of vouchers) and those that address distributional issues such as restitution to former owners and redistribution to current members of non-private farms. Four primary factors are found to influence government choices of privatization procedure: the post-collectivization ownership structure, the length of communist rule, the asset distribution between ethnic groups and the pre-collectivization ownership structure.
- In most cases collective land and property was restituted to former owners, while state land was leased pending sale. The main reason for this was that most state farmland had been officially nationalized during the collectivization drives while collective land had remained formally privately owned, making it justifiably open to claims for restitution. Only in Albania and the former CIS was both collective and state land distributed to farm members because in such cases both types of land were legally owned by the state and, particularly in the CIS, the length of communist rule meant that there was little demand for restitution.
- The asset distribution between ethnic groups was a decisive factor in countries such as the Baltics, Czechoslovakia and Poland, where recent immigrants and long-established minorities were consciously excluded from restitution. The pre-collectivization ownership structure proved capable of either resolving disputes, as in Bulgaria where land ownership had been egalitarian prior to 1945, or exacerbate them, as in Albania where it had been highly concentrated).

¹ A full version of this paper will be available shortly from IFDC.

- In Kosova the post-collectivization ownership structure is blurred by the concept of ‘social ownership’. This type of ownership appears to be neither state, collective or private, but implies ownership by the whole society. Although many argue that this concept merely masks state ownership (particularly with regard to formal alienation rights), there are claims by former owners with valid title to the land, suggesting that all such land was not formally nationalized and could be restituted where this has not already taken place.
- On the one hand the length of communist rule in Yugoslavia was relatively short (in comparison with the USSR) with the result that former owners still have outstanding and often valid claims to plots of land. On the other hand pre-1991 Yugoslav reforms (the ‘Markovic laws’) encouraged farm workers to begin transforming socially owned enterprises into joint stock companies of which they, rather than the former owners, were shareholders. Thus any land privatization strategy for Kosova should acknowledge the rights of both former owners and current farm members.
- The ethnic makeup of Kosova also demands a balanced approach to privatization, particularly on the emotive issue of farmland. Given UNMIK’s current administrative powers of state and socially owned assets and retention of those powers even after the November elections will enable it to ensure that ethnic pressure is not allowed to influence the equity of the privatization process. Where isolated pockets of a certain ethnic group refuse or are unable to coexist with their neighbors, those with a right to land can be granted a share in a different farm in a preferred location.
- The pre-collectivization structure of land ownership in Kosova remains unclear. What is undeniable, however, is the need to discourage the parcellization of the only large-scale farms in the territory even if pre-collective ownership patterns were equitable. A privatization strategy should thus attempt to preserve the economies of scale and infrastructure currently available on some of the most productive land in Kosova, perhaps by using the method of share privatization employed in Russia and Ukraine.
- Kosova could logically either follow the lead of Slovenia, with which it shares its collectivization history and ownership structure by restituting land, or the successes of Albania, which is similar in its high percentage of the population tied to the land and relative rural poverty, by redistributing land in kind. The current situation, however, demands a more balanced approach, accommodating the claims of the different interest groups and communities and protecting the economies of scale and infrastructure provided by the few large farms remaining in the territory. This will require a mixed procedure for privatization, more comparable to the Hungarian or Romanian models, and encompassing elements of restitution, distribution and compensation.

Primary Land Privatization Procedures in Central and Eastern Europe

Country	Collective Land Privatization Procedure	% of Total	State Land Privatization Procedure ²	% of Total
Albania	Distribution (physical)	76	Distribution (physical)	24
Bulgaria	Restitution	72	Mixed	9
Czech Republic	Restitution	61	Sale (leasing)	25
East Germany	Restitution	82	Sale (leasing)	7
Hungary	Restitution, Distribution (physical) & Sale for compensation bonds	70	Sale for compensation bonds & Sale (leasing)	12
Latvia	Restitution	57	Restitution	38
Lithuania	Restitution	62	Restitution	30
Poland	-	4	Sale (leasing)	19
Romania	Restitution & Distribution (physical)	58	Undecided & Restitution	28
Russia	Distribution in shares	40	Distribution in shares	58
Slovakia	Restitution	71	Sale (leasing)	15
Slovenia	-	0	Restitution	17
Ukraine	Distribution in shares	N/A	Distribution in shares	N/A

² Research stations remained in state ownership throughout Central and Eastern Europe.

Presentation 2: The DTI Commercialization Initiative and Prospects for Privatization

Alexander Dardeli, Acting Head, Commercial Law Development, DTI

As there was no written paper or notes available for this presentation, a presentation on a related subject given by the same speaker on July 3rd 2001 has been included below. The presentation at the roundtable on July 2nd focused on the commercialization and privatization alternatives being explored by the DTI [see Summary of Main Discussions on pp3f above] and only secondarily on land. The paper below gives a much more detailed analysis of DTI research on ownership of land held by SOEs.

Land in Social Ownership – A Challenge For UNMIK*

1. Introduction

This paper is concerned with land in social ownership. Indeed, it views such land primarily from the perspective of socially owned enterprises (SOEs). It begins with a discussion of the meaning of social ownership over land. It continues with a discussion of the rights that SOEs have over land. It provides a cursory distinction between agricultural and urban land in social-ownership. Then it focuses on UNMIK's authority to legislate land ownership rights. Next comes an overview of the complications created as a result of past expropriation and/or nationalization processes. The paper ends with a recommendation on the mid-term resolution of the problem of land in social ownership.

2. Social ownership over land is the effective equivalent of state ownership over land

A few words on SOEs: the history of the 1988-90 SFRY Laws on Enterprise and on Social Capital strongly suggests that such companies are owned primarily by their workers, broadly defined, although the larger social community also appears to have retained some undefined residual interest. However, it is clear that what is owned by the workers is assets such as machinery and buildings, not land. Because these laws do not provide for either state control or a right of the state to the proceeds of their sale, it cannot be said that these companies are "owned" by the state, at either the federal or the republic level.

SOEs control significant portions of land in Kosova. The land they control is deemed to be land in social-ownership. Land in social-ownership is not necessarily always under the control of SOEs.

The overwhelming mass of pre-1989 legislation in Yugoslavia designates land as an asset in "social ownership." Few exceptions are made for land used for "personal purposes."

The 1974 FRY Constitution makes no mention of state ownership over land. The only concept that approximates the idea of ownership by a representative entity on behalf of society or the public is

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the concept of “social ownership.”³ From a purely formal perspective, “social ownership” is not necessarily equivalent to state ownership. A state is a territorial unit with a distinct general body of law.⁴ A state also can be assigned more easily the attributes of an owner, or legal person, via its authorized instrumentalities that operate like corporations (municipal corporations). Society is legally vague and undefined. It has less precise contours than a state. It may or may not have a distinct general body of law. Only with difficulty can it be assigned attributes of ownership.

In practice, however, “social ownership” over land appears to have been equivalent to state ownership over land. Consultations with local experts and discussions with SOE managers reveal that no one considered land in “social ownership” to have been anything but state-owned land.

Why would the drafters of the 1974 FRY Constitution have painstakingly avoided using the term “state ownership” in favor of a vague term that can be formally distinguished from state ownership but practically equivalent to it? The answer is necessarily speculative. Such avoidance seems to have been an intentional effort to present actual state ownership in a more palatable form, i.e. social ownership, a form that was supposed to make everybody feel as if they had a share in resources held by everybody and nobody. Too, such ambiguity made possible the use of land as an asset by enterprises that were meant to function like Western-type businesses while ensuring the then Eastern-type prerogative of the League of Communists to intervene anytime through the state to assert control and ownership over such assets whenever its goals and interests were threatened or frustrated.

3. Rights that SOEs currently have over their land

³ The 1974 fry Constitution proclaims that no one has the right of ownership over the social means of production (1974 FRY Constitution, as amended, Basic Principles III). “Means of production and other means of associated labor, products generated by associated labor and income realized through associated labor, resources for the satisfaction of common and general social needs, natural resources, and goods in public use” are social property (Id, Article 12.). Consultations with local legal experts suggest that “natural resources” was understood to include land and forests. According to this constitution, “no one may acquire ownership of the social resources, which are conditions of labor in organizations of associated labor, or are the economic foundations for the realization of the functions of self-managing communities of interest and of other self-managing organizations and communities, and of socio-political communities” (Id). Citizens may own residential buildings and dwellings, “means of labor,” office buildings and office premises. They can lease such property to others and earn income from it (Id, Article 78). However, no one may own land in cities, urban centers, or areas intended for housing and other complex construction, if such land is lawfully earmarked for such construction by the relevant municipality (Id, Article 81). Farmers may usually own up to 30 hectares of arable agricultural land. They may own in excess of 30 hectares in hilly or mountainous regions (Id, Article 80). The 1974 Kosova Constitution mirrors the 1974 FRY Constitution in all essential provisions regarding ownership of land. Albeit not applicable law, the 1990 Constitution of Serbia is helpful in consolidating the understanding of “social property.” It speaks of equal treatment of all forms of ownership including social, state and private ownership (1990 Constitution of Serbia, Article 57). Resources owned by society can be transferred to other forms of ownership under market conditions as specified by law (Id, at Article 59). Natural resources and goods in general use as goods of common interest, and urban construction land, are owned by the state or society (Id, at Article 60). Again, “natural resources” is understood to include agricultural land and forestland.

⁴ Restatement, Second, Conflicts, § 3.

It is clear that SOEs cannot sell the land alone. They obviously have a right of use over it for different business purposes and a right of possession. It is difficult to fully distinguish the right of possession from the right of use in practice.⁵

The 1980 Law on Basic Property Relations (BPR) suggests that ownership is a bundle consisting of three essential rights: the right of possession, the right of use, and the right of disposal.⁶ This conceptualization of ownership mirrors the classic understanding of ownership in Roman law. Ownership was also defined as a bundle of these three essential rights in Yugoslav legal theory.⁷ The sum total of these three rights amounts to outright and full-fledged ownership.

All the pertinent land legislation speaks of rights of use given to SOEs. Only the 1981 Law on Transfers of Real Property (TRP) speaks of a right of disposal.⁸ However, it's clear that this is a

⁵ Formally, possession seems to be a fact with legal consequences not unlike in German real estate law (1980 Law on Basic Property Relations (BPR), Article 70). Possession is implied in those cases where a person is given a right of use over land (Id.). As Yugoslavia was a civil law country, comparisons with other civil law countries may be useful. In French substantive real estate law, ownership is defined as “the right to enjoy and dispose of things in the most absolute way, provided that no use is made of them forbidden by law or regulations.” Article 544 of the French Civil Code. Ownership itself in French real estate law consists of three elements: *fructus*, that is the right of enjoyment, the right to keep and take the fruits of a thing; *abusus*, that is the right to use a thing including consume, destroy, alienate or change it, and *usus*, that is the right to use as owner within the confines of the law. Christian Dado and Susan Farran, French Substantive Law, 81 (1997). French law recognizes the right of a person, other than the owner, to enjoy things in the same manner as the owner, but subject to the obligation to conserve the substance of the thing. Such person is called a “usufruitier” (usufructuary), and in practice has all the prerogatives of an owner. Usufruct is only a life interest. Id., at 82. Possession is “the detention or the enjoyment of a thing or right by oneself or by another who holds the thing and enjoys it on behalf of another. Article 2228 of the French Civil Code. Rights of use exist in German substantive real estate law. *Niessbrauch* is essentially a usufruct, which resembles a lease, but being a right in rem, usufruct differs from a lease in that the right to use and acquire “fruit” is by definition safe against a transfer of property. Werner F. Ebke & Matthew W. Finkin Ed., Introduction to German Law 243 (1996). *Erbbaurecht* is a right of use applicable to land only, which covers the right to build, keep and own a building on another person's land. Id. Possession in German law is merely a fact with legal consequences. Id., at 233. It is characterized by physical not legal control over something.

⁶ BPR, Article 3. BPR states that no private ownership may exist over objects that can only be under social ownership (BPR, Article 2). “Objects” is understood to include land (Conference call with Montenegrin real estate law professors at USAID, Prishtina, on May 15, 2001). An owner of property may possess, use and dispose of his property, as provided by law (BPR, Article 3). This provision mirrors the bundle of rights that were deemed to exist in real property according to Yugoslav legal theory. See Mehdi Hetemi, Fundamentals of Business Law, page 166 [1996]. Citizens may own agricultural and other land, forests, commercial buildings and premises as well as “means of work” that are used for personal gain (BPR, Article 10). With regard to buildings located on socially-owned land, BPR provides that the owner of the building has a right of use over the underlying land so long as the building exists (Id, Article 12). Adverse possession is not a valid way of acquiring ownership over socially-owned property (Id, Article 29).

⁷ See Mehdi Hetemi, Fundamentals of Business Law, page 166 (1996).

⁸ TRP, Article 5. Amended in 1986 and 1988, the 1981 Law on Transfers of Real Property (TRP) states that agricultural, urban construction and forestland may not be transferred out of social ownership unless otherwise provided by law (TRP, Article 4). Socially-owned legal persons may freely transfer such land among themselves without compensation, or for compensation that does not exceed the amount of investments made on the land (Id). Socially-owned legal persons may *sell* agricultural land only when such land is not adjacent to their main holding, and so long as they use the sale money to buy other agricultural land within 2 years of the sale (Id, Article 5). A similar provision governs forests (Id, Article 6). These two provisions suggest that SOEs could own land (Article 5 of TRP states that socially-owned persons can exchange land over which they have a “right of disposal” for other land). Indeed, discussions with legal experts confirm that SOE's could purchase agricultural or forest land from private owners. Socially-owned legal persons may acquire ownership of buildings or sections of buildings and may sell such real estate for fair market value at a public auction (TRP, Articles 7, 9, 12). This provision suggests that, in a good number of cases, such fair market value would logically have to include the fair market value of the right of use. Such sales contracts may be executed by persons authorized by a decision of the municipal assembly or other competent “organ” authorized by this assembly (Id, Article 15). Article 17 speaks of real estate owned by the Autonomous Social Province of Kosova but does not articulate what such real estate was. Private owners are required to offer their “agricultural land” or “development area land” respectively to self-governing organizations (SOEs and cooperative farms) and municipalities (Id, Articles 19 & 20). The municipality has, thus, a right of first refusal over land even in private sales.

very limited right of disposal. It applies only to agricultural land purchased directly by the SOEs from private owners. The 1971 Law on Registration of Real Property in Social Ownership (RRP) lists only a right of use as the possible right that SOEs are required to register in public land registers.⁹

All the major pieces of Yugoslav legislation applicable to land include language prohibiting “transfers” of socially owned land out of social ownership. Such language would normally mean that there was almost a complete ban on exercising a right of disposal over socially owned land.

This right of use was understood to include any reasonable agricultural use in the case of agricultural land¹⁰ and any legitimate business use in the case of urban construction or development area land.¹¹ At least with regard to urban land, this establishes that, in practice, the right of use was almost unlimited in scope.

TRP allows for transfers of land without compensation among socially owned legal persons.¹² Compensation was due in those cases where the socially owned legal person had made investments on the land. In fact, as socially owned legal persons had a right of use over their land, what they could transfer in the overwhelming majority of the cases was precisely this right of use.

With regard to urban construction and/or development area land,¹³ the municipality had a reversionary interest in the land that was triggered once the right of use expired. It is important to

⁹ RRP states that real property in social ownership and the rights that socially-owned legal persons have in such real property must be recorded in public land registers (RRP, Article 1). Significantly, RRP suggests that the only right that such socially-owned legal persons have in real property in social ownership is a right of use (Id). It states that real property in social ownership includes land and buildings. By implication, it would seem that socially-owned legal persons have only a right of use over buildings. This implication, if indeed correct, is contradicted by TRP, Articles 7, 9, 12. These TRP Articles make it clear that socially-owned legal persons could sell buildings. The right of disposal is tantamount to full ownership. As TRP is later in time, its provisions prevail. Law on Construction Land (see below) also suggests a right of disposal that could be exercised by socially-owned legal persons. The registration of real property may be carried out on the basis of a court order, a certified contract, or a unilateral statement by an owner conveying his real property for free to the “social community” (Id, Article 3).

¹⁰ According to the 1984 Law on Agricultural Land (LAL), arable land in use or out of use, fruit orchards, vineyards, pastures, meadow land, swamps or any other kind land which would lend itself most appropriately to agricultural production is considered agricultural land (LAL, Article 2). Ownership over agricultural land cannot be acquired through transfers (Id, Article 6). If those who have a right of use over agricultural land in social ownership do not use such land, then “social interests” are deemed to have been “harmed gravely.” Municipalities determine whether such grave harm has occurred and may take conservatory measures. Wherever LAL mentions agricultural land in social ownership the word it employs to indicate a right over such land is “use.” Agricultural land can be leased (Id, Article 58). Subleases are void (Id, Article 60). Municipalities and Provincial entities share responsibility for the enforcement of LAL. The sum total of the LAL provisions, however, suggests that municipalities were primarily responsible for its enforcement. The municipalities indirectly determined what constituted agricultural land by designating urban construction land and development areas. Such designation practically left the rest of the land in a municipality to be used as agricultural and/or forestland. The 1987 Law on Forests (LOF) governs forests and forest land (LOF, Article 1). Both are deemed to be of special “general interest” (Id). Transferability of forests and forest land is governed by TRP to the extent that LOF does not provide otherwise (Id, Article 7). The leasing of forests and forest land is governed by LAL to the extent that LOF does not provide otherwise (Id). Ownership of forests cannot be acquired through adverse possession (LOF, Article 8). Forests in social ownership are considered “capital assets” (Id, Article 11). Municipal assemblies set the boundaries of forests by decision upon application of the entity that administers forests (Id, Article 70).

¹¹ LCL, Article 13 speaks of “permissible purposes.” Legal scholars and practitioners agree that “permissible purposes” was interpreted broadly and creatively to mean any legitimate commercial activity. There is consensus that, at least theoretically, an SOE could use its land for permissible purposes almost indefinitely.

¹² TRP, Article 4.

¹³ Amended in 1986, The Law on Construction Land (LCL) states that municipalities ensure the rational use of construction land in social ownership (LCL, Article 3). Construction land exists in urban areas and development areas. Municipalities administer construction land in social ownership pursuant to LCL (Id, Article 32). Municipalities are permitted to grant to SOEs a right of use over land in which the municipalities have a right of disposal so that the SOEs may build residential buildings or commercial buildings on the land (Id, Article 39). In such cases, SOEs may acquire ownership of the buildings in accordance with applicable law

note that the time limitation implied here was never formally included in the grant of the right of use but arose by operation of relevant laws. In most cases the right of use expired when the building ceased to exist. The owner of the building had an intervening right of first refusal regarding the option to re-build. If the owner chose to rebuild, the right of use over the land was extended. This intervening right of first refusal coupled with the original right of use over the land suggests that the right of use was almost indefinite. If this right of first refusal was not exercised (a possibility that makes no sense economically), the reversionary right of the municipality was triggered and the land reverted back to the municipality.¹⁴ In practice, the right of use would thus seem to have been unlimited in time.

The municipality had an interest that approximates a possibility of reverter (a slightly different interest than a reversionary one) with regard to agricultural land and forest land. If the land user failed to use his/her/its land as agricultural land, the municipal assembly had to make a determination that “grave harm” had occurred against the “social interest” and divested the socially-owned legal person of its right of use.¹⁵

It is important to note three things, at least with regard to urban land. First, SOEs were permitted to sell buildings on land over which they had a right of use. This practice suggests that the value of the right of use over the underlying land was included in the price and was therefore practically freely transferable. Second, through ownership of a building on socially-owned land, and their right of first refusal with regard to rebuilding in cases where the original building ceased to exist, SOEs could extend their right of use over the land almost indefinitely. Third, the scope of a right of use was almost boundless as any legitimate business use was considered a “permissible purpose.”

(Id). A municipal assembly is the competent authority to declare what urban construction land is (Id, Article 5). Such “declaration” amounts essentially to condemnation of the land. The right of use in urban construction land means the right to use the land underneath a building and the land adjacent to a building, which is necessary for the enjoyment of that building where the relevant party has a right to such enjoyment. The underlying and adjacent land can be transferred only if the building is transferred (Id, Article 12). So the land underneath the building goes with the building. Socially-owned legal persons may use free urban construction land only for “permissible purposes” and may transfer such free urban construction land only to the municipality once the municipality changes its designation (Id, Article 13). Article 15 essentially states that “self-governing organizations and associated labor organizations” (presumably SOEs) are obligated to return the free land over which they have such rights of use to the municipality according to the terms of the transfer of such use right. This plausibly means that the municipality has a right of first refusal whenever such use rights are transferred. However, local legal expertise suggests that this provision simply meant that the transfer back to the municipality had to be carried out with an agreement that mirrored the terms of the original transfer agreement. An immediately prior owner of free urban construction land can use such land for permissible purposes until obligated by decision of “competent authority” to return this land to the municipality for the preparation of such land for construction (Id, Article 17). Prior owners are compensated in accordance with the Law on Expropriation (Id, Article 25). An immediately prior owner of free urban construction land has a right of first refusal over the right of use over such land when the municipality approves plans for construction of this land and the prior owner meets other requirements specified by law (Id, Article 18). A prior owner has this right of first refusal also in cases where the land that he was in possession of includes at least one third of the newly designated construction lot and meets other requirements specified by law. These rights can be transferred only to immediate family members, and legal inheritors (Id, Article 19). Persons who effectuate their priority with regard to newly designated urban construction land, and other persons that acquire through public competition the right of use over such newly designated urban construction land, may not transfer the finished or unfinished building during the first ten years after obtaining permission to use the building (Id, Article 23). Violations of this provision trigger a decision by the municipality to take such land for due compensation according the Law on Expropriation (Id). The owner of a building on urban construction land has the right of use over the underlying and adjacent land, which is necessary for its enjoyment. The right of use over such land is coextensive with the life of the building. If the building ceases to exist or becomes unusable, its owner has a right of first refusal with regard to rebuilding on the same land. The right of use over the underlying and adjacent land cannot be transferred separately (Id, Article 24). Development areas are created by a decision of the municipal assembly (Id, Article 27). All the provisions applicable to land in social ownership that is found in an urban construction area are applicable to land in social ownership that is found in development areas (Id, Article 28).

¹⁴ LCL, Article 24.

¹⁵ LAL, Article 13.

4. Difference between agricultural and urban land

Some SOEs possess and use land that is outside of a city's limits and clearly not urban. Others possess urban land, whether in industrial or residential areas.

The main practical difference between urban construction land and development area land, on the one hand, and agricultural and forest land, on the other, appears to be the broader uses to which the former could be put.¹⁶

SOEs have a right of use over either kind of land, whether urban construction or agricultural. Instances of SOEs owning land outright appear so far to involve agricultural land purchased directly from private owners.

5. UNMIK's authority to grant or confirm ownership over land to newly privatized SOEs

Ordinarily, granting or confirming rights to land is an attribute of a sovereign.

SCR 1244 vests UNMIK with "basic civilian administrative functions where and as long as required."¹⁷ UNMIK is directed to support the reconstruction of key infrastructure and other economic reconstruction.¹⁸ UNMIK is expressly empowered to administer movable and immovable property registered in the name of FRY.¹⁹

These documents have generated an understanding of UNMIK as a trustee-occupant "exercising the most important attributes of sovereignty on behalf of the people of Kosova and empowered to transfer these attributes to interim governmental entities, private investors and to institutions defined by the ultimate political settlement."²⁰

However, such proactive views come from outside UNMIK. There is consensus that UNMIK has developed an entrenched aversion to any proposals for conferring ownership over property that was practically owned by FRY.

This paper supports the view that UNMIK should be challenged in this regard.

6. Determining whether the current legal owners of the land used by the SOEs have obtained ownership by lawful and equitable means

¹⁶ LCL speaks of "permissible purposes" with regard to the use of free urban construction land. LCL, Article 13. There is no corresponding provision in LCL with regard to development area land. LAL suggests that agricultural land can only be used for agricultural purposes. LAL, Article 13.

¹⁷ UN SCR 1244, Paragraph 11(b).

¹⁸ Id., at Paragraph 11(g).

¹⁹ UNMIK/REG/1999/1, Section 6.

²⁰ Henry H. Perrit & John M. Scheib, *Rebuilding Kosova: UNMIK as a Trustee-Occupant*. Perrit and Scheib suggest that Yugoslavia should be understood to have a reversionary interest which might be altered in an ultimate political settlement. Perrit and Scheib state that UNMIK "possesses the necessary legal authority to adopt legislation and to take executive steps to create and transfer property rights necessary to economic development and the attraction of foreign capital." See also Antonio F. Perez, *The Scope of UN's Authority to Administer Property in Kosova*. Perez states that UNMIK is not "foreclosed from transferring title to property owned by FRY."

Between the two World Wars, Kosova experienced an erratic “agrarian reform” and a wave of forceful colonization.²¹ From 1945 to 1953, Kosova experienced massive expropriation of land for nationalization. Legal title was conferred to the state.²² The expropriation wave was followed by a policy of encouraging farmers to donate land to state enterprises and farms. Such “donations” appear to have been inequitable as the state or the ruling communist party would normally pressure private owners to part with their land through discriminatory or punitive taxation.²³

The 1974 FRY Constitution improved the standing of Kosova in the federal republic. It made possible the enactment of provincial legislation that was intended to give a face-lift to individual property rights in Kosova.²⁴ Such legislation triggered attempts to reclaim nationalized property but these were first resisted and then banned by the abrogation of the autonomy of Kosova in 1989.

If this analysis that the state is the formal owner of SOE land is correct, ultimate, long term, resolution of property rights in Kosova may hinge to a considerable extent on determining whether the acquisition of such ownership has been lawful and equitable. However, such determination goes well beyond the scope of this paper.

7. Conclusion and Recommendation

Secure property rights to land elicit effort and investment. Indeed, land serves as collateral for credit or as a source of security. Such secure property rights to land provide the basis for land transactions and improve the transferability of property. Secure and well-documented property rights promote efficiency in land transfers and are key to ensuring the optimal use of land resources. Clear property rights are key to preventing wasteful “over-investment” in protective measures by entities eager to claim and defend their property rights over land. Lack of enforceable property rights over land leads to unsustainable use and degradation of natural resources.

Land rights in Kosova are muddy and unclear. They are governed by a contradictory legal regime that used legal fictions to mask political realities. UNMIK must inject certainty in land rights in Kosova as a necessary prerequisite to economic development. UNMIK cannot hold Kosova hostage to legal fictions that were created under a bankrupt philosophy of governance and that are wholly incompatible with Kosovo’s transition to a market economy. UNMIK is under a moral obligation as an occupant-trustee to fulfill the core purpose of the trust: enabling economic development as a foundation of substantial autonomy.

I submit that, as a medium term solution, UNMIK recognize grantees of rights of use and possession over what is currently considered socially-owned urban land as owners of this land. Agricultural land may warrant different treatment. This recommendation is primarily based on the following analysis. Despite the general prohibition against transferring land out of social ownership, urban land was effectively transferred, its use over long periods of time was possible, and the scope of such use was very broad. First, SOEs were permitted to sell buildings on land over

²¹ See Ejup Statovci, *On Real Property Relations in Kosova*, (Belgrade 77) for an inclusive, albeit pro-communist, overview of these processes and related legislation.

²² See IFDC Policy Paper – Reform of State and Socially-Owned Farms. See also Ejup Statovci, *On Real Property Relations in Kosova*, (Belgrade 77).

²³ Discussion with judge of the Economic Court, Prishtina, and former Ereniku general counsel.

²⁴ Ejup Statovci, *On Real Property Relations in Kosova*, (Belgrade 77).

which they had a right of use. This practice suggests that the value of the right of use over the underlying land was included in the price and was therefore practically freely transferable. Second, through ownership of a building on socially-owned land, and their right of first refusal with regard to rebuilding in cases where the original building ceased to exist, SOEs could extend their right of use over the land almost indefinitely. Third, the scope of a right of use was almost boundless as any legitimate business use was considered a “permissible purpose.”

If this analysis is correct, then the general prohibition against transferring land out of social ownership was effectively evaded and was, indeed, a fiction. Further, if this analysis is correct, grantees of rights of use and possession had in practice, all the indicia of ownership. Such legislative recognition of ownership would therefore entail an updated reflection of practices that were made feasible and were encouraged by prior legislation.

Presentation 3: The DAFRD Approach to Reform and Protection of Agricultural Land

Binak Krasniqi, Co-head Policy and Statistics, DAFRD

Roundtable Discussion: The Legal Framework and Outlook for Land Reform in Kosova²⁵

Robert Cemovich, Legal Advisor on Land Reform, IFDC

General Findings from Assessment of UNMIK Regulations and pre March 1989 Legislation

- Current legal environment precludes privatization of socially- and state-owned land
- Commercialization could and should proceed
- State appears to be the owner
- Lack of reliable information on amount of agricultural land and ownership categories

Ownership Issues

- State appears to be the owner of land associated with SOEs
- Municipalities administer land on behalf of the state
- SOEs enjoy enhanced usage rights
- How much agricultural land is privately owned? State owned? Socially owned?
- UNMIK is precluded from privatizing or commercializing state-owned assets in a manner that would prejudice the rights of future claimants
- Restitution issue should be sorted out post haste

Privatization Issues

- Current UNMIK regulations, pre-existent Yugoslav law and political situation preclude UNMIK from privatizing the agricultural land
- Claims by previous owners should be addressed and property rights resolved prior to privatization
- What do post-Markovic laws say?

Commercialization Issues

- Previous owners and other claimants could be a problem; but should not legally block commercialization
- Commercialization could and should proceed in Kosova as quickly as possible, but should be viewed as only an interim measure.
- A clear procedure should be elaborated in a UNMIK regulation or administrative order
 - notice provisions for stakeholders
 - allow a reasonably short period of time for claims

²⁵ The full paper and legal assessment will soon be available from IFDC.

- establish an escrow account from which successful claimants would receive proceeds from the commercialization
- survey and cadastral information

Next steps to consider

- GOAL: Find a way to privatize land associated with SOEs in a manner that is speedy, fair, and legally valid.
- Establish independent extra-judiciary commission to make final determinations as to property rights and to adjudicate parcel location and boundaries to allow for large tracts of agricultural land to be free and clear of potential claims
- Situational assessment throughout Kosova and neighboring territories to determine ownership composition of agricultural land, how restitution claims were handled and risk of future claims
- Consider assessing post-Markovic laws to determine whether and how agricultural land associated with SOEs could be privatized in Kosova within this extended legal context.

**ROUNDTABLE ON LEGAL ASPECTS OF
COMMERCIALIZATION & PRIVATIZATION
OF AGRICULTURAL LAND**

List of Participants

1. Robert Wilson	Program Manager	USAID
2. Mentor Thaci	Institutional Relations Coordinator	AKA/IFDC
3. Daniel Themen	Policy Advisor	IFDC
4. Robert Cemovich	Legal Advisor	IFDC
5. Osman Gosalci	Legal Advisor	IFDC
6. Alexander Dardeli	Legal Advisor	DTI
7. Binak Krasniqi	Co-head, Policy & Statistics	DAFRD
8. Menderes Ibra	Agronomist	DAFRD
9. Marti Muigai	Legal Advisor	DAFRD
10. Xhevat Azemi	Legal Advisor	DAFRD
11. Malcolm Toland	Project Manager	CIPE
12. Iljaz Ramajli	Administrative Director	Riinvest
13. Ismet Krasnici	Secretary	League of Cooperatives
14. Agim Zajmi	Professor, Agriculture Faculty	University of Pristina
15. Iljaz Haxhiu	Head	Agrokomplex
16. Magdalena Kouneva	Legal Advisor	USAID
17. Merita Emini	Legal Advisor	USAID
18. Flora Arifi	Program Assistant	USAID
19. Ismet Isufi		ACT/MCIC
20. Michael Abraham		UNMIK - Peja
21. Faton Nagavci		RUTH
22. Hiqmet Demiri	Extension Services Advisor	IFDC
23. Dennis Zeedyk	Association Advisor	IFDC
24. Fatmir Salju	Executive Director	SHMK
25. Sali Aliu	Executive Director	KODAA
26. Beka Zahiti	Executive Director	SHPUK
27. Sabri Kadriu	Monitoring Evaluation	IFDC
28. Hamza Gashi	Policy Officer	IFDC
29. Merita Gjushinca	Data Analyst	IFDC
30. Labinot Velju	Translator	IFDC
31. Qazim Kelemendi	Media Officer	IFDC
32. Arjanit Mulaku	Media Assistant	IFDC

Media Representation

1. RTV 21	Television
2. Radio Evropa e Lire	Radio
3. Kosova Live	Radio
4. Rilindja	Print
5. Bota Sot	Print
6. Zeri	Print
7. Koha Ditore	Print
8. Kosova Sot	Print

**ROUNDTABLE ON LEGAL ASPECTS OF
COMMERCIALIZATION & PRIVATIZATION
OF AGRICULTURAL LAND**

Sample of Press Coverage

On Legal Aspects of Commercialization and Privatization of Agricultural Land

Why is Property Being Destroyed ?

A conference held yesterday by IFDC at Fabrika e Plastikes in Pristina and headed by Robert Cemovich, Legal Advisor on Land Reform for IFDC, addressed the legal aspects of commercialization and privatization of agricultural land. The aim of this conference was to bring together the relevant legal specialists and key decision makers and allow them to air their views and to discuss some new research conducted on the subject, said Daniel Themen, Policy Advisor at IFDC. The aim, he said was to reach a consensus on what is required to proceed with land commercialization and on the first steps to be taken in the process of privatization in Kosova. According to him, commercialization and finally the full privatization of state and socially owned agricultural land, is being promoted by IFDC so that such land is not left fallow and so that the members of project assisted associations can participate in commercialization. He also presented the experience of land reforms in Eastern Europe.

Binak Krasniqi, a co-director at the DAFRD, spoke about the reform initiatives and the protection of agricultural land. He said that a major problem was the usurpation of agricultural land, which the Department of Agriculture is attempting to prevent. The root of the problem is the lack of laws and regulations and until regulations are passed protecting social property, there is a serious risk of the destruction of such property. He added that the department supports commercialization, but that unless all departments cooperate, agricultural lands will be lost. Alexander Dardeli from the Department of Trade and Industry confirmed that his department is exploring (analyzing) the possibilities for privatization. According to him, there are several sectors of economy including agricultural and food enterprises that are running and have not been abused but rather further protected by the guarantees [inherent in the commercialization procedure]. Land plays a role in the privatization strategies for all enterprises, which generally have usage and possession rights over their land. He said that commercialization will be only a temporary solution.

Meanwhile, on the issue of identifying UNMIK's first step toward privatization of state and socially owned property and how the question will ultimately be resolved, Mr. Themen said that ultimately it depends on the officials, 'We can only suggest potential next steps. We will explore the commercialization procedures of the Departments of Agriculture and Trade and Industry, and together with the lawyers gathered here today, examine ways to approve the first steps in the privatization process.'

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