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AGRICULTURAL LAND MARKETS IN LITHUANIA, POLAND,
AND ROMANIA: IMPLICATIONS FOR ACCESSION TO THE
EUROPEAN UNION

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APPENDIX

MATRIX OF KEY LEGAL AND POLICY ISSUES RELATED TO AGRICULTURAL LAND MARKETS
IN LITHUANIA, POLAND, AND ROMANIA

I. INTRODUCTION

This report examines the legal basis for development of agricultural land markets in three of the ten Central and Eastern European countries seeking accession to the European Union (EU), with special reference to the requirements for accession. The three countries are: Lithuania, the Baltic country with the highest proportion of population in agriculture; Poland, the country currently engaged in accession negotiations with the highest proportion of its population in agriculture; and Romania, the country preparing for a later round of accession negotiations with the highest proportion of its population in agriculture.

For each of the countries chosen, agriculture plays a significant role in their economies, and agricultural land is a resource (and an asset) on which more than one-fifth of their populations rely. Thus, the implications of the EU accession requirements with respect to agricultural land-market development are of considerable importance.

This review is based largely on work done in Lithuania, Poland, and Romania in March and April of 1999. The authors spent one week in each country carrying out the following activities:

- meeting with senior government officials, government specialists, legislators, bankers, non-governmental organizations, other non-governmental specialists, lawyers, EU personnel, World Bank personnel, and other expatriate specialists knowledgeable about various aspects of rural land market development;
- gathering and analyzing constitutions, laws, and other legal acts that have a bearing on the various aspects of land market development; and
- interviewing local officials, family farmers, and managers of larger enterprises about the status and development of the land market on the ground.

II. RELEVANT EU ACCESSION REQUIREMENTS

Two main requirements for accession to the EU have been identified as relevant to agricultural land. First, countries seeking accession must achieve a "functioning market economy." This requirement was one of four accession criteria declared by the EU heads of government at the Copenhagen European Council in June 1993.¹ To meet this requirement, at the threshold a country's laws must allow a market to function for each of the major factors of production which make up a market economy.

¹ European Council, *Conclusions of the Presidency*, Copenhagen, June 1993; see, e.g. *Agenda 2000—Summary and Conclusions of the Opinions of Commission Concerning the Applications for Membership to the European Union Presented by the Candidate Countries*, Strasbourg/Brussels, 15 July 1997 DOC/97/8.

One of those factors of production is land. Thus, land must be substantially privately owned and capable of being bought and sold. In addition, this requirement carries implications for the legal rules governing processes of land privatization, including processes of land restitution to former owners. Further, the law must also provide the critical supporting structures for a land market, such as registration of land rights and mortgage financing of land transactions.

Second, citizens and legal entities of EU member states should have the right to take up activities as self-employed persons, and to set up and manage undertakings, on the territory of other EU member states.² This right is known as the "freedom of establishment," and includes specifically the right to acquire and use land and buildings (*Treaty* Article 54(3)(e)).³ The "freedom of establishment" is significantly qualified, however, in at least two relevant ways:

1. When agricultural land or buildings are involved, implementation of the freedom to acquire land and buildings in another member state is made subject to the objectives of the common agricultural policy, which include taking account of the "social structure of agriculture," the "disparities between the various agricultural regions," and the need to make adjustments "by degrees" (*Treaty*, Articles 54(3)(e) and 39(2)); and

2. The freedom-of-establishment principle only requires that an EU citizen be afforded treatment equal to "the conditions laid down for [a country's] own nationals" (*Treaty*, Article 52). Presumably, such conditions must also meet the separate "market economy" criterion laid down in Copenhagen. In plain language, a country can impose restrictions on certain activities if the restrictions apply equally to nationals and other EU citizens, and if the restrictions still allow the country to meet the market economy criterion.⁴

III. COUNTRY DISCUSSIONS

This review of the current legal basis for agricultural land markets in Lithuania, Poland, and Romania was carried out against the background of the two relevant accession requirements. Also, the

² See the *Treaty Establishing the European Community (as Amended by the Treaty on European Union)*, Articles 52, 54, 58, 39. UNTS II (1957), and TEU amendments at O.J. C224/1 (1992) and 31 I.L.M. 247. A consolidated text of the *Treaty* can be found in George A. Bermann, et al., *European Community Law Selected Documents (including European Union Materials) 1998 Edition 5* (West 1997).

³ See also *1961 General Programme for the Abolition of Restrictions on Freedom of Establishment*, O.J. English Spec. Ed. 2nd series, IX 7 (Council of the EEC), Title III (A)(d) (second lettered sequence, following (a)-(j)).

⁴ See *Commission v. Greece*, Case 305/87, [1989] ECR 1461, in which the European Court of Justice held invalid under Article 52 Greek laws which had discriminatorily prevented natural or legal persons of other EU members from owning land in border areas and on the Greek islands. See also *General Programme*, Title I, and III (A) and (B) (suggesting that treatment of other EU persons affording rights beyond national treatment may only be required if they are resident self-employed natural persons).

review utilized⁵ a checklist of potential impediments relating to agricultural land markets that the Rural Development Institute developed for the World Bank.⁶ These potential impediments fall under the following 10 broad categories:

- Private ownership of agricultural land;
- Privatization of agricultural land;
- Land restitution;
- Farm restructuring (as it impacts marketability);
- Land-use regulation (as it impacts marketability);
- Transactions in agricultural land;
- Land mortgage;
- Land registration;
- Land taxation (as it impacts marketability); and
- Compulsory acquisition of land (as it impacts marketability).

Each of the following discussions of Lithuanian, Polish and Romanian land markets is organized according to these subject areas. Where significant problems are identified in the legal regime for land markets, we have offered brief “best practice” recommendations for their solution.

A. Lithuania

Lithuanian law contains many of the needed provisions for a market economy in agricultural land to develop. Lithuanian citizens may own land, and engage in the full range of transactions. The law demonstrates a commitment to privatization of state-owned agricultural land, largely through the restitution process. Laws on land mortgage and land registration are sound. In addition, the law does not contain provisions allowing the government to overregulate land rights, or to unacceptably terminate land rights, to any significant degree.

Problems do persist, however. Transaction costs are high, the registration system is in danger of being fragmented throughout the government bureaucracy, and restitution is proceeding slowly due to problems with the various laws and implementing regulations. Also, the Lithuanian Constitution prohibits foreign citizens from owning land, as well as prohibiting both domestic and foreign legal entities from owning agricultural land. These restrictions undoubtedly raise major issues regarding EU accession.

⁵ Two recent reports were particularly helpful for two of the three countries covered by our review. For Poland, we are indebted to Action for Cooperation in the Field of Economics, *The Development of Land Markets in Central and Eastern Europe* (Draft Final Report, June 1998) (covering Poland, as well as the Czech Republic, Hungary, Latvia, Slovakia, and Slovenia, and based on field research carried out during the second half of 1997). For Lithuania, we are indebted to Csaba Csaki, William H. Meyers, & Natalija Kazlauskienė, *Status of Agricultural Reforms in Lithuania: 1995-1997* (World Bank 1998).

⁶ Roy Prosterman and Tim Hanstad eds., *Legal Impediments to Effective Rural Land Relations in Eastern Europe and Central Asia: A Comparative Perspective* (World Bank Technical Paper No. 436, 1999).

Private Ownership of Agricultural Land

Lithuania allows full private ownership of agricultural land by its citizens. Restrictions do exist, however, on private ownership by legal entities. Lithuania's Constitution allows agricultural land to be owned only by citizens and by the state. Thus, legal entities cannot own agricultural land, even if they are Lithuanian. This limitation could adversely impact the development of a market economy in two ways. First, by forbidding Lithuanian banks (which are legal entities) from owning land, the limitation might make mortgage financing of land purchase difficult or impossible. Second, forbidding land ownership by legal entities engaged in agricultural production may impair development of more competitive and efficient farms. Since a fundamental requirement for accession to the EU is the existence of a functioning market economy, the restriction is problematic.

Lithuanian law also proscribes ownership of agricultural land by foreign citizens and legal entities. These issues are discussed in the section on *Transactions in Agricultural Land* found below.

It is widely expected that this constitutional restriction against ownership of agricultural land by legal entities will be removed (a similar restriction was removed for non-agricultural land in 1996). Some believe this change will occur before next year's parliamentary elections, while others believe the change will not occur until the restitution of agricultural land is substantially completed. Completion of restitution could take several years, as discussed below.

Privatization of Agricultural Land

The primary question surrounding land privatization and its relationship to the development of a market economy is the amount of privatization that has in fact occurred. In Lithuania only 36.7 percent of agricultural land has been fully privatized; 63.3 percent remains in state ownership. However, several important facts make this statistic less gloomy. First, the Lithuanian government clearly intends to privatize a significant majority of its agricultural land. See the following section on *Land Restitution*. Second, over half of the state-owned agricultural land is leased to family farmers or used by citizens on auxiliary plots. Furthermore, while Lithuania has a far higher proportion of state-owned agricultural land than in Poland, for example, the administrators of such land appear more willing than in Poland to make it available in small and medium-sized parcels for lease to the family-farm sector.

Privatization of land has occurred in three principal ways. The most significant method is restitution, a process still ongoing. The second way is through the allocation of 2-3 hectare auxiliary plots in use to citizens, who are then allowed to buy the plots out with vouchers or with money. The third way was through the allocation of land to peasant farms in 1989, at the beginning of the land reform.

One obstacle to meaningful land privatization encountered in some transition economies is transferring land into so-called private ownership, but without the right to sell that land. This is not a

problem in Lithuania: when land is transferred into private ownership, it is with the full range of expected ownership rights. Also, the state has not exempted from privatization large amounts of land for specialized production, as has been the case in some other countries. Exemptions for high-quality seed and animal-breeding, research, and other specific purposes probably constitute one percent or less of agricultural land.

Land Restitution

The principal focus of Lithuania's agricultural-land privatization efforts is the restitution of land to Lithuanian citizens who were pre-World War II owners, or their successors. Restitution is, preferentially, to be of the specific land that the pre-war owners had cultivated. Unfortunately the process has gone slowly. The basic political will to carry out restitution exists, but the process has been plagued by problems with laws and implementing procedures. Thus, as mentioned above, only 36.7 percent of agricultural land has been formally transferred into private ownership, including final registration.

The major problems with the restitution program are as follows:

1. Some land was allocated to peasant farmers in ownership under the 1989 law of the Lithuanian S.S.R. "On Peasant Farming," before the restitution law was first adopted in 1991. As a result, unresolved conflicting claims exist between peasant farmers and restitution claimants.
2. The state allocated a substantial amount of land for use as auxiliary plots, and gave the users the right to buy out these plots (first with vouchers, and currently for a somewhat high state-determined price). Some of this land is now in private ownership, while most of it (an estimated 17.4 percent of all agricultural land) is still state-owned. This land was given out in 2-3 hectare allotments. As with the land allocated to the peasant farmers, much of the auxiliary plot land is subject to conflicting claims by restitution claimants.
3. The deadline for submitting restitution applications was extended in successive amended versions of the law.
4. The categories of people who were given restitution rights were expanded in successive amended versions of the law, most recently in the 1997 law "On the Restoration of the Rights of Ownership to the Existing Real Property." Most notably, they were expanded to include grandchildren of the original pre-war owners.
5. Several different laws, and potentially several amended versions of the same law, may be applicable depending on the date a restitution claim was submitted. There also appears to be a lack of clear legal rules to resolve the conflicts between the claims of actual users and restitution claimants under (1) and (2).

6. Numerous administrative problems exist, such as the use of complex Soviet-era land valuation procedures rather than market values.

Some of these problems, paradoxically, seem to arise from efforts to be scrupulously fair to restitution claimants. Complex rules and procedures contribute to indecision and gridlock. It is also worth pointing out that an estimated 50 percent of the claims for restitution of land in kind have now been dealt with. However, as one person noted to us, “the last 30 percent are likely to be the hardest.”

- Recommendation: It would be very desirable to speed up the restitution process, but the issues are daunting and involve highly technical problems of administration and dispute resolution. The best that can be suggested is that the Lithuanian government must recognize that its present goal of completing restitution by 2000 is unrealistic, and that it try to implement solutions to the problems outlined above. Unfortunately, from a legal perspective the problems described in (1) through (4) involve rights which were granted, and thus cannot now be taken away. Some clarifications of ambiguities in the law may be possible under (5). The chief hope lies under (5) and (6), where initiatives to streamline administration and conflict resolution may be possible (improve training of officials who are tasked to work out solutions to conflicting land claims, use market valuations, etc.).

Farm Restructuring

The primary issue concerning farm restructuring and land markets is whether land traditionally used by collective and state farms is being transferred to the ownership and use of individuals. In Lithuania, transfer of ownership has been slow due to difficulties with the restitution process. Nevertheless, most land is used by individuals, as follows:

- Roughly 66 percent of agricultural land is used by family farmers or auxiliary plot holders.
- Approximately 16 percent of agricultural land is used by the 1,650 agricultural companies which are the effective successors to (although much smaller than) the former collectives. Slightly more than half of this 16 percent is leased from the state, and the rest is leased from private owners.
- About 17 percent of agricultural land is unused, with the remainder used in miscellaneous small categories.

The key factors leading to the relative smallness of the agricultural company sector have been government policy to transfer land to individuals, coupled with the prohibition in the Constitution on ownership of agricultural land by legal entities.

Finally, Lithuania has not restricted transactions with privatized land in a way that discourages farm restructuring, as can be seen in some transition economies. A land share system (featuring a cosmetically reorganized state or collective farm using most of its traditional land base, but with the land held in common ownership by the farm members) does not exist in Lithuania. As to individual land

plots, at one point restituted land not being used directly by its owner had to be leased to the agricultural companies. This obligation no longer exists, and most restituted land not used by its owner is apparently leased to family farmers.

Land Use Regulation

Severe penalties do not appear to be used for regulating land use. The 1994 law "On Land" requires that agricultural land not be used irrationally. No "non-use" provision exists, but the law prohibits allowing agricultural land to be overgrown with shrubs or forests. However, there is no clear specification of penalty, and no indication that loss of the land (with or without compensation) is a possible penalty.

Certain legal issues arise when a landowner wants to change the use of his parcel from agriculture. If a town-planning document designates land as available for non-agricultural purposes, then the conversion can be easily made. Otherwise, it appears that a change in the town plan must be obtained under a rather complicated procedure. In addition, special compensation must be paid based on a multiple of the difference in profitability between the land as used for agriculture, and the land as used for non-agricultural purposes (i.e., a number of years of expected profit for the change must be surrendered up-front). Such conversions of land are rare, especially since land usually can be found which is already properly designated.

Transactions in Agricultural Land

1. Sale and lease transactions

All private landowners have the right to sell, and to carry out other usual transactions, and the state has not imposed moratoria on land sales. Although the state does not produce standard forms for exercising transaction rights, private parties have developed and utilized their own forms (with guidance also from the Land Law). Land leasing is not restricted, except that under the 1993 law "On Leasing" of Land some leases may have to be for a three-year minimum term.

One issue that still remains is, for agricultural land that has been sold by the state, as distinct from restitution land, the state has a priority right under the law "On Land Reform" to meet competing offers when the private owner subsequently offers that land for sale. Such a limited and straightforward priority right probably will not raise serious problems, although ideally there would be no such right.

2. Rights of foreigners

Regarding rights of foreign citizens and legal entities, the Lithuanian Constitution presently limits ownership of agricultural land to Lithuanian citizens and the state. Foreign ownership is thus precluded. The exclusion of foreign citizens and foreign legal entities from ownership of agricultural land, compounded by the exclusion of Lithuanian legal entities, raises substantial problems for EU accession. Both the "freedom of establishment" issue and the "functioning market economy" issue appear to arise (see the discussion in the *Relevant EU Accession Requirements* section above). The "freedom of establishment" issue arises with respect to the ban on ownership by foreign citizens, although it may not

arise with respect to the ban on foreign legal entities, since Lithuanian legal entities are also excluded from ownership, thus making the prohibition non-discriminatory. However, the potential problem must also be reviewed in light of the policy considerations integral to the common agricultural policy: taking account of the "social structure of agriculture," the "disparities between the various agricultural regions," and the need to make adjustments "by degrees." (See Articles 54(3)(e) and 39(2) of the EU Treaty.)

The "functioning market economy" issue may arise with respect to the ban on agricultural land ownership by Lithuanian legal entities, both because they, a major class of likely market participants, are excluded from the market, and because Lithuanian banks, in particular, may be discouraged from mortgage lending if they cannot acquire land upon which they are foreclosing, even in the absence of other buyers. Thus, even Lithuanian citizens may find it difficult or impossible to obtain purchase-money mortgages to finance the buying of agricultural land, arguably an essential component of any functioning land market.

Lithuanians generally recognize the problems with restricting foreign ownership. We found fairly broad agreement that the prohibition on foreign ownership should be ended, although many people thought it would be best to complete the restitution process first.

As a final matter, prices of agricultural land on the private market in Lithuania are clearly very low. They are estimated to be around 1,500 to 2,000 litas/hectare (\$375 - \$500/hectare). These prices are low not only in relation to EU market prices, but even relative to prices in neighboring Poland, where a realistic estimate of average market price may be as high as 7,000 zlotys/hectare (roughly \$1,800/hectare). These great price differences suggest that unfettered foreign access to the land market could be highly disruptive, precisely what the Treaty policies quoted above are intended to avoid. In the previous round of EU accession, which involved a much more prosperous group of countries (Austria, Finland, and Sweden), even a restriction whose elimination would have involved far less potential social and economic dislocation (a restriction on foreign purchase of land for vacation homes) was permitted to be retained for a five-year period after accession.⁷

- Recommendation: The restriction on agricultural land ownership by Lithuanian legal entities, especially banks, appears highly vulnerable under the "functioning market economy" criterion, and should be quickly eliminated. This will require a constitutional amendment. As to ownership of agricultural land by EU citizens and legal entities, EU policy and precedent are deferential to the need for extended transition periods (including post-accession periods) to avoid dislocation. This approach should be applied in the Lithuanian context as well.

3. High transaction costs

⁷ See Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland, and the Kingdom of Sweden, and the adjustments to the treaties on which the European Union is founded. O.J. C241, 29/08/94, Title III, Article 70.

High transaction costs are a major problem, especially for transactions involving small amounts of land. The two principal costs are notarial fees and surveying charges. Both notaries and surveyors are private, but the process either requires or encourages high charges. The Ministry of Justice approves the fee schedule for notaries, which starts with a fixed fee of 300 litas for all sales of immovable property with a value up to 30,000 litas (thereafter 0.7 percent of the price up to 100,000 litas, and so on). Surveyors are “approved” at the *rayon* (county) level and publish their fee schedule, which is anywhere from 150 to 500 litas/hectare for their work (equivalent to \$37-\$125/hectare), depending upon a variety of factors. One farmer we interviewed was buying four hectares for up to 3,000 litas/hectare and paying fees totaling 1,200 litas for redrafting the land plan and notarizing the sale. This amount is equal to 10 percent or more of the purchase price of the land. For the purchase of a one-hectare auxiliary plot of poor-quality land, surveying costs could be almost equal to the price of the land.

- **Recommendation:** The minimum fee for notarization should probably be reduced. But, most importantly, competition among the private surveyors needs to be stimulated. It may be necessary to set nationally a maximum price for surveying (perhaps per parcel as well as per hectare) which should be substantially lower than the present fees. While the economic conditions are quite different, a situation of real competition among private surveyors in Moldova, for example, has led to a typical survey of one hectare divided into three separate parcels costing the equivalent of 32 litas.

4. Discrepancy in rent levels between state and private land

Another problem is the discrepancy between rent levels for state-owned land and privately-owned land. This discrepancy may be undermining the lease market, and possibly the sale market, for privately-owned land. Although private farmers we spoke with were leasing land from private parties as well as from the state, it was clear that rent levels for state-owned land were far lower. Rents on state-owned land are usually 1½ percent of a calculated “value” (an amount which is also equal to the normal level of land tax), typically now 20-30 litas per hectare. This is equal to roughly two to three percent of the average value of grain production per hectare. Rents on privately-owned land appear to be in the range of 120-150 litas per hectare (or equivalent in grain), although there are also cases where the owner leases the land for amounts described as “symbolic” or for payment by the lessee of the land tax. It seems highly likely that the availability of substantial amounts of state-owned land at comparatively very low rent levels is significantly undercutting both the private lease and private sale markets.

Recommendation: The solution is to finish the restitution process and get the state out of the business of owning and leasing out substantial amounts of agricultural land.

5. Size limits

Neither maximum nor minimum size limits unduly impede the development of Lithuania's land market. The maximum size limit on ownership of agricultural land by a family is 150 hectares, and was established under a series of laws, including the law "On Land Reform" as amended through 1997. This does not appear to create a problem, although some thought must be given to possible adjustment if

legal entities are given the right to own land. In addition, under the 1994 law "On Land," lower ownership limits could, theoretically, be set locally in accordance with local land-use planning documents. There is no maximum on the amount of leased land. Furthermore, under the law "On Land," it is theoretically possible for sub-division of private agricultural land holdings by transfer to be limited under local land-use plans. This appears to be the only respect in which a minimum size requirement could apply, and does not appear to be a problem in practice.

Land Mortgage

The legal rules as to mortgage under the 1997 law "On Mortgage" and other laws appear to be adequate, with the important exception that legal persons (hence banks) cannot own agricultural land. Thus, if there is an inadequate bid, or no bid, at a foreclosure auction, a mortgagee bank cannot acquire ownership of the land itself, even temporarily. At a minimum, this probably will lead banks only to take mortgages on agricultural land which is clearly marketable and has value well in excess of the loan amount, so that sale to a third party at an acceptable price at a foreclosure auction would be virtually assured. We spoke with one bank that does, nonetheless, make some loans on the collateral of agricultural land, but the restriction on bank ownership clearly is a constraint.

- Recommendation: Unfortunately this is a constitutional issue, so a partial approach is very difficult. Ideally, however, an interim solution would allow banks to own land for a brief period of time, if that land was not successfully auctioned at a foreclosure sale.

The law contains no express reference to purchase money mortgages, but this does not appear to create a problem.

Excessive protection for the mortgagee may give rise to problems, although the practical experience with foreclosure is thus far very limited. The 1997 law "On Mortgage" appears to subject the debtor to a foreclosure auction within little more than a month after default, and we are not aware of any separate period-of-grace or special saving provisions. By world standards, such a rapid foreclosure procedure is fairly drastic.

Land Registration

The 1996 law "On the Real Property Register" appears basically adequate, although some improvement might be imagined. Registration is to be carried out by the "State Land Cadastre and Register." One emerging problem is that there is now a separate Mortgage Registry, maintained in the courts by the Ministry of Justice. In addition, there is discussion about further fragmenting the registration system by turning over registration of other encumbrances or servitudes to the Ministry of Justice.

- Recommendation: Every interest in land that is to be registered should be registered in one accessible place, whatever that place is. Rather than further fragmentation, re-combination of the Mortgage Registry with other registered information would be desirable.

The law "On the Real Property Register" appears to require registration under its new procedures. Rights registered under earlier registration procedures are protected, however, until registered under the new procedures. The registry is open to the public.

We heard complaints about the slowness of the process of registering land sale transactions. The complex requirements found in the law "On the Real Property Register" make it easy to understand the difficulties, even though that law also attempts to set some unrealistically short time-lines for various review steps in the registration process. Registration fees do not appear to be substantial, but notarization and, especially, survey costs for land sales are excessive. See discussion under *Land Transactions* above.

Finally, initial privatization of agricultural land does not seem to be burdened by complex requirements for legal land descriptions and surveys, but survey standards for subsequent private sales are more exacting. Even so, it does not appear to be the standards themselves, so much as the excessive fees charged by surveyors for the work done, which are the problem.

Land Taxation

Land taxes are quite low. They usually amount to 1.5 percent of a state-calculated land value, and may be forgiven by local government. A tax of 1.5 percent of the calculated value would typically be around 20-30 litas per hectare, equal to perhaps 2-3 percent of the average value of grain production from a hectare of land.

No sales tax is levied on the first deal for sale of a restituted land plot made per year; any additional deals are taxed at a rate of 20 percent of the contractual price.

Compulsory Acquisition of Land

The 1994 law "On Land" clearly and narrowly identifies the purposes for compulsory acquisition. The constitutional standard is "adequate compensation." The law "On Land" provides for payment of "the official land market price of that locality," with the right to appeal to a court. Whether "official" and actual market prices may differ significantly, or may come to differ significantly as a land market develops, is difficult to assess. At least at present, compensation for compulsory acquisition does not appear to be a problem.

B. Poland

Poland has the best-developed legal base for agricultural land markets of the three countries reviewed. Polish citizens may own land, and carry out the full range of transactions with that land. Registration and mortgage laws exist and are functioning, and land use rules are generally reasonable. Persistent problems include delays in privatizing some of the former state farm land, a process of registration that takes much too long, and restrictions on foreign ownership of land.

Private Ownership of Agricultural Land

Private ownership of both agricultural and non-agricultural land is legal in Poland. Natural and legal persons may privately own land and enjoy the full range of expected ownership rights. Poland does, however, have significant administrative restrictions on acquisition of private land ownership by foreigners, which are addressed below.

The right of legal persons to privately own agricultural land has not given rise to any problems of coerced contribution of individually-held land to charter capital of enterprises, as in some transition economies. In Poland, the state farm/cooperative sector only uses 20-25 percent of agricultural land (the rest is held in family farms).

Privatization of Agricultural Land

Seventy-five percent of Poland's agricultural land stayed in family farms throughout the communist period. This land remained privately owned and did not require privatization. With respect to the remaining land, certain issues exist as to full privatization.

The Agricultural Property Agency (APA) is a state agency formed in 1992 under the 1991 law "On Administration of State Treasury-Owned Immovable Property." The APA took over roughly 4.6 million hectares of land, which had been occupied by state farms (3.7 million hectares), by the National Land Fund (600,000 hectares), or held in miscellaneous categories (300,000 hectares). The agricultural land in these categories represented 19% of Poland's total agricultural land base. The APA liquidated the state farms (average size 2,500 hectares), and distributed the three categories of land as follows:

- 2.8 million hectares were leased, largely to 6,000 newly-created smaller farms (average size 450 hectares). These new farms are far smaller than the old state farms, but many of them are probably still closer in functioning to a "state farm" than to a "family farm." Although lacking some of the benefits of household-size private farms, these 6,000 farms do continue to employ many former state farm workers, a group that received no privatization benefits.
- 728,000 hectares have been sold, apparently mostly to family farmers to expand their holdings;
- 161,000 hectares have been transferred free of charge;

- 330,000 hectares have been "redistributed" through "management," "perpetual usufruct," or "administration;" and
- 616,000 hectares are officially awaiting disposal, but indications from the APA are that this land is of poor quality and will probably not be used.

The most important issue related to privatization is the disposition of the 2.8 million hectares which have been leased out mostly to the 6,000 new farms created from the former state farms, usually under mid- to long-term lease (we encountered some 15-year leases), and at rather low lease rates. These 2.8 million hectares represent about 11 percent of all agricultural land. We were told by the APA that it is selling about 100,000 hectares of this land annually - probably nearly all to the lessees, who have a preemptive right to buy under the Civil Code. (The lessees are most likely buyers for another reason: a non-lessee buyer would be purchasing land already leased for a long term and at low rents to the lessee.) However, at the present rate it will take 20 to 30 years to fully privatize this land.

Some observers believe the APA is attempting to extend its bureaucratic life rather than serve its intended function of privatizing state land by selling this 2.8 million hectares at such a slow pace. Others argue that, if a new law mandates rapid privatization of APA-held land, most of that land would go to the 6,000 smaller (but still rather large by Polish standards) farms which came out of the break-up of state farms, rather than to true family farmers. Several factors reinforce this possibility: the currently depressed state of agriculture; the location of much of this land away from areas of family farming; and the existence of the leases.

- Recommendation: The land in the APA land fund should be transferred into private ownership. The APA should be given, by law, a fixed period (at most 5 years) to liquidate its "inventory" and close its doors. This may require much lower land prices than the APA presently offers, and probably – where the lessee does not want to buy or cannot meet another's offer – some preference for those local farmers who do exist. A second, lesser preference may also be needed for others who want to relocate to farm directly. Importantly, this land should be made available for purchase in single fields or units that are much smaller than the average size (450 hectares) of the 6,000 farms that are currently this land's principal lessees.
- Recommendation: If APA-held land is to be fully privatized, the workers on the 6,000 successor enterprises to the state farms should receive 15 percent of the financial proceeds of privatization, equivalent to what workers in the non-agricultural sector received when their enterprises were privatized.

Land Restitution

A leading issue in transition economies concerning restitution is whether claims are being processed slowly or are not yet decided. Either a slow pace or potential overhanging claims could prevent the affected land from being presently marketable. (Restitution is not an EU requirement, but a "functioning market economy" is.)

Poland does not currently have a restitution law, but successive drafts of such a law have been debated by the parliament through most of the 1990s. However, even if such a law eventually is adopted, it will affect a very small percentage of agricultural land. The only land affected will be APA-administered land -- land which the state expropriated from the aristocracy or large landlords after World War II and put into state farms. Most expropriated land under the post-war land reform was given in ownership to family farmers; that distribution is universally considered legal and binding, and will not be affected in any way. At most, a restitution measure would return an estimated 300,000 hectares to former owners. The APA has identified such former estates that had been swallowed by state farms, and has followed a policy only to lease this land and not to include it in any land being sold.

Farm Restructuring

As discussed above, the state now leases most of the land formerly held by state farms to some 6,000 farms operated by private enterprises or individuals which average about one-fifth the size of the former state farms. See the recommendation as to full privatization under *Privatization* above.

Because Poland does not have a land share system, the issue of “locking up” land in inefficient production units through long-term lease of land shares to large agricultural enterprises does not arise. The system of leasing out most former state farm land to 6,000 farms which are still rather large by Polish standards may tend, however, to lock up land in inefficient production units. The recommendation under *Privatization* above would attempt to ameliorate this effect by offering this land for sale – still subject to the existing lease, of course – in units much smaller than 450 hectares.

Land Use Regulation

We have found no provisions in Polish law threatening dire consequences for “irrational use” or “non-use.” Nor have we found any indication of draconian penalties for land-use violations. However, under the 1994 law "On Spatial Development" and related measures, a spatial development (zoning/land-use) plan must be complied with in order to get a valid construction permit. This law actually goes dramatically, and undesirably, further than nearly all laws in the EU or North America, requiring compensation to the owner where a change in zoning reduces the value of his land. Following common practice, existing uses are also generally protected against zoning changes.

Under the law "On Spatial Development," if a spatial-development plan which zones particular land for agricultural use has been approved by the *gmina* (village-level administrative body), a change to non-agricultural use requires a change in the plan (a change in zoning). This change necessitates a substantial procedure and approval process. This procedure and approval are carried out at the *gmina* level, however, and our discussions suggest that the actual difficulties of conversion may range from slight to severe, depending on the particular locality (and probably upon such factors as whether the change is to allow a substantial job-creating investment). Under the same law, it might be noted, if the beneficiary of a zoning change then sells the rezoned land, the *gmina* can impose a special fee equal to up to 30 percent of the increase in value of the property due to rezoning. However, this fee clearly does

not represent a confiscatory level of taxation. A formula is used which probably reduces the impact still further compared to the actual price paid.

Transactions in Agricultural Land

1. Sale transactions

Poland appears to have an active sales market in agricultural land. The APA, for example, estimated that 500,000 – 1,000,000 hectares are sold each year on the private land market (roughly 2-4% of agricultural land). As in many developed market economies, there are few or no official forms to be used in land transactions; private parties create their own forms to suit their needs.

2. Rights of foreigners

The Polish Constitution appears to permit, but not to require, restrictions on foreign purchase. It appears that foreign purchase of agricultural land in excess of one hectare or non-agricultural land in excess of 0.4 hectares currently requires permission from the Ministry of the Interior, pursuant to the 1920 Act on Acquisition of Real Estate by Foreign Persons (as amended in 1996). Leases apparently are permitted without limitation.

As discussed in the *Relevant EU Accession Requirements* section above, restrictions on foreign ownership raise EU accession issues related to the "freedom of establishment." Although the prohibition of foreign ownership in Poland is not absolute, the need for administrative approval is, on its face, discriminatory and clearly sufficient to raise the freedom of establishment issue. However, with respect to agricultural land in particular, the requirement as set forth in Articles 54(3)(e) and 39(2) of the EU's governing Treaty needs interpretation. The requirement states that any implementation of the right of foreigners to acquire agricultural land and buildings must be subject to the objectives of the common agricultural policy under Article 39, taking account of the "social structure of agriculture," the "disparities between the various agricultural regions," and the need to make adjustments "by degrees."

The issue of foreign ownership is one of considerable political and practical importance for Poland. On the political front, there is considerable resistance to possible foreign acquisition of tracts of agricultural land, especially by German citizens in the western areas that were at one time German territory and became part of Poland after World War II. On the practical front, Polish agricultural land presently sells for market prices that are far lower than prices for comparable agricultural land in the EU, and consequently could be easily bought up by wealthier EU nationals. Also, it is argued that allowing foreign ownership would also tend to drive up the price of agricultural land, and make it less affordable to Polish farmers.

The differences in land prices between the EU and Poland appear to be substantial. We received estimates of the average price for agricultural land sold in private transactions in Poland ranging from around 3,000 zlotys/hectare (\$790/hectare) to 7,000 zlotys/hectare (\$1,850/hectare). By comparison, it was estimated that agricultural land in the western region of Germany sells for an average price of DM 15,000/hectare (about 32,000 zlotys/hectare), while such land in the eastern region of Germany sells for DM 7,000-9,000/hectare (about 15,000-19,000 zlotys/hectare).

In sum, if Poland's agricultural land market is simply thrown open to bidding by EU citizens and enterprises, there could be adverse economic and political consequences of the sort that Article 39 of the EU Treaty seeks to limit.

- Recommendation: Poland may end up needing a post-accession transition period to remove restrictions on ownership of agricultural land by EU citizens and enterprises. During the previous round of EU accessions Austria, Finland, and Sweden were each allowed to retain restrictions on foreign purchase of land for vacation homes for a five-year period after accession.⁸ These restrictions, if immediately removed, would clearly have been far less disruptive to the local economies than the restrictions at issue in Poland. Moreover, foreigners already have a certain level of access to agricultural land in Poland, since they may lease such land.

3. Leasing

No restrictions exist in Poland on land leasing. Under the Civil Code, lessees who have leases of 3 years or more in length have a priority right to acquire the land they lease. They must meet competing bids, however. Such a straightforward right restricted to lessees only does not seem to pose significant problems for a land market.

One potential problem regarding leasing is that APA lease rates for state-owned land are almost certainly below market. These rates currently average about 2.3 centners of wheat per hectare, which amounts to less than 10 percent of average production. While somewhat low, this rate is not nominal. The APA-held land, moreover, is usually leased out in large tracts and is largely located in areas (in the north and west of Poland) where there are not a large number of family farms. In those settings, APA leases probably do not substantially undercut the private lease market. On the other hand, we also encountered APA leases of smaller tracts in settings where there are many smaller farmers. In such settings, private leasing very likely is undercut.

In addition, low rents for APA land may discourage privatization. Currently the average sale price for one hectare of APA-owned land (2,700 zlotys) is equal to the price of 60-70 centners (6-7 tons) of wheat, while average lease payments to the APA are 2.3 centners per hectare. That is, APA sales prices average roughly 26-30 times annual lease payments, which implicitly (and erroneously) assumes that a reasonable return on investment in that setting is less than 4 percent. Thus, a substantial disincentive to buy the land exists. Since lease payments are already fixed under generally long-term leases, this probably means that land prices will have to be drastically reduced if the APA land stock is to be rapidly privatized.

- Recommendation: To solve these two problems (undercutting the private lease market and discouraging land privatization), the APA should privatize its leased-out

⁸ See footnote 7.

land at whatever prices are possible and go out of business (as suggested under *Privatization of Agricultural Land* above). This may depress the land market for a time, but thereafter a much healthier, and almost wholly private, land market will exist for both sale and lease of land.

4. Other transaction-related issues

Several other transaction-related issues deserve brief discussion. First, anecdotal evidence suggests that high transaction costs may hinder transactions for very small land parcels. One farmer we interviewed, for example, said that last year he purchased 0.26 hectares of land for 500 zlotys. The fees related to the purchase were another 500 zlotys, including the notary fee, taxes, and the registration fee. He added, however, that the costs go down proportionally the larger the land plot being purchased.

Second, Poland does not have upper limits restricting the amount of land private farms can own, as can be seen in other transitional economies. Subsidized loans are not granted to farms larger than 100 hectares, but this may well favor land markets at least in the short- to mid-term, and is indeed considered by bankers we spoke with to be favored by EU policies.

Third, Poland does not have direct minimum-holding requirements for agricultural land, which can often restrict market allocation of land to its most profitable use. However, in Poland two rules exist whose combined effect probably increases artificially the desirability of farms of at least one hectare in size but less than two hectares in size. To be a "farm," a unit must be at least one hectare in size, and only persons with such a minimum holding can qualify for the heavily subsidized agricultural pensions (contributors pay in only an estimated 5-7% of what the agricultural pension system pays out). On the other hand, if someone who loses a non-farm job also has a farm holding of two hectares or more, they do not qualify for unemployment benefits.

Other impediments to land transactions found in some transition economies do not exist in the Polish context, such as rules allowing private "ownership" of land, but without the right to sell that land, or rules imposing heavy financial penalties for early sales of land.

Land Mortgage

A sufficient set of legal rules guides mortgage transactions in Poland, although some improvements might be helpful, as noted below. Significant numbers of loans using agricultural land as security are made by the BGZ Bank and by the cooperative banks. In 1998, the BGZ Bank made roughly 3,500 purchase-money mortgage loans for agricultural land (although these loans were subsidized by the government). As with land sale transactions, the private sector has developed its own forms for mortgage lending. Although Polish law contains no express reference to purchase money mortgages, the general mortgage rules are fully sufficient: purchase money mortgages are available from banks and are treated like any other mortgage.

A number of technical mortgage-related issues should be mentioned. First, banks complain that foreclosure proceedings, which must be conducted through the courts, are very costly and slow. Second, under the Code of Civil Procedure, a mortgage lien had rather low priority relative to other creditors' claims (it stood sixth in order of priority, behind, most notably, workers' wage claims and tax claims). The banks we spoke with consider the problem largely solved by the law "On Mortgage Bonds and Mortgage Banks" (effective January 1, 1998). This law amends the Code of Civil Procedure to provide that mortgages issued by "mortgage banks" are third in order of priority, preceded only by foreclosure costs and alimony claims. Many existing banks will probably set up new mortgage-bank affiliates.

Third, registration of land rights, including mortgage rights, often takes a long time to complete. Since mortgages are not effective until notarized and registered, and banks are reluctant to disburse loan money without registered mortgage rights, mortgagors receive the loan money only after lengthy delays. This problem has been addressed by the appearance of private insurance coverage that will guaranty the bank's security interest during the period between notarization and actual registration, for a fee equal to about one percent of the mortgage loan. Banks can now disburse immediately after notarization. Of course, the optimum solution would be to speed up registration, as discussed in the *Land Registration* section below.

Fourth, the law "On Mortgage Bonds and Mortgage Banks" appears to limit a mortgage loan, in most cases, to 60 percent of the value of the real estate mortgaged. This protects the bank, but requires the borrower to have considerable cash, or non-mortgage financing. Regular commercial banks, however, apparently can and generally do loan 80 percent of the value of real estate when making mortgage loans.

Fifth, in some countries concerns over bank land ownership and land speculation lead to severe restrictions on bank ownership of land, or to the setting of unrealistically short time periods for banks to sell land. Restrictions of these types are not found in Poland. The law "On Mortgage Bonds and Mortgage Banks" allows the new mortgage banks to purchase real estate, aside from office space for bank use, "only in order to avoid losses resulting from lending of secured mortgage credits." This right to buy in order "to avoid losses" would seem to furnish adequate protection to banks.

As a final matter, the greatest impediment to agricultural land mortgage may be social rather than legal in nature: many rural residents frown upon any bank foreclosure proceeding, and may be unwilling to buy their neighbor's land at a foreclosure sale.

Land Registration

The registration law seems basically sufficient, but major improvements could be made. While local lawyers claimed that registration of land rights provided "100 percent assurance," our own reading of the 1982 Act on Perpetual Books and Mortgages (as amended through August 1997) leaves us doubtful. We suspect that private "title insurance" may eventually be offered to shore up registered

rights (as it is in the United States, where the system is one of “deed registration” rather than one of “title registration”). This can be an expensive solution.

A big issue regarding registration is the treatment of unregistered rights. In Poland an estimated 30-40 percent of land is not registered, and these unregistered rights remain valid, as they should. When transactions (or mortgage) affecting unregistered land take place, the notary is required to submit an application to open a registration volume (perpetual book) for that land. With only such so-called “sporadic” registration, decades may pass before all land is registered. Legal registration of unregistered land draws on a plethora of sources, including documents held by the right-claimant, notarial documents, and materials kept in offices (especially a land and building register) that are entirely separate from the legal registry. The perpetual books are open to the public.

A more serious problem is that even sporadic registration is slow, is the subject of many complaints, and is a serious impediment to continued land market development. Typical delays run from a few months in the countryside to up to two years in Warsaw. The land and mortgage registers (the perpetual books) are kept by the nearly 300 district courts, and entries must be made by a judge. The system is thought to be seriously underfunded, and lacking adequate personnel.

- Recommendation: At a minimum, the law should be amended to allow trained personnel who are not judges to make non-controversial entries in the perpetual book. Expand, if also needed, the number of judges. Pay for the system by setting fees to cover actual costs and by letting the Ministry of Justice retain those fees to maintain the land and mortgage registers.

One problem seen in some transitional economies is that registration fees are high, thus discouraging transactions or use of the registration system. In Poland registration fees as such do not appear to be high. The main problem, we are told, is that the fees are not retained for the operation and improvement of the registry system; thus there is little value received for the fees paid.

- Recommendation: Let the registration system charge necessary fees and keep them for its own operation and improvement.

Land Taxation

The land tax, averaging about 2.5 centners of rye per hectare, or roughly 9% of average production, is fairly high. The tax's potentially distorting effects may be amplified by the fact that the land tax is forgiven for the first 5 years of leases of state land made by the APA. This drives annual payments for APA land still further below market levels, and creates a further distortion in favor of leasing rather than buying such land.

- Recommendation: End land-tax forgiveness for all future leases of APA land.

Compulsory Acquisition of Land

The purposes for compulsory acquisition are clearly identified by the 1985 law "On Land Use Management and Expropriation of Real Estate," as subsequently amended. This law sets forth adequate compensation standards, as well as the procedural rules in detail. Practices appear to be predictable.

C. Romania

Romanian law contains much policy supporting agricultural land market development. Most agricultural land is privately owned, and the government's intention seems to be to privatize much of what remains in state hands. Romanian citizens can freely sell, lease and conduct other transactions, and can mortgage their land under the law.

Several problems remain, however. Most notably, foreign citizens may not own or lease land. Foreign legal entities also may not own land, but can lease land under certain conditions. These restrictions are undoubtedly problematic under EU policy. In addition, land use rules contain some onerous provisions regarding confiscation of land in case of rules violations, and the land registration system faces difficulties.

Private Ownership of Agricultural Land

Romanian law provides for private ownership of land. Article 135 of the Romanian Constitution states that property, which clearly includes land, can be privately owned, and shall be inviolable. Article 41 states that private property shall be protected by law. These constitutional pronouncements on private ownership are supported by Romania's major law on land reform, the 1991 law "On Land Resources." This law states that land may be the subject of private ownership. Further support for private ownership rights can be found in the law "On Legal Circulation of Land."

When viewing these laws together, combined with discussions with policymakers and field visits to farms, private ownership rights to agricultural land extend to both Romanian citizens and Romanian legal entities. However, ownership of agricultural land by foreign citizens and legal entities is restricted, and is discussed under the section on *Transactions in Agricultural Land*.

Privatization of Agricultural Land

As of 1998, of the 14.8 million hectares in Romania's agricultural land base, 10.5 million hectares have been privatized, the bulk of it through restitution. Roughly 75-80% of this privatized land has been fully registered and titled. 4.4 million hectares remain in state ownership. Its fate is discussed in this section, and in the section on *Farm Restructuring* found below. For land that has been privatized, full ownership rights have been transferred to private citizens.

In order to gain a clear understanding of the significance of privatization, it is important to know not only how much land is privatized, but the extent to which privately-owned land is cultivated by small and medium size farmers. In Romania, roughly 15 percent of the privately-owned agricultural land has been joined together by the owners and is farmed in large associations averaging 409 hectares in size. Eighty-five percent is farmed in small and medium-sized units. When compared to the total agricultural land base, both private and state-owned, about 60 percent of this base is farmed in privately-owned small and medium-sized units. If state-owned communal pastures are excluded, the figure rises to about 68 percent.

A related issue is the transfer of only lease rights or use rights into private hands, rather than full ownership. As mentioned above, privatization has meant the transfer of full ownership rights. However, the 1.8 million hectares on former state farms have been dealt with by an interim leasing scheme or have not been dealt with at all, rather than being privatized. The details of this scheme are discussed in the section on *Farm Restructuring* found below.

Still another obstacle to land privatization sometimes seen in transitional economies is large amounts of land being categorized as important for research needs, for special plant breeding, and for other activities, and thus being exempted from privatization. In many cases these needs are used as an excuse to retain land that should be transferred to private ownership. This situation does not exist in Romania. The law "On Land Resources" requires a strict determination of which land should be retained for research and other purposes. The Ministry of Agriculture reported to us that, of the 150,000 hectares allocated for research purposes, only 80,000 hectares will be retained for such functions. This amount represents just over one-half of one percent of Romania's agricultural land base, and thus is not a problem.

Land Restitution

Restitution of pre-communist era land rights to private parties has been a major component of Romanian land reform. The vast majority of the 10.5 million hectares currently in private ownership was privatized through the restitution process. Roughly five million people have received land through this process.

An important component of restitution is the timely registration and issuance of documents certifying private ownership. These processes can be delayed for a variety of reasons, such as difficulties in matching beneficiaries with land, various kinds of disputes, and administrative problems in registration and document issuance. While there are still delays, they do not appear to be primarily the fault of the legal rules, but rather reflect factual problems such as boundary disputes or disputes among heirs which are unavoidable during restitution. This is in contrast to the situation in Lithuania, where the law itself is the cause of many of the disputes. In any event (and despite the existence of up to 700,000 continuing disputes as compared to the five million beneficiaries), it is estimated that 75-80% of restitution beneficiaries have their rights registered and have received their documents.

In some transitional economies concerns exist that restituted land owned by urban dwellers cannot be the subject of land transactions for a variety of reasons, such as problems with registration or required government approval of transactions. These problems do not exist in Romania; urban dwellers who own agricultural land have typically leased most or all of their land to farmers. Since 40% of the new landowners live in towns, their ability to conduct transactions is very important to the land market.

Farm Restructuring

The major issue when considering the relationship of farm restructuring to land markets is whether, as a result of farm restructuring, land parcels are transferred to the ownership of individuals. During the communist period Romania had two major types of collectivized agricultural enterprises: agricultural production cooperatives (CAP's) and state farms (IAS's). Under the 1991 law "On Land Resources," the vast majority of land used by the agricultural production cooperatives was privatized, primarily by restitution to prior owners or their heirs. Land used by agricultural production cooperatives that was not restituted was transferred to the management of local authorities. This land apparently is largely pasture land, and is used in common by rural residents. The failure to privatize this land will probably not have a major impact on the development of the land market, and in any event would probably be strongly resisted.

The former state farms continue to cultivate approximately 1.8 million hectares of agricultural land in Romania. Part of this land is already well along the process toward privatization. The law "On Land Resources," in conjunction with the 1994 law "On Lease" (as amended), provides that people whose land had been taken and placed under the administration of a state farm could choose to be designated as "locators." If this option was chosen, they could conclude a five-year lease with the agricultural company using the land, after which the locator would be issued an ownership document to a land parcel. These five-year leases were largely concluded in 1994 and 1995, so will shortly begin to expire. The 1998 revisions to the law "On Land Resources" affirmatively state that the locators, as well as shareholders in agricultural companies, are to receive ownership of the land. This process, once completed, will result in one million hectares of former state farm land being privatized.

The remaining 800,000 hectares of former state farm land that will still be in state ownership consists of lands that were state property between the world wars, crown land, land under reclamation works, and land that no one was entitled to inherit by law. Discussions are currently underway concerning whether or not to privatize this land. Ideally this land would be privatized, but failure to do so would not be a serious blow to development of the land market, since this land represents only about five percent of Romania's agricultural land.

Other concerns that have been raised regarding farm restructuring in various transitional economies include: failure to demarcate newly-privatized land rights; problems with land share systems (prevalent in the former Soviet Union); and improvident long-term leases to cosmetically reorganized collective farms. None of these problems appear in Romania: privatized land is demarcated; no land share system exists; and the former state farms lease land for at most five years.

Land Use Regulation

Three main problems with potential impacts on land-market activity have arisen regarding land-use regulation in transitional economies. The potential impacts come from undermining the owner's security of tenure, or reducing (or threatening to reduce) the land's value. First, laws may allow for confiscation of land for irrational use, non-use, or for other reasons. Second, violations of the land use regime may trigger overly severe penalties. Third, conversion of agricultural land to non-agricultural uses may be severely limited.

In Romania the primary law dealing with land use regulation issues is the law "On Land Resources." This law requires holders of agricultural land to cultivate the land, to protect the land, and not to actively degrade the land. This legal requirement to cultivate the land is neither necessary nor helpful.

The penalties for violation of the cultivation and protection norms are graduated, starting with requests for remediation by the local authorities, then fines, and finally loss of the use rights to the land. The requests and fines are reasonable responses, but the loss of use rights is clearly excessive, since it amounts essentially to an uncompensated expropriation. Fortunately the farmers with whom we spoke knew of no instances of this measure being invoked for land use violations.

- Recommendation: The maximum penalty for land use violations should be forced public auction, with the net proceeds going to the land owner. In addition, the penalty for simple non-use should be eliminated, since the private owner is more likely than a government bureaucrat to make a rational decision on whether putting the land into production makes economic sense.

Regarding conversion of agricultural land to non-agricultural uses, the law "On Land Resources" requires that such conversion be approved by the Ministry of Agriculture and Food. Locally developed land use plans also play a role. Field interviews indicated that conversion was difficult in practice. In addition, the law imposes a heavy tax on land that is converted, which ranges from two times to four times the sale price, depending on soil quality.

- Recommendation: If conversion has been achieved through a planning process, it should not be subject to taxation of a punitive nature. A tax equal to a modest percentage of increase in value, or profit on sale, should be fully sufficient.

Transactions in Agricultural Land

1. Sale, gift and inheritance transactions

The main legislative act addressing agricultural land transactions is the 1998 law "On the Legal Circulation of Land." This law provides that Romanian citizens can acquire and dispose of extra-*vilan* agricultural land (land not in towns) in conjunction with the norms of civil law. Purchase-and-sale, gift, and inheritance transactions are thus sanctioned. Discussions with both policymakers and farmers indicated that no further legal measures, such as implementing regulations or model contracts, were needed for such transactions to be carried out between Romanian citizens.

Dispositions of agricultural land are occurring in Romania. Anecdotally, the local administrative district of Prejmer (which is located near the city of Brasov in Transylvania) has 2,700 hectares of agricultural land. Prejmer has had 45 land sales, most of which were for agricultural land, through which 80-90 hectares of land has been sold. This represents a not-insignificant turnover ratio of about 3

percent, and has mostly occurred in the last year or so. The sales prices were 5-6 million lei/hectare (\$333-400/hectare). Many farmers we interviewed indicated that they had purchased land.

On a broader level, Ministry of Agriculture statistics indicate that, as of December 1998, 12,119 hectares of extra-*vilan* land have been disposed of in 12,438 separate transactions. Most of this land is certainly agricultural land.

The rights of Romanian citizens to acquire and dispose of land are limited in two ways. First, a family may own no more than 200 hectares of arable land. This limit is not a major land market impediment, especially since the average farm in Romania cultivates only 2.2 hectares of land. Additionally, the 200-hectare restriction may help to prevent formation of *latifundia*. One problem that does remain, though, is that if a family acquires more than 200 hectares, then the amount, according to the law "On Legal Circulation of Agricultural Land," "shall be brought to the ceiling set by the law." How the family's land shall be brought to the ceiling is not specified.

- Recommendation: The law should be clarified to provide that forced sale, not confiscation, will be used where a family exceeds the ceiling.

Second, co-owners, neighbors, or lessees of extra-*vilan* agricultural land have a pre-emptive right to buy such land if it is offered for sale. The law "On the Legal Circulation of Agricultural Land" clarified and narrowed the pre-emption rules. The owner of land offered for sale must notify the local administration, which publicizes the offer to sell for 45 days. Within this time period the pre-emptive rightholders have the opportunity to make an offer to buy the land. The seller must accept the offer if the price is satisfactory. If it is not, the seller may sell the land to anyone. While pre-emptive rights extend the time for concluding sale transactions, they are not a major impediment to land markets in the Romanian context. Several farmers interviewed stated that they had bought land, and that the 45-day waiting period was not a significant obstacle to the transaction.

2. Rights of foreigners

Romanian law is much more restrictive regarding foreign acquisition of agricultural land. The Constitution explicitly prohibits foreigners and stateless persons from acquiring ownership rights to land. This prohibition is also reflected in the law "On the Legal Circulation of Land." This law also says that foreign legal entities may not acquire land by way of a transaction with a person, but then goes on to say that foreign rights to land which is the subject of foreign investment shall be governed by foreign investment legislation. The foreign investment legislation states that partly or fully foreign owned companies with Romanian legal entity status may acquire ownership to land in order to carry out their activities, but that the land must be disposed of if the Romanian legal entity liquidates. Thus, a foreign legal entity is able to acquire land for its activities through a Romanian legal entity.

As discussed in the *Relevant EU Accession Requirements* section of this paper, restrictions on foreign ownership raise EU accession problems related to the "freedom of establishment" under Article 52 of the EU's governing Treaty. Since Romanian legal entities as well as Romanian citizens can own land, the prohibition covering legal entities and citizens of EU countries is clearly discriminatory.

However, with respect to agricultural land, the requirement as set forth in Article 54(3)(e) and Article 39(2) of the Treaty requires interpretation. The requirement expressly makes room for policy considerations integral to the common agricultural policy under Article 39, taking account of the "social structure of agriculture," the "disparities between the various agricultural regions," and the need to make adjustments "by degrees." In a setting in which an estimated 37% of the Romanian population makes its primary livelihood from the land, and in which market prices for agricultural land are low, the standards of Article 39(2) could, and probably should, be read to allow an extensive transitional period (even after accession) before sales of agricultural land to foreigners are required. Romanian agricultural land is incredibly cheap as compared with land in Germany, for example, and could not be thrown open to bidding by EU citizens and enterprises without a high risk of staggering economic and social dislocations. Such adverse impacts are precisely what the policies of Article 39 are intended to avoid.

During the previous round of EU accessions Austria, Finland, and Sweden were each allowed to retain restrictions on foreign purchase of land for vacation homes for a five-year period after accession.⁹ These restrictions, if immediately removed, would clearly have been far less disruptive to the local economies than the restrictions at issue in Romania.

- **Recommendation:** Romania should be required to remove restrictions on EU citizen and enterprise ownership of non-agricultural land at an early date. With regard to agricultural land, EU policy and precedent provide the basis for a post-accession transition period for agricultural land, if such a transition period is ultimately needed.

3. Leasing

Leasing of agricultural land is common, both through written contracts and by oral agreement. Rents paid typically range from 10-30 percent of the crop. Leasing is particularly important since a high percentage of rural land owners live in the towns, and thus do not cultivate most or all of their land personally.

The 1994 law "On Lease" allows Romanian citizens and legal entities to freely conclude lease contracts for agricultural land and to agree on the terms, most notably the duration of the lease and the amount of rent that the lessee shall pay. The law also adequately outlines the required contents of a lease, such as that the lease be in writing, contain the names and addresses of the lessor and lessee, describe the real estate being leased, state the lease duration, and include other responsibilities of the parties as they agree. Additionally, the law does not give the lessee a pre-emptive right to renew the lease. Such a pre-emptive right would restrict the lessor's right to use and dispose of his land as he chooses, and is often seen in the laws of transitional economies.

The most significant lease restriction for European Union accession purposes is the requirement that lessees who are natural persons must be Romanian citizens. Natural persons who are not Romanian citizens cannot lease agricultural land under the law. Additionally, lessees which are legal entities must be "of Romanian nationality" and have a representative office in Romania. This provision

⁹ See footnote 7.

may not seem a serious problem, since it does not preclude Romanian legal entities controlled by foreign capital from leasing land, but it clearly raises "freedom of establishment" problems under the Treaty since it discriminates against EU legal entities.

- Recommendation: There should be an early, but probably not complete, easing of the leasing restriction. Leases of agricultural land to EU citizens or legal entities might initially be limited to a medium term, such as a maximum of 5-7 years, with any renewal requiring negotiation.

Two additional land market restrictions can be found in Romania's land lease legislation. First, sub-leasing of land is prohibited. While this restriction is not of major significance, ideally the law would allow the lessor and lessee to decide the question between themselves. Second, a lessee who is a physical person must have agricultural education, agricultural experience, or hold a certificate issued by the Ministry of Agriculture that testifies to the lessee's knowledge. This requirement adds a level of complexity to the lease transaction process, since the lessor must somehow determine that the lessee meets the standard. This requirement also manifests a lack of confidence in the workings of the market, which is premised upon private actors undertaking endeavors in which they believe they will be successful.

4. Other transaction-related issues

Another impediment to land transactions seen in some transitional economies is a moratorium on sales. Romania had such a moratorium at one time, but it has been abrogated. Other potential problems, such as financial penalties for quick-turnaround sales, nominal lease rates for government land undercutting the private market, and minimum landholding size requirements, do not exist in Romania.

Yet another set of problems in some transitional economies can arise from high transaction fees (notarization, surveying, registration, etc.). In Romania there seem to be problems related to high notary fees. Notary fees are calculated as a percentage of the value of the transaction, and can in practice reach as high as 30 percent of the declared purchase price of the land (as well as reaching a very substantial percentage of the, usually higher, actual purchase price). These high fees discourage otherwise willing sellers and buyers from carrying out land transactions. Reducing these fees would clearly help development of the land market.

Land Mortgage

The legal rules for mortgage of agricultural land are sufficient, according to several bankers we interviewed. Mortgage is clearly allowed, the necessary procedures are adequately detailed, and banks and borrowers can decide for themselves what the loan funds secured by mortgage will be used for. With regard to purchase-money mortgage in particular, the general mortgage rules are sufficient to allow such mortgages.

Foreclosure on mortgaged property for which the borrower defaults is governed by the Code of Civil Procedure. The Code contains a comprehensive procedure for adjudication of foreclosure claims, and for forced sale based upon a court judgment. The debtor can delay processing of the action by appealing to the court to use its discretion to grant up to one year of grace to pay all delinquent payments, or by appeal of an adverse court judgment. These rules seem adequate and do not seem to favor the mortgagor or the mortgagee, but they have not been significantly applied in practice.

Countries transitioning to market economies sometimes prevent banks from owning agricultural land, especially as a result of a foreclosure, for fear that banks will become large landowners and engage in land speculation. Rules such as these are often too restrictive and have the effect of discouraging mortgage lending. In Romania, the 1998 Banking Law forbids bank ownership of land, except for bank offices and for land "acquired as a result of the execution of the bank's claims," i.e. foreclosure, in which case the land must be disposed of within one year absent exceptional circumstances. This approach seems like a reasonable compromise.

Finally, as a practical matter, almost no mortgage of agricultural land has taken place in Romania. Reasons given by bankers included low land values, unreliable land values, and difficulties in selling agricultural land.

Land Registration

Due to its history of being divided between the Austro-Hungarian and Ottoman empires, Romania has two different registration systems currently in use. These are the "land book" system and the "inscription-transcription" system. The 1996 law "On Cadastre and Real Estate Publicity," the primary legal act dealing with land registration, contemplates use of the land book system throughout Romania, and outlines the procedure for switching over from the inscription-transcription system. Rights under the latter system are protected under this law until each particular jurisdiction is ready to make the change. (There will be 170 land book offices, under each of the 170 local court offices.)

A fundamental need in a land registration system is for the law to provide sufficient guidance on the system's major aspects. The law "On Cadastre and Real Estate Publicity" is on balance sufficient, addressing significant issues such as:

- which agency shall maintain the land books. In Romania the law gives this function to the Ministry of Justice, and declares that the law courts shall have specialized land book bureaus;
- describing the components of a land book. These are: (1) the description of the land parcel; (2) notations as to the land parcel itself, such as description of the owner, record of transfer of the land parcel, and easements; and (3) notations as to certain encumbrances, such as leases of more than three years, mortgage, and servitudes;
- the evidence to be considered in making notations in the land book;
- the procedure for making notations in the land book;
- procedure for dealing with disputes; and
- public access to the information contained in the land book.

An additional vital component of the registration system is a clear statement as to the legal effect of registration. The land book system is, in theory, supposed to provide conclusive evidence of ownership and other registered rights. However, the description of the land book in the law raises the possibility that the rights entered in the land book can be annulled in the future by court judgment. In addition, some rights, such as successions and rights obtained through court judgment, are enforceable even if not inscribed in the land book. These exceptions make it difficult for third parties to rely on the land book, since rights already entered in the land book can be overturned, or rights not entered may be enforceable.

Thus, it is not correct to view Romania's land-book system as a conclusive system of "title registration" in contrast to a primarily notice-giving system of "deed registration." In practice, Romania's system probably falls somewhere between the two; private title insurance may arise in the future to fill the gaps, but at a price.

Another potential problem is that the land book offices have little capacity to gather information; they rely on the local units of the National Office of Cadastre, Geodesy, and Cartography for all information upon which registration decisions are made. Unless these cadastre units are exceptionally responsive to requests from the land book offices, the land book offices may not be able to carry out registration activities in a timely manner. Unfortunately, these local cadastre units are required to accomplish a myriad of cadastre-related activities, and thus it is possible that their most important task, supplying information to protect legal rights, will not receive the needed attention and resources.

Land Taxation

In transitional economies, high land taxes and taxes on transfer of land can adversely affect the agricultural land market and can trigger undesirable social or economic impacts. Fortunately, high land taxes for agricultural land are not a problem in Romania. (There is a tax-related problem, however, when agricultural land is converted to non-agricultural uses, as discussed in the section on *Land Use Regulation*.)

Compulsory Acquisition of Land

Problems can arise for the private land market in transitional economies if security of tenure is undermined by inadequate rules for the forced acquisition of private land by the government for various supposed needs. Problems arise when the purposes for compulsorily acquiring land have not been clearly stated and limited, when the compensation provided is less than fair market value, and when the procedures for compulsory acquisition are unpredictable.

Romania has had little, if any, experience with compulsory acquisition to date. Indications are that the law that is in place is satisfactory. Article 47(3) of the Constitution provides a good general

standard, allowing compulsory acquisition only if for a public purpose, and only for "just compensation paid in advance."

Appendix

Matrix of Key Legal and Policy Issues Related to Agricultural Land Markets in Lithuania, Poland, and Romania

Issue	Lithuania	Poland	Romania
1. Private ownership of land			
-- by citizens	allowed	allowed	allowed
-- by legal entities	prohibited	allowed	allowed
-- by foreign citizens	prohibited	allowed, but with restrictions	prohibited
-- by foreign legal entities	prohibited	allowed, but with restrictions	allowed only through Romanian legal entity subsidiary
2. Privatization of land (see also section 3)			
-- main method(s) of privatization	mostly by restitution to former owners, though land also allocated for auxiliary plots and private farms	most land remained privately owned during Communism; state-owned land being privatized through sale to lessees	restitution
-- speed of privatization	very slow	very slow, but affects the minority of land which is state-owned	mostly completed
-- intent to privatize	clear intent to do so	doubtful intent	clear intent to do so
-- current use(s) of land remaining in state ownership	leased to private farmers or to citizens for use on small plots	leased to farming corporations far smaller than the predecessor state farms	cultivated by state farms (this represents a minority of land; privatization expected soon)
3. Restitution of land			
-- problems with restitution	complex laws, competing claims, and administrative hurdles	no restitution program	some problems of excessive parcelization
4. Farm restructuring (as it impacts marketability)			
-- is collective and state farm land being transferred to the ownership and use of individuals?	yes	somewhat (most land remained privately owned)	yes
-- do restrictions exist on private	no	no	no

land transactions that discourage farm restructuring?			
5. Land-use regulation (as it affects marketability)			
-- are "non-use" or "irrational use" subject to sanctions?	no	no	sanction for non-use
-- are penalties for violation of land use excessive?	penalties do not appear excessive	penalties do not appear excessive	yes, land can be seized without compensation in certain cases (though not currently invoked)
6. Transactions in land			
-- may citizens and domestic legal entities participate in purchase-sale transactions?	only citizens, not legal entities	yes	yes
-- may citizens and legal entities participate in lease transactions?	yes, including foreigners	yes, including foreigners	yes, including foreign legal entities. Foreign citizens may not lease land
-- do certain parties have pre-emptive rights to buy or lease land?	yes, the state has priority rights for very limited lands (not for restituted lands)	none identified	yes, co-owners, lessees, and neighboring farmers have pre-emptive rights (but strictly limited and not problematic)
-- are transaction costs (notarization, survey, etc.) high?	notary fees and survey fees seem excessive	fees seem high for transactions of small amounts of land	notary fees seem greatly excessive
-- is there a moratorium on land sales?	no	no	no
-- do size limits exist on the amount of land that can be owned or leased?	150 hectare limit on owned land; no limit on the amount of land that can be leased	no limits	200 hectare limit on owned land; no limit on the amount of land that can be leased
7. Land Mortgage			
-- is basic mortgage law sufficient?	yes	yes	yes
-- do restrictions exist on banks (i.e., lenders) owning land?	yes, banks cannot own land, even temporarily	no	yes, but not a problem. Banks must dispose of foreclosed-upon land within one year.
-- are foreclosure rules fair and efficient?	rules seem to excessively protect the lender, although they rarely have been applied in practice	banks complain that foreclosure is costly and slow	rules seem fair and efficient, but have been only minimally tested

8. Land Registration			
-- does the registration law provide adequate definition and protection of legal rights	yes, but some fragmentation into separate systems	yes, but much land is not registered, with "sporadic" registration occurring for transactions	overall yes, though there some rights may not need to be registered, causing uncertainty
-- is registration carried out in a timely manner	some complaints as to the slowness of registration	no, long delays often occur	registration seems timely
9. Land Taxation			
-- are land taxes too high so that they distort market activity?	no	yes, and distortion is increased when combined with tax forgiveness for leased-out state lands	no
10. Compulsory Acquisition of Land			
-- compulsory acquisition should be allowed only to meet clear, limited, public purposes	law is satisfactory	law is satisfactory	law is satisfactory
-- just compensation should be paid when land is taken	market price is to be paid	compensation standards are adequate	law provides for "just compensation paid in advance"

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