

**REGISTRATION OF RIGHTS TO IMMOVABLE PROPERTY  
IN  
THE REPUBLIC OF BELARUS:  
ISSUES OF LAW AND ADMINISTRATION  
IN THE  
FORMER SOVIET UNION \***

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**INTRODUCTION**

The technical cooperation project "Support of Urban Land Registration/Cadastre System in Belarus" began in 1994 under the sponsorship of the Belarus Ministry of Housing and Communal Services (MOH), supported by a small grant from the International Development Fund.<sup>1</sup> Conceived by MOH and the Housing and Municipal Services Group, Country Department IV, of the World Bank, the project proceeded from the premises that privatization of urban housing and land markets would be an important element in privatization of the Belarusian economy, and that a transparent and legally binding system of recognizing and protecting ownership rights to immovable property would accelerate and enhance the creation of private land and housing

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<sup>1</sup>Under the terms of the grant from the International Development Fund, MOH retained the author as an advisor on legal and policy aspects of the project. MOH was assisted in its efforts by ESMA, Ltd., a subsidiary of MOH's Scientific-Industrial Association named "Zhilkomuntechnica," an association of research and development firms concerned with issues of building, housing and geographic information system (GIS) technology. ESMA, Ltd., a firm that specializes in GIS technology, provided methodological guidance and support to the project, including design and testing of the computer software products to be used in the registration process. MOH retained the firm of Kampsax Geoplan as advisor on technical and policy aspects of the project. The Kampsax Geoplan work was headed by Ms. Karin Haldrup, to whom the author is very grateful for good advice and an education in many aspects of this task. Kampsax Geoplan produced much valuable analysis regarding all aspects of the project which it has generously permitted the author to use freely in the preparation of this paper.

markets; provide a foundation for privatization of commercial activities; and facilitate development of private credit systems based on immovable property as collateral.

The project was substantially completed in March, 1996, and as a result a national law of registration of rights has been prepared and submitted to the Belarusian Supreme Soviet for consideration, and a National Center for Registration of Rights to Immovable Property has been created and, with support from MOH, is actively pursuing design and implementation of a system of land and real estate registration in accordance with the recommendations of the project.

As most of the newly independent countries of the former Soviet Union (FSU) struggle with economic reform, a major element of which will be private markets in land and real property, some of the issues which arose in Belarus may be pertinent. In all aspects of its legal and administrative systems - and in many aspects of its politics and culture - Belarus is typical of many of the countries of the FSU, and obstacles or opportunities encountered there may be relevant in these other countries also. In this regard, it is worth noting that at the time this paper was prepared no country of the FSU had yet fully implemented a national system of registration of rights to land and real property.

This paper will focus primarily on the relevant legal and administrative systems of Belarus as found by the project team upon beginning work in 1994; formulation of project principles and objectives on the basis of the investigations into the existing system and relevant international standards; the issues which arose in the context of designing the system of registration; and the responses to those issues, which must be considered tentative at this time not only because the legislative process has only recently begun, but because of the unsettled political climate of the country.<sup>2</sup> Technical issues of a non-legal nature are addressed in separate project reports.

## **BACKGROUND**

### **REAL PROPERTY RIGHTS**

When the project began in 1994 Belarus was, and as of September, 1996 is still, using civil and land codes adopted during the Soviet era.<sup>3</sup> These laws still contemplate state ownership of all real property, and rely mainly on the Soviet version of usufructuary rights to allocate land to users. There was no comprehensive statement of modern real property rights in the Belarusian law. Of course, also lacking was any law of land cadastre or of registration of rights to real property. Nevertheless, when the project began Belarus had recently initiated privatization of land and

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<sup>2</sup>Belarus is not in the forefront of reform among the countries of the FSU. A recent report published by the World Bank estimates that less than 10% of the country's enterprises had been privatized as of August, 1996, and that more than 90% of property generally remained in state ownership. See Transition: The Newsletter About Reforming Economies, Vol. 7, No. 7-8 (The World Bank; July-August, 1996).

<sup>3</sup>Respectively, Civil Code of the Belarusian SSR (1964) and Land Code of the Belarusian SSR (1990).

housing under several limited laws of privatization which chipped away at the monolithic state ownership of the Soviet era, and had even enacted a law of pledge, based on a 1992 Russian Federation model, which permitted privately owned real estate to be mortgaged.<sup>4</sup>

Land could be owned privately only for individual housing construction, personal garden plots and private farming, though little if any private farming was actually in progress.<sup>5</sup> Juridical entities could not own land, but could lease or obtain rights of use from the state. Other than land for private farming, land could not be owned for commercial purposes. If land was owned, there were the usual rights of disposition, including sale, devise and mortgage. For the most part, this remains the status of land ownership rights in the Republic through September, 1996.

House plots and gardening land, as well as private farm land held in ownership, could be mortgaged under the Decree on Using Land as Collateral, elaborated pursuant to the 1993 Law on Land Ownership, and a permitted form of land mortgage had even been issued by the Government.<sup>6</sup>

Apartments and other residential property (houses, dachas) could also be owned with rights of disposition and could be objects of mortgage under the terms of the 1993 Law On Collateral.<sup>7</sup>

For various reasons, primarily the state of the economy, the lack of a competent banking system, and inadequacies in the law, few, if any, mortgage loans on real property have been made to date.<sup>8</sup>

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<sup>4</sup>Some erosion of monolithic state ownership and control of real estate had begun in the *perestroika* era in most of the USSR. See, e.g., Law of the Republic of Belarus On Lease (1990); Law of the Republic of Belarus On Property (Ownership) (1990); Law of the Republic of Belarus On Investment Activities (1991).

<sup>5</sup>See Law On Land Ownership (1993). Theoretically, the collective farms were characterized as “owners” of the land, but use of the term is open to question.

<sup>6</sup>No. 879/29, December 31, 1993. Under the mortgage decree only one bank, Agroprombank, the former state agricultural credit bank, can make mortgage loans on land. Mortgages on land could be taken by the landowner (holder of the State Akt) to secure bank credits for improving the quality of land, purchasing additional land, building a house on the land, or purchasing agricultural equipment or supplies. On default by the borrower the bank is authorized to resell the land at auction after offering the borrower a right of redemption at the full outstanding balance of the loan, after which the bank may offer the land to the local council or another individual "who has the right to be an owner."

<sup>7</sup>Law On Privatization of Housing Resources in the Republic of Belarus (1992). The law of housing privatization included a three year moratorium on private market resales of the privatized apartments, which has now elapsed.

<sup>8</sup>The laws on mortgage of real property are rudimentary, at best, and raise more issues than they resolve. The approach frequently taken by Soviet lawmakers had been that the initial laws on any topic were broad and lacking in real substantive or procedural guidance, essentially only acknowledging a concept as “permitted.” Most such laws required substantial expansion through subsequent normative or regulatory acts. This was the case with respect to the very broad Belarusian laws on mortgage as well. However, no such additional normative acts have been forthcoming.

Each of the laws of privatization and collateral specifically provides for registration of property rights and mortgages, designating the responsible registry.<sup>9</sup>

Structures in commercial use - though not the underlying land - could also be "owned" by privatized enterprises.<sup>10</sup> At the time the project began there was under consideration a draft proposal for granting land ownership to privatized enterprises, but that initiative seems to have stalled. Under the laws of most countries of the FSU, ownership of a structure alone entails rights of free disposition and entitlement to cash compensation for state confiscation. Registration of ownership rights to non-residential real estate was not provided in the law, though the laws on enterprise privatization require that an inventory of privatized enterprise property be kept by the State Property Committee and registered with the local council.

### **REGISTRATION OF LAND AND LAND RIGHTS**

Prior to the start of privatization, local soviets, or councils, had been legally responsible for registration of rights to use land, and actually kept a land office. With privatization, responsibility was often delegated by local governments to the local representatives of the State Committee on Land Reform and Forms of Land Tenure (the "Land Committee"), or the local representative office of another national executive organ such as the Architectural and Construction Ministry. Like most state bureaucracies in the FSU, the Land Committee consists of a national office - a department of the Ministry of Environment - and local offices which receive guidance and methodological support from the national office but which actually operate as agencies of the local governments.

Local registries usually showed only the rights of the major users, including farms, enterprises, and public institutions. A look at one of the older registration books reveals very few entries. The information contained in the land book was minimal, essentially showing the holder of the right of use, land use restrictions and any changes in use rights.

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<sup>9</sup> The laws on housing and land privatization provide that the contracts of privatization are to be registered with the local executive council. The Law on Collateral provides that pledge agreements, including mortgages of immovable property, are to be registered in the place where the property itself is registered. The Law on Collateral was supplemented by the 1994 Resolution of the Council of Ministers On Registration of Pledge Agreements, intended to implement the registration provisions of the Law on Collateral. The basic terms of this act include guidance on the form of the mortgage or pledge contract (written and notarized); the minimum content of the contract; the form of the application for registration; the contents of the registration entry; the procedures for registration; time periods for registration; effectiveness of registration; and reasons for denying registration; collateral which may be subject to pledge or mortgage; and the places where pledge or mortgage agreements must be registered. Mortgages on land, dachas, houses and garages must be registered with the local council of the areas in which the property is located. Mortgages on houses and apartments must be registered with the local office of the Bureau of Technical Inventory.

<sup>10</sup> Law of the Republic of Belarus On Denationalization and Privatization of State Property (1993).

In addition to the land rights registration book, the council usually kept separate books containing maps and surveys, copies of the legal document granting the right of use (the "State Akt"), and official architectural and planning documents relating to use and improvement of the property. Maps were updated periodically, mostly by schematic hand drawing on the original survey as improvements and subdivisions to the property were made, with detailed surveys of changes and improvements being provided in the architectural and planning documents. The books themselves were organized geographically, by district, and ordered by an index using address and name of user.

In fact, after the initial grant and registration of use rights, the larger institutional holders of the land may have subdivided their rights in any number of ways, granting use rights to other organizations (collectives, cooperatives, etc.) and individuals for housing and gardens, but these rights were considered subordinate to the rights of the registered institutional holder and would not necessarily be entered into the land registration book. Whole towns and villages could be developed on land registered to a farm, or land allocated to an enterprise may have been transferred to the use of a different enterprise, without formal subdivision of the land and registration of the new rights of use.

As the project began, to reflect the emergence of private property rights in land, the Land Committee had begun a revision of the registration system. The most pressing problem was to reflect in the system the rights of the new owners of home plots and garden land and to prepare for the emergence of private secondary transactions, which, while minimal at the time, were on the immediate horizon.<sup>11</sup> Since the local branch of the Land Committee was frequently responsible for supervising the privatization of home plots and garden land, the new system revolved around the privatization process, where most registration of rights was then occurring. The combined process of privatization and registration of new land rights consisted of the following steps:

1. **Application.** Upon receipt, each application to privatize land was registered in a separate log book and given a registration number. The application was registered by name and address, and included a general description of the land.
2. **Technical Review.** A representative of the Land Committee inspected the site and attempted to determine boundaries from the existing land records. This process could include discussions among adjoining occupants regarding boundaries. A case folder and technical documentation concerning the boundaries of the land - usually a general schematic - were prepared.
3. **Local Council Decision.** The privatization application was submitted to the local council and approved at a regularly scheduled meeting based upon the data submitted by the local Land Committee.

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<sup>11</sup>The law on land privatization was followed quickly in 1993 and 1994 with various normative acts which refined the privatization process and laid the foundation for secondary markets, including the Council of Ministers Resolutions On Additional Measures to Satisfy the Needs of Belarus Citizens or Land Parcels; On State Akts for Ownership, Possession and Use of Land; On Procedure for Purchase and Sale of Land Plots By Citizens of Belarus; and On Approval of the Form of Contract of Purchase and Sale of Land Plots.

4. **Registration.** A cadastre number was issued for the land parcel and the new land rights registered in the land book.
5. **Issuance of Certificate of Ownership.** Two copies of the State Akt (Certificate of Ownership) were issued by the local Land Committee, one of which was kept in a separate registration book by the committee and the second delivered to the new owner.

With respect to secondary market transactions the procedure was essentially the same except that in lieu of action of the local council the purchase and sale agreement would be certified by a notary prior to registration. However, the seller would nevertheless have to turn in his certificate of ownership to the Land Committee and request issuance of a new certificate for the purchaser.

#### **STRUCTURE OF THE LAND COMMITTEE'S "LAND BOOK"**

##### **Summary Table**

- *land plot cadastre number*
- *names and addresses*
- *registration date*
- *description and date of decision of local council (basis of title)*
- *term (if a lease)*
- *form of tenure (lease, ownership. etc.)*
- *land area*
- *limitations on use*
- *price of the land and combined price of land and buildings*
- *subsequent transactions (lease, mortgage, etc.);*
- *date and description of any subsequent documents of conveyance*
- *signatures of owners and registrar*

##### **Mortgage Table**

- *names and addresses of mortgagor and mortgagee*
- *land area of mortgaged parcel*
- *registration number and date of mortgage agreement*
- *maturity date*
- *amount of loan*

##### **Transactions Table**

- *names and addresses of grantors and grantees*
- *type of conveyance (lease, sale, etc.)*
- *whether the sale includes a building*
- *date and registration number of the operative legal document*
- *signature of the registrar*

##### **Land Use Limitation Table**

- *descriptions of all restrictions on use of the land*

In addition to the application log, the registration records consist of the land registration book and separate volumes for original maps and documents, including copies of State Akts retained by the registry. The newly designed land registration book is comprised of several tables,

including a summary table and separate tables for mortgages, land transfers, and land use restrictions.

The tables follow each other sequentially in separate sections of the land book. Upon initial registration each parcel of land is given a separate cadastre number, and all future entries in the book indexed by that number. Each table is cross-referenced by the use of a common cadastre number for each parcel of land. Additional cadastre numbers are issued only if the land is officially subdivided or consolidated with another parcel. A separate volume of maps or original legal documents is maintained by cadastre number for each parcel, though State Akts are kept in a common volume and filed in the order issued.

With perhaps minor changes, this was the land registration procedure as it existed in September, 1996.

### **REGISTRATION OF RIGHTS TO HOUSING AND OTHER REAL PROPERTY**

Historically, registration of rights to occupy apartments in multifamily buildings was a matter for the housing authorities, and closely tied to the internal passport, or "propiska," system. However, the residential buildings themselves, as physical objects, were registered by the Bureau of Technical Inventory ("BTI"). Rights to freestanding houses, which were owned even in the Soviet era insofar as they could be transferred *inter vivos* or devised, were to be registered by the local governments separately, but this was also usually performed by the local BTI. BTI's registration work was carried out under the instructions of the Central Statistical Bureau of the USSR, the most recent and still effective one of which was issued in 1986. With privatization, the new law provided that local governments were to create or designate an agency to supervise housing privatization, and to register housing privatization transactions.<sup>12</sup> BTI became the agency of choice of many local governments to undertake both of these tasks.

Registration of rights to non-residential structures has been, and largely remains today, voluntary, and only a portion of non-residential structures are reflected in the accumulated BTI records. Rights to non-residential structures are registered informally by the enterprise privatization agencies by attaching to registered privatization contracts a schedule showing the property owned by the privatizing enterprise. General authority to register rights to non-residential structures and transfer of rights to non-residential structures is not clearly delegated to any agency under present law. Consequently, depending upon the office, the local BTI could have files on 40% - 100% of the housing structures in the relevant geographic but only, 10% - 40% of the commercial or public structures.

With the exception perhaps of freestanding homes, BTI's registration activities had little if any legal significance, and was primarily a tool of demographic analysis and inventorization of property.

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<sup>12</sup>See Resolution of the Council of Ministers of the Republic of Belarus On the Approval of Instructions Governing Privatization of Units of Living Space in the Apartment Buildings Making Up State and Public Housing Resources, As Well as Their Maintenance and Repair, No. 398, June, 1992.

BTI is presently an agency subordinated to the Ministry of Housing and Communal Services for methodological and budgetary support and to local executive councils in day-to-day implementation of its responsibilities. The organization has offices in almost every locality, and frequently has larger administrative offices supervising the operations in several districts.

All records are kept at the local level. The BTI records are burdened with a great deal of detail. Information on the holder of the rights is essentially only a file identifier; the real bulk of the file lies in the detailed description of the property, including its physical characteristics, utility services, and depreciated value. Although BTI has no specific authority to register rights to land, frequently the BTI records include information on the land area surrounding structures - schematic drawings in the country and actual surveys in urban areas.

A main focus of the local BTI offices now is privatization and registration of rights to housing under the April, 1992 Law On the Privatization of Housing Resources. The privatization and registration process in place as the project began consisted of the following steps:

1. **Confirmation of Eligible Owners.** Privatization begins with identification by the local housing management organization of the persons residing in the house or apartment who are eligible to apply for privatization, and the amount they may be required to pay.<sup>13</sup>
2. **Application.** All applications are logged into a separate application book, which consists of an assigned application number and date of application, name and address of the applicant, the general purpose of the application, and the name of the registration officer to whom the file is assigned.
3. **File Review and Site Inspection.** The assigned officer reviews the file on the property and conducts a site inspection. If not already in the file, the assigned officer, who is usually an engineer, will produce a scaled floor plan of the structure. Also reviewing the file will be a legal officer, who reviews the history of ownership of the property and any legal documents contained in the file. Access to the property files is limited to several people in the office. Registration officers who obtain files for review or work must sign receipts for the files.
4. **Issuance of Map and Technical Passport.** If all is found to be in order, the office issues to the applicant the "technical passport," which is essentially a certification of the current physical and legal status of the property.
5. **Resolution of the Local Council.** On the basis of the documentation prepared by BTI the local Council issues a resolution authorizing the execution of a contract of sale between the council and the applicant.

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<sup>13</sup>Housing privatization was not necessarily *gratis*, but based on a complex formula for figuring space entitlements and required payments by occupants.

6. ***Notarization of Legal Agreements.*** Contracts of sale are notarized.
7. ***Registration and Indexing.*** Upon completion of notarization the transaction (contract) will be registered and indexed. Registration consists of entering abstracted information into the registration book together with copies of original legal documents such as purchase and sale contracts.

Registration of any subsequent (“secondary”) transaction with respect to the property will also require an application to BTI from the parties and re-issuance of the technical passport. For secondary transactions the officer will inspect the property to determine if any additions or improvements have been made. In a secondary sale of the property, the applicant must present the BTI documentation to the notary as a condition of completing and notarizing private legal agreements. The law provides that no legal documents affecting the real property may be notarized without the necessary certifications from BTI.

The existing system for registration of rights to buildings uses what is essentially the "perpetual book" system, that is, a single book opened for each property in which all relevant information and documents are filed. It is not based on the land plot as the unit of registration and does not use a uniform system of cadastre numbers; it is indexed by the names of the parties, building inventory numbers supplied by the BTI office, and the street addresses of structures. The main volume for each property contains: an inventory number and registration number; surveys and technical information about the property; and legal documents (registration certificates; purchase and sale agreements; testamentary documents; etc.). All books are kept on a geographic basis by district, subdistrict and block. Cross reference to materials in the several files are by the registration number.

There is main index which includes the registration number of the property; name and address of the owner; information on subsequent transactions (sale; inheritance, etc.); and a reference to the current legal basis of the rights (contract, privatization, etc.). In addition, the registry keeps an inventory log which is in effect a running total of transactions, and includes simply the inventory number (an arithmetic total of transactions to date); registration number, and the name and address of the owner.

#### **ASSESSMENT OF THE EXISTING SYSTEM**

The context in which the project began was clearly not a *tabula rasa*. There was a long history of inventorization of land and real estate objects; several bureaucracies with established administrative procedures for the inventorization and registration process; and a great deal of historic data. Existing practices reflected some understanding of European systems of registration. Some government actors were relatively sophisticated regarding modern techniques of cadastre and registration of rights, and were improving their skills quickly. The Land Committee was engaged in a demonstration project in land surveying with assistance from a team of Swiss consultants, using the most modern available satellite and digital mapping equipment. The MOH was also conducting a pilot project in registration in a small jurisdiction consisting of preparation of digitized base maps, use of private surveying firms, a detailed audit of the local land an

building records, and development of a unified computer data base containing both the maps and the audited information from the land and building records.

The main findings of the project team, which are perhaps transferable today to other countries of the FSU, included the following:

- ***Property Rights.*** Important types of rights to immovable property were still undefined or only vaguely defined in the civil legislation and land laws, and rights to immovable property generally were not well understood. Rights to ownership of personal residences and land plots for personal use were the most highly defined and best understood. Rights of lease, mortgage and servitude and rights to non-residential property were the least well defined. Rights to non-residential structures and land had changed little since the Soviet era, and were based upon an antiquated right of usufruct generally unsuited to private markets in real property.
- ***Law of Registration.*** Existing procedures for registration of rights to immovable property lacked a clear legislative basis. Many legal issues of registration were simply not addressed because practice had been put ahead of creating a legal framework. In the absence of a general law governing registration of rights to immovable property the legal implications of registration, or of failing to register, were not clear and the procedures of registration were mostly undefined.<sup>14</sup>
- ***Multiple Registries.*** Responsibilities for collection of data and registration of rights to real property was spread over a number of bureaucracies which had proprietary interests in continuing their job. While responsibility for registration of rights to immovable property legally belonged to local governments, in practice it was delegated mainly to two agencies - the BTI for buildings and portions of buildings and the local branches of the Land Committee for land. Each operated a separate registration system and there was no interface between them. Several other agencies, including the Ministry of Architecture, Construction and Infrastructure, were involved with some issues of immovable property cadastre and inventory and claimed legal rights to implement a system of property registration..
- ***Juridical Data.*** The amount of information available on immovable property rights was extensive, considering the separate files of the local governments, Land Committee, BTI and the Ministry of Architecture. In fact, there was far more information than necessary for a good system of juridical cadastre, because each agency had administrative objectives

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<sup>14</sup>An upshot of this was that public officials who should have been expert in the system of registration of rights held differing and sometimes conflicting perceptions of how permitted transactions in immovable property were to be structured and registered. Officials working with registration laws and systems have not had the opportunity to consider the interests of property owners and other users of the registration system involved in a systematic way. Part of the problem had been the lack of access to educational material on the theory and structure of registration systems throughout the world.

other than registration of titles.<sup>15</sup> However, the overall reliability of information held by the registering agencies was not generally good. On the basis of early reviews of data, roughly 25% of the existing records held by the BTI were erroneous or incomplete and would not serve as the basis for registration of rights. Problems existed particularly in the use of identifiers such as addresses and inventory numbers.

- ***Geodesic Data.*** With respect to the existing data and geodesic institutions, the technical consultant, Kampsax Geoplan, found that there existed a wide range of geodesic data of varying quality held by various organizations throughout the Government. Accurate maps of Belarus of more or less high quality in scales ranging from 1:500 to 1: 10,000 could be found. However, some important and potentially useful maps and geodesic data, including the coordinates of the national geodesic grid, were simply not available, being subject to security restrictions originating under the laws of the USSR. The provisions for licensing private surveyors and instructions for preparation of surveys for registration of land plots, which could be carried out by licensed private surveyors, were well prepared, appeared to be working well and private surveyors were playing a large role in land plot registration.
- ***Geodesic Agencies.*** There were multiple agencies with some responsibility for creating and collecting geodesic data.<sup>16</sup> Some of the state entities responsible for gathering and managing geodesic data had already been converted into profit-oriented entities or had been made self-financing because of budgetary constraints. The maps and information

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<sup>15</sup>The amount of information included in the records may be useful for other purposes at this time. Belarusian housing privatization is based upon complex payment formulas and property evaluations. Accordingly, the valuation data collected may be necessary at least through the end of the privatization process. Secondly, the privatization process is essentially creating condominium buildings in the absence of a law on condominium. The emphasis on recording physical characteristics of buildings and apartments may in the short run provide a substitute for the formal surveys and floor plans of condominium charters and declarations; that is, the process is essentially defining the physical boundaries of property rights within privatized buildings. Finally, the accumulated data may be relevant someday to a system of *ad valorem* real estate taxation. In fact, the BTI is looking seriously at using its data as the foundation for a mass appraisal system of real property taxation.

<sup>16</sup>According to the report of Kampsax Geoplan, there are at least four main sources of geodesic information, some with overlapping scopes of work. The Belarus State Land Project Institute, subordinate to the Land Committee, prepares topographic and geodetic materials relevant to land administration, valuation and registration. "Belgeodesia," a self-supporting concern under the Ministry of Architecture, Construction and Infrastructure, is the firm which prepares all national base maps and maintains ground controls. This Ministry also is responsible for training and licensing surveyors. The Belarus Institute for Agricultural Photography and Survey, which is subordinate to the Ministry of Agriculture, also prepares geodetic and topographic material relevant to land administration. Finally, many of the major cities, in particular Minsk, have their own geodetic agencies responsible for local mapping. The Ministry of Architecture, Construction and Infrastructure in particular has staked out a substantial claim for control of geodesic activity, if not generally than at least in urban areas. See Report On the Status of Development of Urban Land Registration and Cadastral Systems in Belarus, Kampsax Geoplan, February 26, 1995.

which they hold are viewed by them as significant assets and may be available only at a high price

- ***Unnecessary Bureaucracy.*** Where the system did contemplate secondary transactions in the private market, it injected state agencies into all aspects of private market transactions in a way that was inefficient and questionable. In most case the parties to a private market secondary transaction would nevertheless have to obtain various certifications and approvals from state agencies before they could complete their transaction. Most economists would view this for what it was, rent seeking on the part of bureaucracies with the power to prevent a private transaction unless paid a fee or tax for superfluous services.

## RECOMMENDATIONS

Based upon the preliminary assessment, recommendations for action were made to MOH which included the following:<sup>17</sup>

- Develop a national law on registration of rights to immovable property that responds to the legal system of Belarus as it exists today, while at the same time anticipating future developments.
- Codify registration management procedures in appropriate regulations, guides and manuals.
- Implement a system which unifies or closely coordinates registration of legal rights to land and structures, abolishing distinctions between land and structures and among structures on the basis of type of use.
- Place a considerable amount of responsibility for implementation of the system at the level of local government.
- Provide a reasonable period of transition from the present system.
- Focus on a system of registration of rights that can be implemented through automated data processing as well as paper-based methods of registration.

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<sup>17</sup>An additional recommendation presented to MOH was the creation of a National Land Information Center with capability to train and support local experts; consolidate existing expertise in the one center to facilitate interchange of ideas and experience; and implement programs of training and dissemination of information for geodesic and registration professionals. This recommendation was adopted by MOH and in fact implemented with creation of the National Center on Registration of Rights to Immovable Property in Spring, 1996.

- Set a few realistic goals. Identify a limited set of data to be entered into the system of registration of rights and reserve other data sets for entry into a broader national system of land and real estate information at some later time. Defer emphasis on expensive processes - such as digitizing national maps - until economic conditions warrant.
- Make efficient use of existing expertise and resources by reliance on existing maps and coordinate systems as well as drawing upon the accumulated data and experience of the various branches of the government that have in the past been responsible for gathering and registering information on immovable property and rights to it. At the same time, consider rationalizing the institutional structure for geodesic work, which may mean a reorganization or consolidation of functions to prevent wasteful, duplicative activity.
- Undertake a systematic inventory of immovable properties based upon existing data bases, with a view to cleaning the data bases of errors and further coordinating relationships through cross-referencing data.
- Free the national coordinate system from security restrictions; place the entire nation on the same coordinate system.

### **PRELIMINARY QUESTIONS**

At the start of the project the questions which would be addressed were defined to include the following:

- What is the administrative structure of the registration system and the role of the existing agencies of the national and local governments?
- What is the basic unit of registration of rights to immovable property? Land parcels? Land and structures separately? Land and structures together?
- What rights are to be registered? What rights not?
- What are the legal consequences of registration and of failure to register?
- What data is relevant to the registration system?
- How are records to be organized and managed?
- What are the procedures of registration?
- How are existing files on immovable property and immovable property rights to be treated?

- What is the relationship between geodesic work and registration of rights?
- How will the benefits of the system be guaranteed to users? What is the nature of the State's liability for flaws in the system.
- What is the role of the notariat?
- How is the system to be financed?

### **APPROPRIATE MODELS**

Various models of registration systems were presented in seminars given to key decision makers in the government agencies concerned with land, real property, urban development and geodesic activities. The objective was to present to decision makers appropriate models and concepts available from the systems of other nations.

The "American" system of deeds recordation was not seriously considered as an appropriate model and not given a great deal of attention, other than description in seminar presentations. Though that system has some points to recommend it, it was not considered to be a good match for the legal or institutional history or capabilities of Belarus, or for the context of economic transition. Belarus looked for its models on many issues primarily to the systems of neighboring states in Europe, as was evident in the work that had already been accomplished in cadastre and registration. Most attention was therefore given to the title registration systems of Germany, Austria, Denmark and Great Britain.

As it turns out, in Belarus as in several other nations of the FSU, there are certain core concepts of the European style registration systems - primarily the ability of a true registration system to create and terminate rights, and the accompanying principle of state liability to those harmed by the system - which may make policy makers pause. It may be possible that at this time many citizens of nations of the FSU hold a stronger concept of property rights than found in many long time market economies, and are very protective toward newly won rights and freedoms. The idea that one could lose rights to real property through a mechanical flaw in the registration system, or through fraud, for example, is a difficult pill for many to swallow. (As discussed below, this attitude also colors perceptions of the appropriate role of registrars, who some Belarusian experts preferred to restrain with a very narrow scope of authority.)

On the question of state liability for damages caused by the system, many argued that the state simply lacked the resources, and that to give an empty guarantee was worse than giving no guarantee at all. In any event, they argue, no one trusts the state to pay.

It appears necessary in the FSU to place substantial emphasis on explaining the legal implications of registered title, with its accompanying guarantees and state liability, and to accept that these concepts presently may not be acceptable. It may happen that many of the nations of the

FSU will design system which lack these elements of European systems, in which case the experience of the United States in building systems of title protection in the absence of state guarantees - for example, the American laws of "marketable title," which attempt to limit the open-ended nature of risk in the deeds recordation system - may become more relevant.<sup>18</sup>

### **GENERAL OR SPECIFIC LAW**

The MOH was enthusiastic about creating a proposed law of registration and made it a primary objective of the project, but the nature of the law to be produced was still under consideration through the end of the project. Legislative practice in states of the FSU has been to develop laws of general principles which establish a very broad framework for the regulatory activity. These laws are followed by more detailed codes which expand on the general principles, and by regulations or other acts of government agencies which provide sufficient guidance for implementation of the regulatory structure. (Frequently they were followed by no such normative or regulatory act, providing maximum bureaucratic flexibility to interpret the law on an as-needed basis.)

Enacting laws of general principles, to be followed by more detailed acts of implementation, has several positive aspects. Such laws allow development of a political consensus on the key points without bogging down the discussion in minutia. It is presumed that once general principles have been established it will be an easier task to move on to the details of implementation. It is also true that regulations and other acts of government can generally be changed more easily than a law, and change will probably be necessary when implementing a new system. Finally, many lawmakers in the FSU tend to be uncomfortable with highly detailed legislation and react more favorably to a format which they recognize.

In the context of this project the approach of a law of general principles raised several problems. First, experience of economic transition in some places has shown that laws of general principles may not be implemented for long periods of time because they are dependent upon the detailed guidance to be provided by regulation. The Belarusian mortgage laws, discussed above, are a case in point. The project in which this law was to be developed called for actual implementation of a system on a pilot basis, which necessarily called for some development of the details of the system.

Experience has also shown that a law of general principles can be delayed indefinitely as departments of government work out their conflicts in the process of preparing implementing

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<sup>18</sup>There are apparently some systems which adhere to the formalities of registered title but decline to provide the benefits, and this is always an alternative. Such an alternative might be based on the premise that the meticulous procedures of title registration systems alone would create confidence and provide adequate protection to users in the absence of guarantees and indemnification. In other words, it would be a better deeds recordation system. It might be hoped then that the better, more reliable system would be reflected in lower fees to attorneys and insurance companies, at least to the extent necessary to offset the higher costs of the more meticulous system.

regulations. To that extent, it was suggested that including detailed guidance in the law could raise issues and encourage accommodation among government departments at the earliest possible time, and facilitate the process of issuing implementing regulations by limiting the range of interpretation and discretion.

Finally, the project in which this law was conceived was in large part a training and educational exercise. Development of a detailed piece of legislation exposed the experts of Belarus to a wider range of issues than may have arisen in preparation of a law of general principles.

For all of these reasons the law that was prepared was somewhat detailed, and could perhaps be implemented with only a minor amount of additional regulatory acts. Ultimately, however, at the urging of many Belarus experts, the law prepared by the working group was edited and refined over time to reduce the level of detail, particularly in matters of defining administrative details of the registration system which were thought better left to regulations which could be changed more easily as the system developed. Specific regulations - for example, the technical format of the registration records and the qualifications, powers and procedures for appointing local registrars - will remain to be defined by regulation. An effort was made, though perhaps not always successfully, to distinguish that which should be in law and that which could be reserved for regulation.

It is of course possible to resolve this issue by developing the law and its implementing regulations at the same time, but the project did not provide for this level of effort. As it turned out, the amount of material removed from the initial draft could perhaps serve as the basis of a detailed regulation in this project.

## **REGISTRATION OF RIGHTS AND OBJECTS**

The project emphasized registration of rights to immovable property, and not registration of immovable property objects themselves. This may be a distinction without a difference, but there arguably is a difference in approach. It appears that in some instances, when a project specifically sets out to register real estate objects, it tends to focus on the technology of mapping and cadastre, and not the simple legal needs of the transitional economy. This is not necessarily the fault of foreign advisors, as the indigenous experts are also enamored with the possibilities of technology, perhaps with good reason. Therefore, the difference in emphasis may be useful on a theoretical level to place the project into context - which is that market economies are ultimately more dependent upon protecting legal rights than they are on excellent maps.

But it is clear that to register a right it is also necessary to define the object to which the right attaches, as the object is the vehicle on which rights enter the registry. Therefore, an important part of the project was to define the relationship between defining immovable property objects and registration of rights to the objects. It became clear early that these two functions were

presently, and for the foreseeable future, likely to be carried out by separate agencies of the Belarus Government.

At present in Belarus, as in other nations of the FSU, buildings and structures are registered separately from land. Structures are identified in the inventory of structures managed by the BTI, which is also responsible for maintaining floor plans and layouts of buildings and structures and providing them with their official identification number for inventory purposes. Land parcels are identified primarily by the Land Committee, which is also responsible for assigning cadastre numbers and registering rights to land.

Suggestions were made initially that unified responsibility for all aspects of physical cadastre and registration of rights would perhaps be a more efficient system, achieving a level of economy and coordination greater than a system comprised of separate entities. However, it was determined that any attempt to unify these functions in a single agency of government would bear unacceptably high cost in terms of confrontation and controversy, and perhaps provide only marginal returns (separation of physical cadastre and legal registration is a model that works, more or less efficiently, in many countries).

Accordingly, it was proposed that the registration system continue to rely for delineation and registration of land parcels on the national land cadastre and the agency that manages it, and on the Bureau of Technical Inventory for identification and inventory of structures, regardless of where the responsibility for legal registration ultimately vested.

Complicating this picture, as noted previously, were findings of the technical consultant that geodesic data was under the authority of several state agencies; that the agencies took a proprietary attitude toward the data and had in fact “privatized” it; and that rationalization of the responsibilities for geodesic works may become necessary to prevent duplicative and wasteful capital investment. In developing the proposed system it was assumed that the Land Committee ultimately would be the agency authorized to create the national land cadastre and supervise geodesic data for the national registration system. In fact, there were some indications that this would be the outcome, despite claims to this role by various other agencies.<sup>19</sup> Ultimately, it was necessary to refer in drafts and reports only to the national land cadastre and its role in the system, which left open the possibility of supervisory authority being vested in different agencies.

## **RELATIONSHIP TO LAND CADASTRE**

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<sup>19</sup>When the project began there was, in addition to the 1990 Land Code, which gave to the Land Committee the responsibility to maintain the national land cadastre, a corresponding Resolution of the Council of Ministers On the Procedures Of Maintaining the State Land Cadastre and Land Monitoring which also favored the Land Committee. At the same time, there was a conflicting law which granted to the Ministry of Architecture, Construction and Infrastructure the authority to create and maintain an “urban cadastre.” The differences between the State Land Cadastre and the ‘urban cadastre’ were a matter of some contention between the two Ministries aggravated by the fact that divisions of the Ministry of Architecture then held a leading role in preparation of national maps, survey standards and licensing of surveyors.

As the project began there was no comprehensive law of land cadastre in Belarus, though there were several normative acts granting authority to the Land Committee and the Ministry of Architecture to create land cadastres. At the time this paper was prepared a law of land cadastre was in development under the sponsorship of the Land Committee.

MOH considered the laws of survey and land cadastre to be largely beyond the scope of the project, but it is clear that laws of registration and physical cadastre should be considered as a unit and closely coordinated.<sup>20</sup> If that is not possible, as in this project, the relationship between registration of rights to immovable property and a national land cadastre can perhaps be addressed indirectly. In this project the following basic principles were established:

- Units of immovable property are considered to be created as physical units in accordance with procedures which may be specified in the laws and authorized normative acts of the Republic of Belarus. These procedures may entail delineation or identification of property and assignment of cadastre numbers pursuant to a law of national cadastre.
- Rights to immovable property may be registred through a systematic process of delineation of land parcels and adjudication of rights supervised by a government agency under law.
- Registration numbers shall be the cadastre number assigned by the cadastre agency or the building number assigned by the Bureau of Technical Inventory; documents submitted for purposes of registration must contain a reference to the cadastre number of land plots and/or building numbers of structures as assigned by the responsible agencies.
- If it is not included in a national cadastre, registration of rights to a land parcel requires a boundary survey meeting technical standards defined by the responsible agency.
- Land parcels entered into the national land cadastre are deemed by law to have fixed boundaries, with the resulting legal implications. All other boundaries could be fixed or general.
- A parcel of land defined in the national land cadastre may be registered only as so defined; no subdivision, sale, or mortgage of a portion of a parcel of land defined

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<sup>20</sup>In this project the laws of land cadastre were under the supervision of branches of the government other than the one to which the project grant was made, and considered to be outside of the scope of work primarily because to address them might be viewed as interference. However, the governmental agencies involved with land cadastre were active and generous participants in considering the proposal for the title registration system.

in the national cadastre may be registered until there has been a formal subdivision process reflected in the cadastre and new cadastre numbers issued.

- The cadastre authorities are obliged to notify the registry of any subdivision, merger or modification to land boundaries.

The early drafts of the law prepared for the project contained details on the creation of land surveys and the definition of land boundaries for purposes of registration, all of which were deleted in the final draft by the working group in the expectation that such matters would be addressed in a comprehensive law of survey and land cadastre. A law on survey and land cadastre is important and useful and should be placed on a longer term legislative agenda, but it was believed that the provisions of the proposed registration law, together with the regulations of the Land Committee, are sufficient at this time to adequately describe the relationship between registration and the delineation of land parcels as objects of immovable property.

## **LAND BOUNDARIES**

It was proposed simply that a boundary survey meeting the requirements established by the Land Committee be required to open a registration file concerning a land parcel. The requirement could be met by an actual survey or by reference to a national cadastre map.

It is unrealistic to expect that there will be precise boundary surveys for each piece of land at this time, yet rights to such land exist and need to be registered. The Land Committee recognizes this fact in the present land privatization process by offering the land holder two choices - to have a precise survey prepared at their own expense, or to accept an approximate boundary in the form of a schematic diagram prepared by the Land Committee. The implications of the choice are the quality of the rights obtained. If the approximate boundary is accepted it is subject to adjustment at some later time in the course of preparing the national land cadastre.

This approach was duplicated in the project. Registration would be permitted with either fixed or general boundaries, the qualities of which were to be defined by regulation of the Land Committee. Fixed boundaries would not be open to challenge once entered into the register, while approximate boundaries could be subject to later challenge and adjustment. The proposed law would further require that fixed boundaries be certified as correct by adjoining land owners or that they be established through a process in which adjoining land owners are given notice of the proposed boundaries and a period of time in which to lodge objections, and that they be fixed on the ground by permanent markers.

It is anticipated that in the short run a great many registrations - particularly outside of the cities - will be accomplished using general boundaries, and that the process of fixing precise boundaries will proceed slowly with development of the national land cadastre. Once entered into a national land cadastre the description of the land parcel found in the cadastre is the only acceptable description for purposes of registration.

## ADJUDICATION OF RIGHTS

The systematic delineation of land boundaries together with identification and certification of rights is often an important element of transition to a new system of property rights and registration of rights. Such a process protects the integrity of the registration system by certifying the quality of rights and foreclosing disputes which might arise after beginning the “chain of title” in the registry.

Belarus presents several issues relating to a systematic adjudication of rights to immovable property. First, there is already an ongoing *de facto* adjudication process - it is called “privatization” - with respect to much of the immovable property that may presently be privatized. The privatization process - which applies to housing, personal land plots and enterprise property rights - often entails a somewhat detailed review of existing rights, preparation of appropriate surveys or floor plans, and issuance of title documents before entry of data into the registries that presently exist. For those properties, it is questionable whether further adjudication of rights is necessary, or could be justified as a budgetary expense.

While it is true that the present process of boundary delineation for most personal land plots is an approximate process, that is a deliberate choice based on the need to register rights as they arise while at the same time conserving scarce resources. It is likely that Belarus will proceed with a national land cadastre over the coming years, at which time land plot delineation will be addressed in a systematic manner. But such an undertaking will take years and be conducted on area-by area basis, and in the meantime rights must continue to be registered.

An argument may be made that systematic adjudication of rights need not be expensive, and can be done on an informal basis by using existing maps and title records, approximate land boundaries, publication of results in local media and opportunity for informal appearance of citizens to make comments and objections. Undoubtedly this is true, but it may be questioned whether this informal process provides any significant benefit if a main goal of the adjudication process is to foreclose future claims, as to do so on the basis of an informal process might be inappropriate. Also, if a main product of adjudication is to mark boundaries on the ground and obtain the agreement of adjoining landowners - which is perhaps the most expensive part of the process - it may be questioned also whether the process is worth pursuing if this is not accomplished.

It is possible to distinguish here a process of audit, or “cleansing,” that may be applied to existing records before conversion of data to the new registration system. The National Agency On Registration would have the authority to establish rules and procedures for conversion of data to the new system and a close audit of the accuracy and completeness of existing data is possible and should be encouraged.

The project proposed approaching systematic adjudication of rights by allowing but not requiring it. The intention was to allow registration to proceed at this time on a piecemeal basis, in response to applications, but to provide for the possibility of systematic delineation of land parcels and rights if enacted under a separate law. In effect, the issue is left for further consideration by

the appropriate government departments, which are expected to take it up in the context of the national land cadastre.

## **THE REGISTRY**

Having conceded that it was not necessary to combine the functions of physical cadastre and legal registration, the project nevertheless recommended that there be only one legally designated registry of rights to immovable property, under the direction of a single agency. A main purpose of this recommendation was to unify the present system of separate registries for land and structures and to encourage greater attention to registration of rights to non-residential structures. In addition, some key participants from the Government believed it was necessary to begin to move toward a unitary concept of real estate ownership based on the land.

While a system of divided responsibilities for legal registration of rights to immovable property is not necessarily unworkable, the following concerns were raised:

- Potentially higher transaction costs for users in the form of multiple registration and notary fees and greater expenditure of time and effort.
- Higher costs of creating, maintaining and operating multiple hardware and software systems with considerable excess capacity.
- Potentially greater possibility of confusion and inconsistency among records affecting the same immovable property, defeating the fundamental purposes of certainty and confidence in registration.<sup>21</sup>

It might be noted that while these points have intuitive appeal, hard evidence of their validity is difficult to find, and perhaps equally strong arguments can be made that electronic technology makes integration of separate data bases, maintained by separate registries, feasible and not inconvenient. The question remains, however: why would anyone want to maintain separate bureaucracies to do essentially the same job? One compelling answer: to preserve the fiefdoms of entrenched bureaucracies and avoid political and bureaucratic conflicts. Understanding this is important to understanding many administrative issues in the FSU today.

The project proposed one legally designated registry of rights to real estate, both land and structures, though the existing agencies presently involved in land and immovable property matters would continue to have important roles in the ongoing registration system. For example, the Bureau of Technical Inventory would continue in its role of management of housing data and privatization of housing assets, as well as describing and providing inventory numbers to structures

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<sup>21</sup>It is worth noting here that under some laws in the FSU now ownership of a structure may not entail ownership of the underlying land, but it does create a right of use to the land which is practically as strong as ownership. Consequently, ownership of a structure is a significant burden on land rights, and it is essential that there be close coordination between registration of rights to land and real estate objects.

for the registration system. The Land Committee would continue its role of managing development of the national land cadastre and would be responsible for delineating land plots as objects of immovable property and assigning land cadastre numbers. However, both agencies would be required to transfer information from their data bases to the unified system of registration in order to accomplish registration of legal rights to immovable property.

Ultimately, MOH decided to accept this principle, and has proposed to designate the existing structures of the BTI, which is subordinate to MOH, as the legal registry of all rights to real estate, including land. It remains to be seen how this proposal will be received.

An important but sensitive issue which is reflected in this discussion is the extent to which the existing bureaucracies will go to preserve their prerogatives in the face of market changes. Another manifestation of this was the significant number of Belarusan participants in the project who thought nothing of requiring private owners to obtain from various state bureaucracies various certificates, documents, "passports," etc. - all of which required payment of fees and few of which had any apparent useful purpose - as a condition of completing a simple sale of their property to another private owner. These requirements were not viewed as infringements on the rights of property, and were frequently presented rather as "protections" for the parties to the transaction. Old habits die hard. The project instead attempted to project a future where private real estate transactions were in fact private, and only a single fee (and perhaps a transfer tax) would be paid to a registry upon registration of a transfer of rights.

#### **ADMINISTRATIVE STRUCTURE**

The administrative structure proposed in the early stages of the project included the following:

- ***National Commission on Registration of Rights to Immovable Property.*** This Commission would draw upon the expertise of the various government departments involved in issues of immovable property management, including the Ministries of Housing, Environment, Architecture and Justice. The Commission would be the highest level policy making body of the system, responsible for supervising implementation through promulgation of rules and regulations. Conceived as a transitional management device, within two years the Commission would make recommendations to the Government regarding a permanent supervisory body for the registration system.
- ***Local Immovable Property Registry.*** Each local jurisdiction would have an Immovable Property Registry, though a regional or consolidated registry could be created for a number of smaller jurisdictions. The registry would be responsible for registering all rights within its jurisdiction.
- ***Local Registration Commission.*** The Local Registration Commission would consist of the Registrar and the heads of the district Land Committee and BTI. It would be empowered to hear and decide disputes arising from decisions of the registrar as well as

disputes regarding land boundaries. Citizens could take appeals from decisions of the registrar directly to the Local Registration Commission. Decisions of the Registration Commission could be appealed to a court of law.

In the course of the work several changes were made to the initial proposal. In the final proposal of the working group the National Commission is more clearly a short-term administrative measure which will exist only until a National Agency for Registration can be created. The local registries are retained but will be based on the existing structures of the Bureau of Technical Inventory, thereby avoiding the financial burden of creating new administrative structures.

The Local Registration Commissions were proposed for several reasons, not the least of which was an often expressed fear of placing too much power over property rights in the hands of a minor local official - the registrar - without some oversight. Corruption, or its possibility, is a driving force behind the structure of much legislation today in the FSU. It was also suggested that the Commissions could perhaps resolve issues more quickly and efficiently than the courts, and bring more expertise to bear on the issues, as the local courts are generally perceived to be one of the weakest elements of government at this time. Ultimately, as a further act of simplification and a cost saving measure, the Local Registration Commissions were abandoned in favor of referring all disputes regarding registration matters directly to the local courts.

#### **CONTENTS OF THE REGISTRY**

Existing data bases contain much information which is irrelevant to registration of rights to immovable property. For example, much of the data on buildings contained in the BTI records would in other systems be found in the record of the tax assessor, being detailed descriptions of the structures, their physical conditions and their valuation. Similarly, much data gathered by the Land Committee concerns the quality of land and its value. While this type of data may be valuable for various administrative purposes, it is not required for registration of rights.

To facilitate rapid implementation and as a cost saving measure, the project emphasized a small set of data which would include:

- a description of the immovable property;
- cadastre, inventory numbers and addresses of the property;
- a description of the nature of the right registered and certain limitations on rights (minority, trust, prohibition on mortgage or assignment, etc.);
- names and addresses of holders of rights;
- references to the documents submitted to the registry; and

- copies of documents.

The specific contents of the registry are to be defined in regulations. It is anticipated that the system of registration of rights can serve as the foundation for other data relating to immovable property which may be added over time to create a comprehensive land and immovable property information system. In such a comprehensive system the detailed information maintained by the BTI, Land Committee and the Ministry of Architecture might be particularly important for purposes of taxation, land management and urban development.<sup>22</sup>

## REGISTERED RIGHTS

Belarus, like many of the nations of the FSU, has a set of property rights that have roots in sources as diverse as classical Roman civil law and the principles of socialism. The project proposed to register all rights recognized under current civil and land laws, and a few which were not formally recognized but clearly existed informally. The basic rights to immovable property to be registered include the following:

- ***Ownership.*** Under Belarusian law ownership consists of the most complete set of rights with respect to immovable property - the rights to possess, use and dispose of the property. The rights of ownership to immovable property presently apply only to personal residences and land plots for residences, and personal gardening and private farming and are defined in several legislative acts of the Republic, including On Provision of Land Plots to Citizens of Belarus and On Privatization of the Housing Stock.<sup>23</sup>
- ***Lifetime Possession.*** The right of lifetime possession allows use of the land during the life of the holder and the right to pass the land on to heirs. The heirs in turn enjoy the same right of lifetime possession and right of devise. However, no current holder of the land enjoys the right to sell the land, though under certain circumstances he may lease it or grant a right of use to another during his life. Upon death of the present holder without heirs, the land rights escheat to the state.

The right of lifetime possession was difficult to classify, having some of the characteristics of a fundamental right of ownership and also characteristics of a burden on ownership. Ultimately it was decided that the right of lifetime ownership more closely resembled ownership than it does a burden on the right of ownership and was treated accordingly; this conclusion may be questioned.

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<sup>22</sup>As of September, 1996, the Belarus BTI was actively exploring use of its data base to create the foundation of a "mass appraisal" system of real property taxation, and the Ministry of Architecture, Construction and Infrastructure had expressed strong interest in reforming the system of urban planning and land use controls.

<sup>23</sup>On rights of ownership generally, see Law of the Republic of Belarus On Property (Ownership) (1990).

The following rights are to be registered as “burdens” on the rights of ownership and lifetime possession of immovable property.

- ***Permanent use.*** A right of permanent use is a right to use the land or other immovable property for its targeted purpose for an undefined period of time. It differs from a lease - and from usufruct in some civil law systems - in that it is for an undetermined duration, and in the past has not generally required payment of rent. It is suitable for grants of land and property rights to state enterprises and institutions, or to public and nonprofit associations such as institutions of higher education or fraternal organizations which then hold the property in their “economic management” or “operational management.” Property held in permanent use remains in the ownership of the state. Rights of permanent use entail limited rights to deal with the property. It cannot be sold or leased without the consent of the owner or its authorized representative.

Land or other immovable property can be granted by the state on the same terms as permanent use but for a defined period of time. These rights are often referred to as rights of “temporary use,” and under the proposed law would have to be registered if for a term of more than two years.

- ***Economic management, operational management.*** These rights are essentially similar to rights of use, and the right of use is their foundation. However, they are defined as separate rights under the present laws, and to prevent confusion it was considered desirable to register them as distinct forms of property rights. These rights may perhaps be compare to the concept of a “net lease” under western real estate terminology, in which the user has virtually complete control of and responsibility for the premises but lacks powers of disposition.
- ***Lease or sublease.*** Leasehold is a recognized right to immovable property under the Law On Lease. It was proposed that leasehold or sub-leasehold rights for terms in excess of two years be registered.
- ***Servitude.*** In the absence of a defined right of servitude in the laws of Belarus, the right was defined operationally in the proposed law to include rights to make limited use of the property of another, any agreement to do or refrain from doing anything on land for the benefit of others, and any agreement for common maintenance of immovable property.
- ***Mortgage.*** There is no specific law of immovable property mortgage in Belarus at this time. However, the right to pledge rights to certain immovable property is recognized in the Law of Pledge and in the regulation entitled Approval of Procedures to Transfer Land Plots to Mortgage in Order to Obtain Bank Credits.
- ***Judgments of courts.*** In certain cases a court judgment or order can create a right to immovable property - for example, where rights under a mortgage are enforced or where

property is sold by the court in satisfaction of a judgment. In these cases the court order or judgment may be registered as the appropriate documentary evidence of the right created.

- ***Use restrictions.*** The present practice in much of the FSU is to impose many land use restrictions on a case by case basis in the process of land allocation, and not solely through laws of general applicability. It was proposed that specific restrictions on land or structures should be registered; responsibility for registering design and use restrictions be placed on the architectural authorities; and if not registered the restrictions would not be binding on subsequent purchasers of the land.

Any transfer, modification or termination of a registered right must also be registered. Rights such as preliminary contracts to purchase immovable property, options, preemptive and preferential rights - all of which have only vague foundations in the laws - may be registered at the option of the holder of the right.

### **UNREGISTERED RIGHTS**

In most systems there are rights and restrictions affecting immovable property which are not registered. Generally, these rights and restrictions are those of which all persons are held to have knowledge because they are expressed in a law generally applicable to all immovable property, are found in other accessible public records, or can be easily determined by a visual inspection of the immovable property and minimal inquiry. Essentially, the existence of these rights and interests places the responsibility on all persons dealing with the property to exercise reasonable diligence to inspect other public records, to conduct at least a visual inspection of the property and to make appropriate inquiries before entering into transactions with immovable property.

It was proposed that the rights affecting immovable property which need not be entered into the record include:

- laws and regulations of general applicability to immovable property, including town planning, health, safety, building and environmental laws;
- claims for taxes or other public assessments which by law need not be registered;
- rights arising through possession and occupancy for a defined terms of years, to the extent permitted under the civil law of Belarus;<sup>24</sup>

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<sup>24</sup>Prescriptive acquisition is not a recognized legal concept in Belarus. However, it is recognized in the 1994 Russian Federation Civil Code, which may have significant influence on Belarusian law over the coming years, as that code is widely considered by the nations of the FSU as a common model. The implications of right of prescriptive acquisition in a system of registered titles are discussed in various legal commentaries.

- leases and rights of temporary use for terms less than two years.

## **UNDEFINED RIGHTS**

It was agreed that a law on registration of rights should not create rights to immovable property, but should aim to protect rights that already exist under the civil legislation. However, defining the legal rights to be registered sometimes posed a problem because rights are not clearly defined in basic law, or not defined at all. There is at this time no basic law of real property rights, such as a modern Civil Code or Land Code. It is therefore necessary to glean from various laws - including the laws of the Soviet era which have not been explicitly modified or repealed - the rights that exist.

The case of easements or “servitudes” is the main example. Such rights are not defined in any existing law, as prior to the creation of private rights of ownership of immovable property they were unnecessary. The user of land could not prevent imposition of another use in the nature of a servitude if the other use was deemed necessary by the authorities; in effect, servitudes were established by administrative decision. Now, with respect to land in private ownership, servitudes may be a matter of negotiation or court order, and the state may not be able to subject privately owned land to the use of a person other than the owner simply by administrative decision, as to do so may constitute a confiscation requiring compensation to the land owner.

Some attempt to deal with limited rights of use over the property of another is necessary as such rights apparently exist informally, without a clear basis in the law, and will become increasingly important as a market system grows. In particular, definition of servitudes will become necessary in the process of privatization so that various existing but undocumented rights to use land are preserved after it is placed in private ownership. It was therefore considered necessary in the proposed law to attempt to define in operational terms a right in the nature of a servitude that may be registered. Depending upon how quickly formal legal concepts of property rights are developed in countries of the FSU, this may sometimes be necessary, but such definitions at this time should be explicitly subordinated to any future developments in the civil laws.

## **REGISTRATION FILES**

To be registered, rights must attach to defined objects of immovable property. In Belarus today there are two distinct forms of immovable property - structures and land - and land plots and the objects attached to them may be held in separate ownership. This distinction and property concept has been largely abandoned in most modern civil law jurisdictions in favor of the principle that the owner of the land also owns any structure or improvements located on it. While in other

systems structures may be deemed to be “owned” by persons other than the owner of the land, this is usually a legal fiction created under laws of taxation and not under laws of property.<sup>25</sup>

Ownership of structures separate from the underlying land was a convenient principle in the development of the law of the Soviet Union as it allowed a “market” in buildings and structures without recognizing the need for ownership of the underlying land, which of course could be owned only by the state. The owners of buildings are in fact deemed to hold permanent rights of use to the underlying land, a rights which they can transfer to their purchaser simply by selling their rights to the building. In effect, this system approximates the long-term leasehold of land with rights of construction. The implications for a system of title registration is that the system must accommodate registration of rights to land and to structures as separate units of immovable property, each of which may have its own burdens on ownership.

It was at first considered, with some encouragement from decision makers, that a system might be based solely on the land parcel as the object of registration, reflecting all other rights, including so-called “ownership” rights to structures, as burdens on the land. However, in designing the details of the system it was determined that this attempt at simplification might in fact result in complex and unwieldy registration files, as burdens such as leases and mortgages were added to items which were themselves characterized as burdens. Since recognition of the divided concept of immovable property better conformed to Belarus law of the moment, it was considered appropriate to allow creation of registration files for units of immovable property other than land plots.

In the proposed system the units of immovable property for which separate registration files may be opened include the following:

- a land parcel;
- a land parcel and objects attached to it which are held in unified ownership;
- an object attached to a land parcel which is held in the ownership by someone other than the owner of the land;
- portions of buildings or structures which under law may be separately owned (for example, apartments and other subdivided portions of condominiums); and

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<sup>25</sup>The fiction is useful under laws of taxation in order to recognize the long term leaseholder as eligible recipient of the benefits of ownership of land and structures, including deductions against taxable income for such things as depreciation, as well as the burdens, such as payment of property taxes. This is not to say that the developer of a structure on leased land could not negotiate for the right to move or demolish the structure, or even for some compensation upon expiration of the lease term, only that in the absence of such explicit agreements he would be entitled to none of those things.

- two or more land parcels, with or without the objects attached to them, which form a functional unit and which the owner chooses to register as a single unit of immovable property.

The law would provide that subsequent to creation of a registration file no portion of a unit of immovable property may be sold or mortgaged without first creating new, separate registration files for the resulting units of immovable property. This would in some cases require a formal subdivision process, reflected in modifications to the land cadastre, or if it is simply the sale of a building to a new owner it may be accomplished by the registry itself without land subdivision.

## **REGISTRATION PROCESS**

It appears to be a widespread practice in the countries of the FSU to provide in regulations for a generous period of time - upward of 30 days - in which official agencies are obligated to process applications and render a decision. Usually, no sanctions are imposed for failure to meet this deadline. It was therefore anticipated that in most situations registration would not occur immediately upon submission of an application, though this surely may happen in smaller jurisdictions in which there are few transactions.

In cases where there may be delay between submission of an application for registration and legal effectiveness of registration it was considered essential to protect the priority rights of the applicant; prevent further transactions in the property which conflict with the rights of the applicant; and give notice to all other persons dealing with the property that there is a right awaiting registration. It was proposed to require creation of an application log which would preserve the priority rights of the applicant against later applications and place others on notice of the application.

Registration would begin with submission of legal documentation to the registrar which describe the right to be registred, together with any forms or applications required by the registry. Application for registration would be entered into a daily log or application file in the order they are received, and entered also into the registration book in the form of a "flag" or notice of pending application. Entry of final registrations would occur in the order of the application file. Upon completion of registration, the actual date of registration would relate back to the date of application for purposes of determining the legal effects of registration.

## **LEGAL DOCUMENTATION**

The proposed basis of registration is submission to the registrar of legal documents which create, transfer or modify a right to immovable property. Such documents are to be prepared in accordance with the requirements of the civil legislation. The National Agency on Registration may propose forms of documents and applications which are mandatory for registration, but which are supplementary to the documentation prepared by the parties to the transaction.

The requirements for acceptable documentation are stated broadly to include:

- adherence to the requirements of any civil law of Belarus for form and content;

- signatures of the parties;
- a description of the property, including cadastre number and building inventory number;
- description of the right which is to be registered; and
- notarial certification if required by the civil law.

It is too early in the development of Belarus' system of commercial laws to determine the form that legal documentation will take. The proposed Civil Code is not yet enacted. If the system follows the lead of the Russian Civil Code enacted in 1994, legal documentation will be largely a private matter subject to certain minimum requirements specified in the code regarding form and content. It was therefore thought necessary to allow for a broad range of possibilities with respect to documentation. If eventually the legal system develops with standardized documents, the system can accommodate this. If more varied documentation becomes the norm, the system can accommodate this also, and also assure the efficiency of the registration process by requiring certain standardized applications and abstracts as a condition of registration.

One noteworthy implication of a system of document-based registration is the extent to which the users of the system are deemed to be on notice of the contents of the legal documents submitted to the registry. The answer would depend upon the law.<sup>26</sup> The practical reality is that in most systems some diligence in inspecting documents pertaining to current rights is expected. In effect, this may increase transaction costs by requiring the assistance of professionals such as attorneys. But the choice may be perceived as between incurring the costs in the public sector, by making the registrar the legal officer responsible for protecting the rights and interests of the users of the system, or placing the same cost burden on the transacting parties, who may tend to be among the wealthier segment of society in transitional economies.

One approach to this issue which has been suggested would be to place the user on notice only of the contents of registered documents which support current rights, but not earlier documentation. In effect, this acts as a limitation nullifying the effects of any earlier defects in title, which is closer in spirit to the concept of registered titles.

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<sup>26</sup>During the course of the project comments were voiced by interested observers from other nations of the FSU that the proposed process is an unidentifiable hybrid of a system of "registration of rights" and "registration of documents." Undoubtedly, this is true. However, the implications of that distinction today may be largely meaningless, as most systems are just such hybrids. The true distinction between the concepts of "registration of rights" and "registration of documents" today seems to be the legal implications of registration, and in that respect the proposed system adhered to the basic approach of registration of rights.

An issue which arose in Belarus is the role of the State Akts, legal documents which grant rights to land. State Akts essentially are certificates of title. Required by current law, and intended to be definitive evidence of title, they are designed to contain all pertinent data regarding the land parcel, including liens and encumbrances. The design of the certificates made by the Land Committee suggests that all transactions modifying rights to the land would be reflected by notations on the certificate, and that upon property transfer the certificate would be turned in and new certificate issued to the new owner.

Certificates of title draw mixed responses from title professionals. They are sometimes considered to be administratively burdensome and inconsistent with the approach of a unified registration book. Problems that may arise include poor record keeping, which results in conflicts between the certificate and the registry, and reliance on the certificates rather than the registry as legal evidence of title. However, in the transitional period of Belarus, in which there is not a great deal of confidence in centralized registries as the protector of property rights, argument are frequently made for an actual document - a "security blanket" - to be held by the right holder. To accommodate this value it was at first proposed that copies of the State Akt be included in the document file of the registry but explicitly subordinated to the contents of the registry book. Neither the registrar nor the right holder would have the obligation to keep the certificate updated or to present it as the basis of registration. Holders of certificates could present them to the registrar to have updated, but in the event of a conflict between a certificate of title in circulation and the registry book the contents of the registry book would govern.

The final version of the draft law prepared for the project omits specific reference to the State Akt document, and states simply that the registration book is the sole and authoritative source of information on rights to immovable property. It is believed that this approach will prevent excessive reliance on paper documents, which could lead to fraud and other irregularities. Moreover, any holder of a registered right can obtain evidence of that right if desired by requesting from the registrar a signed and sealed abstract of his own registration file.

## **ROLE OF THE REGISTRAR**

There is a choice to be made between an active registrar, with discretion, and a passive registrar who is limited to reviewing the content of documents against a checklist of fixed requirements and either accepting or rejecting registration. Concerns were frequently expressed during the course of the project about giving an active role to the registrar, focusing primarily on abuse of authority, corruption, error, and variations arising in practice among jurisdictions. On the other side, an active registrar may be appropriate in Belarus for the foreseeable future as concepts of property rights and transactions in immovable property are undergoing rapid and sometimes confusing development. In addition, criminal and fraudulent activity regarding immovable property rights is increasing in many of these jurisdictions (which may argue as much against as for an active registrar).

The project proposed that the registrar be given an active role in managing the registration system, including in some cases significant authority to reject registration. The registrar would be

obliged generally to register transactions meeting the law, but could exercise some discretion to reject registration to prevent mistake or fraud when circumstances warranted. The registrar would be obligated to reject applications for registration when applications did not meet the requirements set by law or regulations; when there is a conflict between information contained in the application and the registration book; in the presence of discrepancies in documents or applications which justify further inquiry; or if at the moment of application there was a pending dispute regarding ownership of the registered property.

The registrar was also authorized to manage and maintain the records, removing obsolete materials, and to correct minor technical defects in records on his own initiative or on the application of a registered party. However, material defects in registration records, modification of which would result in transfer or termination of rights or material detriment to another registered right, would only be made by order of court. To protect against abuse of discretion, corruption or simple error of judgment, changes or modifications of records would require notice to interested parties and an opportunity to appear. Protection against abuses by the Registrar are provided by the right of appeal to a local court, and registrars are personally liable for damages caused by their willful illegal acts.

The initial drafts of the law prepared for the project included provisions which set out in some detail the scope of the powers of the registrar, professional qualifications and manner of appointment. The final versions of the law produced by the working group leave these matters to further regulation, perhaps reflecting the ambivalence toward these issues at this time.

## **ROLE OF THE NOTARIAT**

Under the existing law of Belarus private notary practice is permitted. Previously, all notaries were employed by the state. While the number of private notaries is not yet great, there is the possibility that this segment of the legal profession may become more significant in future years as there is significant interest.

Most transactions with immovable property under the existing law require notarial certification. The notary will confirm the identities of the transacting parties; confirm the contents of the property registry; and confirm the legal validity of the documentation. In addition, the notary office has in the past been an important depository of legal records and in effect a registry of personal transactions and testamentary matters. The notary generally represents the interests of both parties, representing the transaction rather than the individuals, a role consistent with the role of the notary as a functionary of the state.

Because of their importance in the legal system the role of the notariat in the new registration system must be carefully considered. To require notarial certification for all immovable property transactions can be expensive. At the same time, the notary can exercise an important professional review of the quality of a transaction before it reaches the registry, thereby protecting the citizens and the integrity of the registry. It was considered inappropriate to require notarial certification of immovable property transactions in a law of registration, and the decision

whether to do so was left to the civil legislation of Belarus. At this time, the laws of privatization do require notarial certification of certain fundamental documents concerning immovable property. It remains an open question whether further notarial involvement will be required for subsequent transactions. Much may depend upon the content of the Civil Code which is under development.

In anticipation of a growing role for the Notariat, the proposed law relieves the registrar of the responsibility to inquire into the accuracy or validity of certain matters to which a notary's certification attests as to the truth and accuracy, including the following:

- the identities of the parties to a transaction;
- compliance of submitted documentation with legal requirements;
- accuracy of any information contained in legal documentation, other than information which can be found in the registration book;
- the authority of trustees;
- or the proper execution of any document.

By relieving the registrar of this burden, it also relieves the registry of liability for any errors with respect to matters for which the notary was responsible. The upshot of this provision is that notaries will be liable to their clients for their own errors, raising the need for adequate insurance against errors and omissions, which at this time is not widely available in the FSU, if at all.

If notarization is to be required for immovable property transactions, the system cannot afford a dual system of certification, where matters are reviewed and certified by both the notary and the registry. Moreover, if the private notariat is to be compensated for professional services at market rates it is more efficient for them to insure against their own errors and omissions than to have the state do so, and placing responsibility with the notaries provides greater incentive for them to exercise care in their professional activities.

## **PUBLIC ACCESS**

There is no law which defines the right of the public to inspect and use information gathered and held by the Government and its agencies. In fact, the law and experience of Belarus and the rest of the FSU has been opposed to rights of public access, denying citizens access to data and information other than such that the Government voluntarily decides to release.

Historically, across cultures and different types of legal systems, creation and transfer of rights to immovable property has been a public and open act, and it remains so today; many land registration systems are open to the public without significant restrictions. With respect to the limited issue of access to registry data on immovable property rights, there are strong arguments -

to well known to be belabored here - that open and unfettered access is desirable and has beneficial effects on protection of rights and development of real property markets. However, perhaps in reaction to practices of the Soviet era, there appears to be a strong cultural value of privacy which extends to most personal and business matters. Fear of victimization by criminal elements is often offered as one reason for keeping personal financial matters secret.

The project sought to establish several basic principles regarding public access to the registry information:

- Natural and juridical citizens of Belarus are guaranteed access to registry information, enforceable in court, unless prohibited by another law. It was considered preferable to establish the right of access first and then require affirmative subsequent action to limit it.
- The Council of Ministers, on the advice of the National Commission On Registration, may establish reasonable fees and charges for access to registry information and for specific information products.
- The registry is liable for unauthorized disclosure of information the privacy of which is protected by law.

It is unclear even at this time, when the proposed program is under consideration in the Supreme Soviet, how this issue will end up. The final result may depend in part upon the opportunities for commercial exploitation of the registration data by the Government, and how that would be affected by a policy of open access.

## **OPEN ISSUES**

### **LEGAL EFFECTS OF REGISTRATION**

Defining the legal consequences of registration proved to be difficult, partly because of unfamiliarity with basic legal concept which western systems take for granted, but on policy grounds as well. The premises of the proposed system were that registration in accordance with its terms would constitute legal notice of the registered interest to all parties subsequently dealing with the immovable property; provide irrefutable proof of the priority of the registered interest over any later registered interest in disputes in which time of registration is material; and protect any *bona fide* purchaser of the property against any challenges to his registered title.

The concepts of notice and priority are somewhat straightforward, though various factual issues may always arise to complicate them. As described in the project, the principle of notice simply meant that all persons dealing with the property were held to be aware of the information contained in the registry, and a legal claim or defense alleging ignorance of that information would not be entertained. Notice imposes an obligation on persons dealing with immovable property to familiarize themselves with the record, a prudent practice in any country but particularly important

in the unsettled markets of Belarus. The concept of priority meant simply that matters which depend upon time of registration will be conclusively proved by reference to the record. In effect, the concept of priority imposed the burden on the private parties to a transaction to register their interests quickly.<sup>27</sup>

The difficult issues concerned primarily the protection of the subsequent purchasers who rely on the record. In many legal systems these purchasers are called “*bona fide*” purchasers. The concept of a *bona fide* purchaser was recognized to some extent in the Civil Code of the USSR, which continues in effect in Belarus to the present. In effect, the *bona fide* purchaser is one who purchases in good faith, without knowledge of any prior conflicting interests that would be compromised or harmed by his purchase.

As established in some systems, the *bona fide* purchaser rule protects the investor against claims of defects in the title of persons who preceded him in the chain of title. The protection provided is strong, and would even protect the investor against claims by persons who were deprived of their rights through fraud or other criminal activity, provided that the investor did not know of or participate in the criminal activity. Persons who lose their property to a *bona fide* purchaser under such circumstances would instead be permitted to claim compensation from the registry if the loss was not due to their own negligence. The benefits of this system are thought to be increased confidence in the integrity of the registry and efficiency in dealing with property disputes; the drawbacks can be an apparent failure of justice.

The concept caused some consternation in Belarus, for many of the reasons discussed elsewhere in this paper. First, the concept clearly establishes the ability of state officials to create or terminate rights through their actions. To people who often have come to view minor local officials as corrupt or incompetent, the thought that one could be deprived of one’s property because of an act of a local official - either negligent or deliberate - is troubling. The issue of compensation from a registry offers little comfort - they seriously doubt that the state will be able or willing to pay, and, like the common law, they do not view real property as fungible; cash compensation does not really compensate for loss of one’s homestead. Finally, it offends a sense of justice. The case of the elderly widow who was defrauded out of her property and unable to recapture it because of the *bona fide* purchaser rule brought gasps of astonishment and howls of protest in some seminars. In fact, it was often accurately noted that the rule itself is primarily designed to facilitate markets and protect “investors.” These are worthy goals, but they are just not paramount goals in many nations of the FSU at this time, particularly if they offend a sense of justice.

## STATE LIABILITY

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<sup>27</sup>There are of course many complications to both simple concepts, which were reviewed in seminars and in the course of preparing the proposed law of registration, but the concepts themselves presented no particular challenge. They already have some support in the developing laws of the region. The 1994 Russian Federation Civil Code essentially provides that certain unregistered interests in real estate are considered null and void as a matter of law as to the rights of third parties and therefore cannot possibly achieve priority over a registered interest.

Where registration of immovable property interests is mandatory, it is often argued that the state assumes the responsibility to operate a system which provides the promised protection to users of the system, and that along with this responsibility goes liability to the users for mistakes and errors made by the system.<sup>28</sup> Since inherent in any system of registration is the possibility of fraud and criminality, the state is obligated to compensate the citizens against financial losses arising from these inherent defects as well.

The project proposed that the state assume liability for defects in the system, and to cover the state's liability an assurance fund that would be funded by a portion of the registration fees collected. Creation of this fund on a financially sound basis could take years. Accordingly, the fund would be supported also by the general revenues of the Republic of Belarus, from which appropriations may be made to cover shortfalls. In addition, the registry would be authorized to seek damages and reimbursement from any person whose fraud or negligence contributed to a claim against the registry.

Creation of a system for indemnification of users of the system is not a simple matter, even in some established systems where indemnification may be difficult to obtain. It becomes even more difficult in a start-up system in a country that has scarce budgetary resources with which to support a system of indemnification, and in which registry errors may be commonplace in early years. Choices range from providing no guarantees of title, thereby perhaps undermining confidence in the system, to providing absolute indemnification. A middle ground may be to spread risk between the state and those who deal with the immovable property. This middle ground would result in providing some protection, but also placing significant responsibility on individuals to act prudently to protect their own interests. Steps taken to limit the liability of the state could include declining liability for damages caused by the claimants own negligence, error or omissions of a notary, or errors and omissions in boundary surveys. The system could limit liability by not recognizing causes of action for technical defects in registration that do not defeat the essential purpose of notice to other parties, in the absence of demonstrated harm to a person who relied reasonably on the registry.

## **FINANCING THE SYSTEM**

The project sought to design and implement the system in such a way as to incur minimal additional expense. This was done primarily by reliance on the existing administrative structures as the foundation of the new system and by designing a system that can be implemented if necessary without acquiring a large amount of new electronic equipment. While modern electronic equipment is extremely helpful in implementing a system of registration, and it is hoped that at

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<sup>28</sup>An excellent and comprehensive treatment of all of the issues concerning guarantees of title and state liability in registered title systems is Mapp, T. W., Torrens' Elusive Title (Alberta Law Review Book Series, 1978).

some point the system of registration designed for Belarus will be fully automated, the amount of capital necessary to create a fully automated national system at this time is not available to the Government of Belarus, and it is likely that automation will be a gradual process. Accordingly, the project gave equal legal weight to both electronic and manual means of registration, and the rules and procedures of registration - in particular the definition of the types of data to be maintained and the format for registration - were designed to accommodate automated and traditional paper-based systems of registration.

It is anticipated that much of the operating cost for the new system will be supported by fees and charges for registration services and from the sale of data products to users. Fees and charges will be established periodically by act of the Council of Ministers on the advice of the National Agency for Registration. It is anticipated that the fees or registration services will be reasonable and established in a manner that will not impose substantial financial burdens on ordinary citizens. At the same time, to prevent excessive and costly demands on the system for information services and frivolous requests for services by citizens, firms and government agencies, it is anticipated that the costs for services will bear a reasonable relationship to the actual costs of providing the services.

Funds for starting up the system - in particular the funds necessary for acquisition of needed capital equipment and training of staff - will likely be necessary from time to time and will be left to the usual budgetary processes of the Government.

Revenues of the system will be expended essentially in the following order of priorities:

- contribution to the assurance fund;
- payment of the operating expenses of the National Agency and territorial registries;
- reimbursement to the cadastre agencies for data products provided to the registry.

Revenues of the system would be allocated to a fund managed by the National Agency, and allocated periodically by budgetary act of the Council of Ministers on the advice of the National Agency.

## **OWNERSHIP OF DATA**

A question closely related to financing the system, and of great interest to the Belarusian participants in the project, was proprietary rights to data. As noted, a great deal of information on land and real estate exists which would be helpful to the registration system. Creation of a unified system of registration of rights to immovable property could therefore require consolidation of existing data bases, or at least portions of existing data bases, into a single, unified registry.

Moreover, several existing agencies - for example, the Land Committee - would continue to have some role in gathering and providing data to the registration system. These agencies express reluctance to give up ownership of their data, which they view as potentially useful for commercial exploitation.

This situation is complicated in Belarus as in most of the FSU because of the absence of modern laws of intellectual property which would serve to define the rights of creators and users of modern electronic data bases and software products. The provisions on intellectual property which do exist are found in the Soviet-era Civil Code and date from a time long before the advent of electronic data systems, and are limited largely to traditional rights affecting literary and other artistic products. Moreover, there is no well-developed legal concept of the rights of citizens to inspect and use information gathered and held by the Government and its agencies.

Inducing data producing agencies to cooperate in creating a system requiring data consolidation is a difficult task anywhere, even in countries which have somewhat advanced legal concepts of information property rights and advanced commercial systems. How this can be accomplished is an open question. It may be possible in some cases to take a simple budgetary approach to data ownership, whereby the revenues from the registration system would be pooled and distributed among the agencies which collect or produce the data in accordance with some agreed upon formula. A more complex legislation on the rights and obligations of government producers of data could be considered, but perhaps not in the short run in economies at the stage of Belarus. In Belarus the apparent solution for the time being is an understanding among the data producing agencies to agree on a "treaty" - promulgated by regulation - setting out the rules of data sharing and exploitation.

## **TRANSITION**

The proposed transitional period for implementation of the new system is three years. It is expected that during that period the National Agency and local territorial agencies will be established, and transfer of relevant existing data from local governments, the BTIs and the local branches of the Land Committee to the new registration system will be completed. At their discretion, localities may accelerate the process of conversion to the new system.

An issue for transition was the time at which the provisions of the new system would become effective on the territory of the Republic. It is clear that in addition to various rules of administration and procedure, a proposed law would be an integrated system, which might only be successfully implemented if the entire law takes effect at the same time. It was questionable whether specific provisions of the law could be implemented nationally on a piecemeal basis over the three years of the transition period. At the same time, few administrative districts in the Republic would be ready to implement the entire law in the near term.

One approach to this problem was to declare certain transitional provisions of the law effective immediately with respect to the entire Republic, but to implement the requirements and procedures of the law in administrative districts of the Republic on a phased basis as the administrative structure, training and data conversion processes are completed in those districts.

At any given time during the transitional period there would be some districts operating wholly under the provisions of the new law, while other would operate under present procedures until their transition process was completed.

Questions arose as to how and at what point prior to expiration of the transitional period administrative districts would implement the entire law on their territory. This decision could be left to local governments or to the National Agency for Registration, or to a cooperative decision of both. Strong arguments can be made that because this is a national system created pursuant to national law, the decision on implementation in a given administrative district should be a technical decision of the National Agency based on an assessment of the district's capabilities and progress in transition processes. Such an approach would discourage delay by local administrations and place the burden on the National Agency to provide the necessary assistance and incentives for conversion to the proposed system.

It seems likely that the longer present procedures of registration remain in effect, the larger and more costly will be the task of converting registration data from the existing systems to the new one. This task can be made easier if during the transition period technical modifications which anticipate the design and legal requirements of the new system are made to existing registration procedures, and this process has in fact begun.

In considering the process of transition, specific attention was paid to the following issues:

- treatment of rights registered under the existing system during the period of transition;
- allocation of responsibility for transfer of existing file to the new system, and protection of existing right holders from errors and omissions;
- treatment of rights which must be registered under the new law but not under prior law;
- the outside effective date for conversion to the new system on the entire territory of the Republic.

## **CURRENT STATUS**

As of September, 1996, the status of the project in Belarus, which is now entirely in the hands of Belarusan professionals, was as follows:

- The interministerial working group had prepared a proposed law of title registration and had obtained the comments of all Government Ministries. Objections were raised only by

the Ministry of the Environment, the parent of the Land Committee, which disagreed with the proposed assignment to BTI of responsibility for legal registration of all rights to land and real property.

- The Government issued its Decision 457 (July 12, 1996) entitled “State Program for Attracting Investments In Belarus,” which included as its first item enactment of the law of registration of property rights.
- The Republican Center for Registration of Rights to Immovable Property has been created and staffed.
- The concepts of the project are being further developed in a pilot project in Brest, the second city of the Republic.