The MDB as Mid-Wife:
Delivering Property Rights Reform

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Abstract

Competition for land is pervasive in the developing world, and competition can become conflict, sometimes violent conflict, where rules are unclear or a rule-of-law environment does not exist. While competition for land is a critical cause of such conflict, many conflicts over land have broader political dimensions and resonate at deeper levels, making them particularly difficult to resolve. The content of these disputes is not constant however, but shifts with changing uses and new values of land. This paper asks how the land conflicts of the 21st century might differ from those of recent decades, how the environment in which they will take place is changing in ways that will affect them and their resolution, and what we have learned on an institutional, legal and process level about managing such conflicts. The paper will discuss the international experience, but will draw heavily on African case studies to develop some of its points.

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Introduction

A number of papers in this volume, and in particular those by Bromley and Bebbington, raise questions about the relevance and adequacy for developing countries of received notions about property rights in land, at least the versions conveyed by development institutions such as the multilateral development banks. Bebbington, noting that such outside players now influence local perceptions of meanings of land, suggests that it is important that we explore *how* these outside influences operate. Many multilateral and bilateral donors are actively involved in the promotion of land tenure reform,[1] but this paper describes the mechanics and substance of the promotion of property rights reform by the World Bank, drawing upon the author's seven years in the Legal Department of the Bank. The Bank is the development agency whose research has most influenced thinking on property rights reform in the developing world,[2] and draws upon the author's seven years in the Legal Department at the Bank.

To what extent can we observe in these efforts by the Bank the future of property rights in developing countries? The paper examines the focus and effectiveness of those efforts.

Property Rights Reform as a Growth Area

The bilateral and multilateral donor organizations that manage development assistance are more focused on property rights reform today than at any time in the last half-century. Concerns for land reform from Cold War days have given way to an emphasis on the need for secure, marketable property rights in land. The insights which provide the economic basis for land tenure reform are not new, but come out of early work in agricultural economics, notably the 18th century debate on the impacts tenancy on productivity. Bromley in this volume reviews those developments through the work of several economic thinkers. In the less nuanced world of development "common knowledge", however, the idea that stands out is that strong property rights can enhance farmer incentives and, in the words of Adam Smith, "turn sand to gold".

Today, equally dramatic propositions about the role of property rights in development are being put forward. Due largely to the work of Hernando de Soto, and in particular his book *The Mystery of Capital*, property rights are urged as fundamental to the process of capital building. The extensive lands held without benefit of formal property rights are characterized as constituting a vast fund of "dead capital," which can be brought to life through the conferring of formal, transferable and mortgageable property rights. Because the poor hold much of the world's land under informal and customary tenures, it is suggested that they would be major beneficiaries of this change (De Soto 2002).

This is obviously a gross oversimplification. Property rights are only one of the cogs that need to be in place in order for the complex gears of a market economy to engage and

move the development process forward. Failure to recognize this and a tendency to see property rights reform as the removal of a "bottleneck" led donors in the 1960s to serious over-promise on the impacts of rural property rights reform and titling. The results were disappointing and gave rise to disillusionment with the strategy (Bruce and Migot-Adholla 1994). Moreover, the poor, given marketable property rights, may loose their land through ill-considered and desperate sales rather than using it to access formal credit (Bledsoe 2006, Quan 2000, de Janvry et al 2001). When one adds the fact that in many developing countries land is important not just as an object of investment but is the principal resource for social security, is often entangled in a web of kinship relations and is embedded in local cultures and governance system, the complexity of the task of property rights reform becomes clearer.

What constitutes "reform" of land rights will not mean the same thing at all places and times, and certainly does not mean the same thing to everyone. As Bennington makes clear, one's sense of what makes sense as land policy and property rights depends on how one can benefit from the land, and different actors bring different values and claims to policy discussions. As he suggests, "[I]t is not simply the case that the meaning of land has changed over time…; it is also that these different meanings co-exist, and can come into conflict with each other…" Land is thus political. Vested and powerful interests are involved and property rights reform is a task to be tackled carefully. Often it can be achieved only incrementally. Poorly conceived or overambitious property rights reforms can sow normative confusion and seriously decrease security of tenure. This is a lesson learned from early land privatization reforms of the 1960s in Kenya and elsewhere (Shipton 1988, Migot-Adholla 1993). But is has been largely disregarded in the enthusiasm for formalization of property rights in land.

What are the main focuses of reforms of property rights today? In countries transitioning out of state ownership and management of land, donor agencies have sought to use technical assistance in law and technology to deliver new property rights systems almost overnight. In eastern and central Europe these efforts have met with considerable success, and, given impetus by the desire of these nations to join the EU, these reforms will continue to move steadily forward. In former Soviet Central Asia, the process has proved much more difficult and halting, and authoritarian governments have manipulated the privatization process to concentrate land in the hands of the former farm management class and political cronies (Bloch 2002). In China, land has been decollectivized and farmers given greater freedom to produce and market their produce; reforms to further strengthen tenure security are under consideration.[3]

In Latin America, South and South-East Asia and especially Africa, the process of property rights reform has been complex and accurate generalization is more difficult. . Many of these countries and especially those in Africa have substantial areas where land rights are governed by custom, plus colonial statutes still in force and judge-made law by colonial courts still applicable, plus later deposits of legal detritus from attempts at either (or both) land nationalization and privatization further littering the normative landscape. One finds layer upon layer of land legislation like geologic strata, piled upon each other

without much attention to repeals or reconciliation, in desperate need of restructuring for accessibility and intelligibility (McAuslan 2004). A housecleaning is clearly needed.

The really challenging issue, however, is that of the future of customary land tenure. In Africa, as Bromley suggests in his article in this volume, early efforts at tenure reform and titling met with disappointing results, resulting in a barrage of critical studies. Those efforts underestimated the cultural embeddedness of customary systems: a customary tenure system is not a case of informality, but constitutes an alternative formality with its own values and vested interests. Some critics have urged that such programs were premature (Bruce and Migot-Adholla 1994), others that they misconceived the process of evolution of property rights (Platteau 2000). Bruce and Migot-Adholla (1994) argued for much more selective use of tenure reform and titling, focusing on lands in urban and peri-urban areas, and for development of supplemental strategies that encourage customary land tenure to evolve in response to changing conditions, instead of government seeking to transform it overnight in a forced march toward individual ownership. Still others have argued, as does Bromley in his paper in this volume, that these titling efforts represent a failed attempt to transplant values about land developed in European cultural and agronomic contexts into African contexts where they simply do not fit, and that fundamentally new approaches are needed.

In spite of some disappointing experiences with these programs, land law and property rights reform remains a staple of development assistance. How exactly does a multilateral development bank such as the World Bank assist client governments in the process of land law reform? National law is made by national institutions, and so the role of an MDB in law reform can only be encouragement and support; however much influence the bank may have, it does not have the final say. Drawing on the recent experience of the World Bank, the flagship of the MDBs, this article describes how Bank task managers decide what reforms to encourage and how those reforms are pursued within the context of the Bank's lending programs, then evaluates the relative effectiveness of the different approaches reflected in current Bank practice.

The World Bank and the Content of Property Rights Reform

Neither the World Bank nor any of the other multilateral development banks has a land policy.[4] Do the banks simply follow the classic prescriptions of neo-classical economics? In fact, World Bank research has produced serious qualifications of the property rights prescriptions generally associated with neo-classical economics, and these have been embraced by the Bank in policy papers. The 1988 econometric study of impacts of land titling in Thailand by Gershon Feder made a compelling case for the credit and investment benefits of titling and registering land (Feder 1988). But Binswanger, Deininger and Feder on "Power, Distortions, Revolt and Reform in Agricultural Land Relations" (1995) is an astute analysis of the issues of land tenure and land reform from a political economy perspective. Bruce and Migot-Adholla's *Searching for Security of Land Tenure in Africa* (1994), reported survey results from studies jointly funded by USAID and the World Bank in several African countries that raised doubts about whether registration of private ownership would significantly increase investment, and at the same

time drew attention to the ability of customary tenure to evolve to meet new needs. A comprehensive statement of the Bank's approach to land tenure, the 2003 Policy Research Paper on *Land Policies for Growth and Poverty Reduction* (Deininger 2003*),* largely accepts those critiques and embraces a variety of tenure forms including leasehold and customary tenure system as workable in market economic contexts. Much of the recent work of the Bank on negotiated land reform[5] (government funding being provided to groups of the poor to purchase land in the market) reflects an understanding that they will not, left to themselves, deliver land to poor but efficient producers (Deininger 1999). Most recently, a volume on land law reform published by the Bank's Legal Vice-Presidency urges refocusing land law reform efforts to prioritize gender equity, poverty-reduction and natural resource conservation (Bruce et al. 2006).

The relatively innovative perspectives developed from Bank research are not however always reflected in Bank lending. It is not the Bank's researchers or policy wonks in the Bank's central (or "anchor") units who work with client countries to develop and deliver bankable projects for Board consideration. That work is done by the Bank's task-managers, based in the regional vice-presidencies. Task-managers of land projects exhibit very different levels of experience and expertise in the land area. Some are deeply committed to work on land issues, with very substantial experience, and have developed a sophisticated and pragmatic understanding of the economic and political issues at stake.[6] But there are other Bank staff managing land projects with little or no specialist knowledge; this is considered acceptable on the questionable reasoning that a good manager can access the expertise needed through the hiring of consultants.

How are new knowledge generated by research and related best practices communicated to this task-manager cadre? The most important conduit is the Land Policy and Administration Thematic Group. Thematic groups in the Bank are voluntary associations of staff with common interests, sponsored and funded at a very modest level by anchor units, in this case the Rural Development Department.[7] These thematic groups mix "anchor" staff (staff from central units in the Bank whose job is to provide expertise and advice to colleagues and clients) with staff from the regional lending units, in particular the task manager cadre. Research results and field experience are exchanged largely through brown-bag lunches, seminars, and presentations during the Bank's annual Rural Week.

New knowledge and understandings from research do reach Bank lending staff, but they do so slowly and imperfectly, and when faced with decisions, Bank task managers do sometimes fall back on economic first principles. They do tend to assume, for instance, that land markets are benign, will distribute land fairly and will produce more efficient and productive land use. The roughly twenty ongoing Bank land administration projects, whose land titling and registration support the development of land markets, dwarf the four ongoing projects supporting negotiated land reform.[8]

The Bank's task managers seek to implement their understandings of the need for property rights system reforms in two quite distinct lending contexts. One is the policy lending context, in which Bank lending is specifically framed to promote policy change

and legal reforms. The other is investment lending, in projects that invest in land administration or other concrete activities such as the construction of infrastructure or agricultural development. While the latter projects do not have law reform as a primary objective, law reform may be seen as needed for project success, and so a "policy and regulatory framework" component will be included in the project to support reform efforts.

The World Bank cannot compel legal change by sovereign states, but it does create incentives for governments to change laws: funding for a project or part of a project may be conditioned on certain legal reforms. It generally does so in partnership with the ministry or other government agency with which it is working, often the recipient of its funds, and in support of local champions of such reforms. It focuses on changes in law rather than only policy, because policy is ephemeral and binds only the government of the day, whereas legal changes remain the law even after governments change.

How does the Bank promote land law reform in each of these two lending contexts?

Law Reform in the Policy Lending Context

An ever-larger part of Bank lending, more than a fourth of new commitments in the FY 2005 fiscal year, falls outside traditional investment projects and in the realm of policy lending.[9] The relevant lending instruments were previously Structural Adjustment Loans but today are largely Poverty Reduction Support Credits (PRSCs) (World Bank 2003). For a PRSC, the policy or legal reforms needed are typically described in a Letter of Development Policy exchanged between the Bank and the Government as a prelude to the Loan.[10] These typically deal with numerous reforms stretching across sectors. The Letter of Development Policy is written by a client government official to the World Bank as part of the lead-up to the PRSC. Progress in achieving reforms will later be reviewed in the PRSC Program Document and the subsequent aide-memoires from Bank supervision missions. As countries usually have a succession of PRSCs, this process repeats itself: a statement of intention in a policy letter followed by assessments of progress under the PRSC, followed by a further policy letter, followed by another PRSC, and so on.

For example, the Bank is currently working with the Government of Vietnam on land policy and legal development, which are dealt with under the Vietnam Second Poverty Reduction Support Credit, 2003 (P075398). The Letter of Development Policy (LDP) for the credit provides, in paragraph 54, that the program will support issuance of land tenure certificates, noting that land-use rights that can be traded and mortgaged provide several benefits, especially for the poor. The Development Credit Agreement (DCA) for the project, in schedule 2, notes progress made to date: issuance of land-use right certificates to (i) about 35 percent of users of urban residential land; and (ii) in forest areas, about 60 percent of households and individual land users who have received or rented forest land directly from the State. The Letter goes on to state, in paragraph 80, that under future PRSCs:

> [T]he National Assembly is expected to adopt a new, substantially revised Land Law, which will provide greater land-tenure security and equal access to land by all sectors, that is correspondent with the customs and habits of the communities that are using the land legally. Registration and other civil transactions relating to land use rights will be simplified. Especially, land use rights and project bidding methods will be applied widely for the cases when credit organizations fail to collect their debts. Issuance of Land Tenure Certificates will be continued under PRSCs.[11]

Policy lending is a powerful tool for law reform because PRSCs provide largely untied and so very attractive funding. But they have some drawbacks as vehicles for law reforms as well. First, in contrast to land investment projects, project preparation for PRSCs sometimes does not effectively mobilize expertise on land law and policy from within and outside the Bank at the time when the conditionality is designed. This is because the project is not focused on land, but is being used to leverage numerous and diverse policy changes. The Bank staff involved represent a variety of sectoral interests. These often lack the land-specific expertise of Bank staff working on investment projects that deal directly with land. These non-specialists are more likely to fall back on economic "first principles" rather than the more nuanced prescriptions indicated by recent research and experience. Second, a policy loan often does not provide for effective technical assistance to the client government in meeting its policy and law reform obligations in relation to the loan. Third, the PRSC context does not allow focused application of loan funds to support particular activities; the assistance consists of broad support for government across a wide range of deserving purposes. Follow-through in terms of support for implementation of legal reforms is often not present.

Law Reform in the Investment Policy Context

During preparation of any investment project, the Task Team asks if the legal conditions needed to achieve project objectives exist. How rights are defined and distributed can affect both how intended beneficiaries will respond to the opportunities offered by the project and how the benefits of the project will be distributed. The team may recommend a condition in the credit agreement requiring legal change, for instance a condition involving law reform which must be met before funds are disbursed. In many cases, the legal problem affects some subset of activities under the project, so the condition on disbursement may apply only to the relevant component of the project. Recognizing the need for government to respect the legislative branch's prerogatives – here the rationale is quite different than in policy lending -- the Bank is careful regarding the legal form of obligation taken government commitments to enact laws. They are inserted in loan agreement using conditions rather than covenants, whose violation has more serious consequences than failure to meet a condition. Often, the condition will take the form of a commitment by the executive branch of government to prepare and submit legislation to the legislative branch by a particular date, rather than a commitment to enact the legislation.[12]

It is rare that projects which are not "land" projects call for legal change, and conventional wisdom among task managers of Bank land projects is that it will usually be futile to tackle land policy and law reform without the strong focus on these issues provided by a land project. They simply require focused attention and substantial resources if changes are to be achieved.

Most land law reform support then takes place in the context of investment projects that are focused primarily on land issues. These tend to fall into three major categories: a) land administration projects, b) land reform projects, and c) natural resource management projects. Land law reform in each of these project contexts are reviewed in turn.

Land Administration Projects

Land administration projects account for the majority of "land lending" by the Bank. The objective of these projects is to provide security of tenure and enable the development of land markets, and they do so by supporting the provision and documentation of land rights. While such a project usually has several components, a look at the budgets makes clear that these are essentially land titling and registration projects. Such projects are common in countries of Eastern Europe and the former Soviet Union, and there are also a substantial number in East Asia and Latin America, fewer in Africa and other regions. On both efficiency and equity grounds, the Bank has supported primarily systematic titling and title registration, based on a field operation for demarcation and survey of boundaries and adjudication of rights. At best, that process moves from parcel to parcel in a locale officially declared an "adjudication area," gathering the needed information and informally mediating disputes. The approach is especially useful in major transitions, as when: (1) customary or informal rights are to be formalized; (2) state or collective land is being broken up into smaller holdings and privatized; or (3) it is simply desired to bring all land in an area onto a single efficient rights database. Because the process is painstaking and participatory, fraud is minimized and the results are reliable, so registration of a title can be given conclusive or other strong legal effect. The certainty created allows anyone contemplating a transaction to rely confidently on the register to show who is the legal owner of the land (Simpson 1976, Dale and McLaughlin 1999, and Deininger 2003). A review of these projects shows a variety of legal reform issues arising, pursued under sub-components for "policy and legal reform" or "the regulatory framework".

First, there are sometimes issues with the contents of the rights to be registered. While the Bank has become far more flexible over the years in this regard, and is comfortable funding titling of customary rights, use rights and leasehold rights, it must still ask whether the tenure available is robust enough to provide landholders with the incentives needed to invest and is secure under national law. There is after all little point in documenting rights that may be arbitrarily withdrawn or casually overridden by government or powerful private interests. This issue only occasionally surfaces in land administration projects, because it is so fundamental that it should be addressed before such a project will even be considered. It is especially important in countries in transition out of state ownership of all land, such as those in Eastern and Central Europe and

Central Asia. Some of the Eastern European countries such as Poland, Yugoslavia, and Hungary, retained a limited amount of land under private ownership (household food plots, for instance) even under communism, and so property rights reforms come relatively easily. In countries of the former Soviet Union the process has been more difficult. In former Soviet Central Asia, some countries such as the Kyrgyz Republic have made the transition to private property relatively quickly, but in others, such as Azerbaijan, Kazakhstan, Tajikistan, and Uzbekistan, the reform process has been halting and has delayed Bank-funded support for land administration.[13]

The Bank does however sometimes commit to land administration project in countries where improvements in the content of property rights are a concern. For example, the loan agreement concluded for the Ghana Land Administration Project, 2003 (P071157) reflects a concern with security of tenure through a disbursement condition that requires clarification satisfactory to the Bank of a constitutional issue concerning the continued validity of customary land rights. This assurance, in the form of memoranda from the Ministry and the Attorney-General, were provided and the condition met. In another example, the Nicaragua Agricultural Technology and Land Management Project, 2002 (P056018) supported a national Committee for the Study of Agrarian Legislation in the hope of drafting a new law to consolidate and guarantee property rights.

Second, and by far the most common, land administration projects supports reform of the legal framework for three basic tasks in the process of land titling and registration itself: rights adjudication, survey and titling. Bank task managers experienced in these projects are knowledgeable about the legal issues and models involved. The key statutes for titling and registration are typically a Land Registration Act, a Land Adjudication Act, and a Land Survey Act. One sometimes finds these dealt with in broad terms in a single Land Law, with specifics left to regulations.

In Cambodia, for example, the Land Law of 2001 contains the basic legal framework for title registration, adjudication, and survey, but few details. The multi-donor Cambodia Land Management and Administration Project (LMAP) supported by the Bank has focused its legal reform assistance on elaboration of the subsidiary legislation related to adjudication and titling. Technical assistance has been provided by an Asian Development Bank team working within the Ministry of Lands, and the Ministry has produced and enacted a broad range of subsidiary laws and regulations under which an ambitious program of systematic titling and registration is going forward.[14]

Specific legal issues that arise with some frequency in land administration projects and for which legal reforms have been sought include the needs to a) create one-stop shops to better service clients; b) strengthen provisions on the legal conclusiveness of titling; c) provide more adequately for systematic adjudication of land rights; d) provide public access to the land register; e) give field adjudication officers the authority to make decisions based on incomplete documentary evidence and to rely upon oral evidence, and f) provide more rigorous standards for correction of mistakes in the register (Bruce et al.. 2006). While some of these may seem “technical matters”, there is often opposition from

attorneys and notaries to simplifying reforms of land registration law, because they see their incomes as threatened by simpler, cheaper approaches.

Third, there are sometimes institutional reform issues to be addressed that require legal change. The Bank often urges consolidation of several institutions with roles in the land registration and titling process into a single agency to reduce the alarming transaction costs often involved in registration. Commonly, for instance, survey and title adjudication functions are in a Lands Agency while the title register is managed by the Ministry of Justice. Bank experts insist that land administration projects in One-Agency countries (Armenia, Moldova, and Kyrgyz Republic) are performing well, but not those in Two-Agency countries (Bulgaria, Croatia, and Romania). The Bank's project on Land Registration in Macedonia only moved forward to signature once the title registration function was moved from the Ministry of Justice to the State Agency for Geodetic Works. This can be a contentious issue with Western European donors, who are familiar with and quite comfortable with the Two-Agency model. And the Bank is not always successful in achieving the sought-after reform. Under the Philippines Land Administration and Management Project, 2000 (P066069), a proposal to consolidate the land titling function in the Ministry of Natural Resources, which already did land titling and already operated a title registry, was successfully resisted by the Ministry of Justice, which operated a parallel judicial titling system. In Ghana, in connection of the Bank's Ghana Land Administration Project, 2004 (P071157), Cabinet has committed itself to reorganizing an older deeds registration and a modern title registry under the Commissioner of Lands, to promote an effective transition to the modern system and end the competition which had existed between the two units.

Fourth, there are now Bank projects that seek to register customary rights. In some cases, national statutes do not make provision for this. In Indonesia, the Project Appraisal Document (PAD) for the Indonesia Land Administration Project, 1994 (P003984), spells out a phased approach to customary land rights: a) excluding areas under customary communal tenure from areas chosen for systematic adjudication, b) bypassing those areas when found in an adjudication area, c) examining the feasibility, desirability, and methodology of registering *hak ulayat* in three selected areas through *adat* [customary] land right studies, and d) engaging government of needed reforms. Toward the end of the project, as a result of these discussions, Government enacted a regulation providing for registration of communal land rights.[15]

In Malawi, the Malawi Community-Based Rural Land Development Project, 2004 (P075247), is supporting development of a new Land Law which will provide for full recognition and certification of customary rights. The Cambodia Land Management and Administration Project, 2002 (P070875), is working in a context in which the legal authority for registering customary rights exists but the modalities for adjudication and titling need to be worked out.[16] The project is working with local NGOs to develop satisfactory approaches to get this land on the register. The Ghana Land Administration Project, Ghana Land Administration Project, 2003 (P071157), is working with a Land Registration Act that provides specifically for registration of customary land rights, and is developing a pilot for registration of the allodial land rights of traditional communities.

Another potential front in land law reform in land administration projects is gender equity. The Bank's OP 4.20 on Gender and Development (World Bank 2003), while it calls for nondiscrimination, does not specifically mention property rights, nor does it provide explicit guidance on how to pursue nondiscrimination in project contexts. Task managers sometimes face legal systems that discriminate against women in land rights, and it can reasonably be asked whether land administration projects should proceed in such a context. That question is not however generally asked, and the Bank's land administration projects have rarely faced up to the need for legal reforms in this area. One exception is the Philippines Land Administration and Management Project, 2000 (P066069) which played a major role in obtaining the 2002 repeal of a 1936 administrative order; the repeal removed explicit gender bias in provisions on the acceptance and processing of applications for homestead patents and other applications for public lands.[17]

More commonly, the gender equity issue in land administration projects arises as an issue of how to avoid the project's titling actually disadvantaging women landholders. This issue has generally been neglected because task managers have assumed that a national law is adequate if it does not *de jure* discriminate against women with regard to land access and rights. Recently, the Bank has studied the gendered impact of land titling and registration projects (World Bank 2005)[18], and it is better understood (if not universally accepted) by task managers that even where women have valid legal claims upon land, they can be lost in the registration process if adjudication staff do not take affirmative action to ensure they are registered. This can often be handled at the level of regulations, instructions and training for staff and Bank land administration projects in Laos and Viet Nam are good practice examples in this area.[19]

Finally, land administration projects frequently break new legal ground in the provision of alternative mechanisms for resolution of land disputes. The Bank has sponsored regulations for systematic adjudication that provide for mediation in the field by project staff, subject to appeal to administrative authorities or the courts. This topic deserves a paper of its own. For example, the Cambodia Land Management and Administration Project, 2002 (P070875), supports a system of Cadastral Commissions at the district, provincial, and national levels to hear appeals of field adjudications. The project has funded the drafting of regulations to govern the proceedings of these commissions as well as training and equipping them. In addition, the project is funding NGO legal assistance to poor and disadvantaged parties appearing before the commissions.[20]

Negotiated Land Reform Projects

Today a new generation of Bank land reform projects is implementing "negotiated" or "community-based" land reform, in which Bank funds are provided to groups of beneficiaries to purchase land. Early experience suggests that this reform model is a relatively efficient way to move land to the poor because it reduces political tensions, bureaucratic inefficiencies and corruption, and court disputes.

The Bank's pilot work with this concept was hampered by a Bank rule against disbursement against land, but in 2003 the Managing Director exempted community-based land reform projects from this prohibition and set up a Community Land Purchase Committee within the Bank to vet projects and monitor success. In August 2004, the "expenditure eligibility" reform, designed to loosen a variety of restrictions on the activities the Bank can fund, did away completely with the prohibition.[21] The Land Purchase Committee continues to review projects seeking approval for land purchases and to craft guidance for Bank staff on use of land purchases in a much broader range of contexts.

The community-based land reform approach uses the market mechanism, and this affects the legal issues that arise, which are quite different from those arising in compulsory land acquisition programs. Under the criteria applied by the Land Purchase Committee, a project will be approved to purchase land only where the purchase is for a productive purpose, where the land market is sufficiently developed to provide an efficient means of transferring land, and where mechanisms are in place to ensure safe handling of funds. This Committee asks task manager to inquire closely into (a) the forms of tenure available; (b) whether the sellers can provide good title to the land to be purchased; (c) the efficiency of the land market (including regulatory restrictions, credit market imperfections, and the distortions that both introduce into the land market itself); and (d) the forms of organization available for beneficiary groups, which must provide the juridical personality required to hold land.

The flagship project is the Brazil Land-Based Poverty Alleviation Project, 2001 (P050772). This project extends to several Brazilian states a program piloted in 1996–97 in the State of Ceara.[22] The PADs and the DCAs for both the pilot and the new project raised none of the legal issues mentioned. This was not surprising since the large holdings to be purchased under this program belong to a formalized land sector, one in which full private ownership is well established, land is registered, and the legal framework for land transactions is well developed. Unlike land reform programs involving compulsory acquisitions, there is not a series of legal hurdles to be surmounted under this model—just the normal requirements for valid land transactions.

The first project operating under the exception allowing the purchase of land with Bank funds for community-based land reform is the Andhra Pradesh Rural Poverty Reduction Project, 2003 (IDA-37320/P071272). Land purchases are budgeted at $4 million, with land purchase being one possible use of funds under the project's Community Investment Fund. Investment funds will also be provided to beneficiary groups. The project commissioned studies of the operation of land markets and the land administration

machinery prior to appraisal and concluded that, with precautions, these could safely be used. The project benefited from two detailed legal reviews of the arrangements, one by a legal consultant hired by the project design team and the other as part of the external review process used by the Land Purchase Committee. Again, it was concluded that the project could proceed within the existing legal framework.

The next project, the Malawi Community-Based Rural Land Development Project, 2004 (P075247), has been approved and implementation has begun. The project will provide funds for land purchases by poor members of local communities from freehold and long-term leasehold estates in southern Malawi. In this case, the funding was provided to the government in the form of an IDA grant. Legal issues did arise during appraisal, concerning the type of land registration, purchases of leaseholds, an option for the purchasers to fold the land purchased back into the customary land tenure system if they chose to do so, and the appropriate form of association for land purchase groups. Again, laws did not need to be changed achieve the aims of the project.[23]

There early community-based land reform projects represent an important departure for the Bank and raise important legal issues for consideration during the design process, but they have not so far required reforms of land law. They of course do require a legal framework that allows secure transactions in land rights, but it appears that projects in this early stage are only moving forward where these conditions already exist. This may change with time, if the model continues to prove its worth.

Natural Resource Management Projects

The Bank has far fewer natural resource management projects than land administration projects. Many are focused on protection activities and regrettably pay scarce attention to property rights issues, but there are exceptions. These exceptions have focused not on individual property rights but on the rights of communities in natural resources (Bruce and Mearns 2002, Bruce 2003).

One of the most systematic and substantial reforms of land policy and law supported by the Bank in Africa began in the context of a forestry project, the Tanzania Forest Resources Management Project, 1992 (P002785). Building upon a landmark public consultation and report by the Presidential Commission of Inquiry into Land Matters (Government of Tanzania 1991), the policy development process under the project produced a new Land Policy in 1995 and, with DFID technical assistance, resulted in the enactment of important new law in 1999, the final year of the project.[24] The new law, *inter alia,* affirms the right of villages to use by-laws to manage their natural resources; these are facilitating the replication of a number of the household and community forestry initiatives developed under the project (Wiley 1997).

Another Bank-supported natural resource management project which supported property rights reform was the Colombia Natural Resource Management Program, 1993 (P006868). According to the Project Appraisal Document, local communities in Colombia's Choco Region on the Pacific were unable to manage their natural resources

as the project envisaged because the entire region was classified as a forest reserve: "Clarification of the land ownership situation is essential for the design of resource management and conservation policies, in order to assess the convergence of interests of the parties affected and involved, [and] the distribution of economic benefits and costs." A legal regime for titling indigenous reservations had existed for some time, and land was titled both to individuals and Amerindian communities. The project worked on regulations and contractual arrangements for implementation of these legal reforms in the Choco Region, and for the coordination of claims from the different ethnic communities. It eventually issued 83 titles covering 404 communities containing nearly 40,000 families and covering nearly 2 million acres, but a growing insurgency in the region precluding a follow-on project (Ng'weno 2000).[25]

Where Bank natural resource management projects have confronted access issues concerning state-owned forest resources, the Bank has encouraged governments to work with contractual solutions. These involve agreement between the forestry department and a community or resource user group on a forest management plan (Lynch and Talbott 1995). For example, the Lao PDR Forestry Management and Conservation Project, 1994 (P004169), funded the launching of a pilot program for participatory management of production forests in sixty villages in two provinces. The Forestry Law of 1996 (Article 7) allowed for the organization of village forestry associations, agreement between governments and associations on ten-year management plans, and fifty-year management contracts between the State and associations for association use of state forest land, with sharing of revenues (Williams 2000).

Usually such agreements do not confer property rights, and they often fall short of providing secure tenure (Bruce 1999). The Bank-supported Vietnam Forest Sector Development Project, 2004 (P066051), does better, aiming to provide long-term leases to local communities. Forest plantations (fast-growing trees, mixed plantations, and fruit trees) are to be established on state land (all land in Vietnam being state land) with forty- to fifty-year Land Use Certificates, using a participatory approach involving village consultations, land allocation, and certification of land use rights.

In the arid pastures context, a context occasionally addressed in Bank projects in client countries in Africa and Asia, the Bank has faced similar issues of state land ownership and reluctance on the part of governments to accord secure use rights to user communities. In Mongolia, through a Japan Social Development Fund (JSDF) grant and a Sustainable Livelihoods Project, 2002 (P067770), the Bank encouraged the government to pursue a system of community-access commons, which were allowed under the 1994 Land Law. In an unfortunate regression, a 2003 Land Law in effect returned pastureland to the status of an open access resource.

Bank projects on natural resource management and forestry have not generally sought property rights and titles for resource users, though communities may be as badly in need of these for their forests and pastures as are individuals for their residences and farms. Nor have these needs for tenure and title been addressed in Bank-funded land administration projects. These have avoided titling on forestland, given the frequent lack

of a legal framework for property rights there, rather than confronting that lack as a legal reform issue. There is in fact a serious and unfortunate disconnect between the Bank's work on land law reform and reform of the law relating to common property. Bank land administration projects in Cambodia and Laos[26] lack the legal basis for registering local land resources – the village soccer field, the village temple, the village commons -- to local communities and so these are registered in the name of the state. The Bank has failed to seek legal reforms needed to remedy these situations, and lost an important opportunity to clarify the legal status of local communities.

Blind Spots and Promising Approaches

This paper has reviewed the processes by which the World Bank pursues land law reform in various project contexts, and provided a good many concrete examples. It hopefully is enlightening as to the processes and substance of Bank-promoted reforms. The Bank, which lends to governments to support their program, lends to support government activities, and especially land administration, a key government function. It lends its support primarily to titling and registration of individual property rights, less to land reform and natural resource management, and only very rarely for a broad range of other legitimate land activities by the state: land use planning, state land management, and sustainable land management.

The emphasis on land titling reflects the Bank's conviction of the transformative power of property rights. Laws create property rights but it is land titling and registration that make them effective. They identify the land, identify the right-holder, and document the link between the two in ways that promote security of tenure and marketability of land. The Bank has been practicing this for decades, and its land experts are nonplussed by the new enthusiasm for formalizing property rights and the fanfare that has accompanied it. Like the Native Americans whose continent was discovered by Europeans, they wonder how their territory can have just been "discovered" when they have always lived there. They know, moreover, and from hard experience, that property rights reforms are never simple or easy. Still, they are themselves believers in strong property rights and new generations of Project Appraisal Documents repeat the lessons of the Thailand Land Titling Project. Unfortunately, often they do not probe seriously the extent the country at hand is like or unlike Thailand, and the financial analysis of returns to the investment is constructed on the basis of assumptions that may or may not be applicable.

There are some surprising blind spots that recur in Bank land administration projects, and two are particularly serious. First, the emphasis in Bank thinking and projects remains on individual rights; Bank projects now work with long-term use rights and leases and even customary rights, but they still tend to focus, with a few exceptions, on individual rights. Some natural resource management projects have embraced common property solutions, vesting land rights in communities rather than individuals, but the mainstream land administration projects have paid remarkably little attention to such rights, even where they have been reflected in local practice (if not national law). The Bank has not, as it should have done, identified this as a key area for policy dialogue and legal reform.

A second blind spot is reflected in the lack of incorporation of land use planning in its land administration projects. There is skepticism among many Bank land administration staff as to enforceability of such restrictions in many developing countries, not unreasonably given the experience. They are also leery of land use planning because, especially in recently socialist polities, officials sometimes seek to use land use planning to revert to command agriculture, for example assessing soil quality and dictating crops to be planted in given areas.[27] In addition, bringing land use planning within a land administration project often requires involving another ministry – the administration of property rights and land use planning are rarely in the same ministry or agency – and this greatly adds to project complexity. Bank task managers, quite rightly, value simplicity in project design.

But failure to include land use planning creates an imbalance. Property rights in western economies can be framed in a relatively absolute fashion because the legitimate claims of the state to social control of land are achieved through legal controls characterized as regulatory and situated outside land law, in planning law. Property rights and regulatory restrictions exist in a creative tension, providing the balance that makes them both work. This understanding is largely absent from discussions dealing with land in the Bank, and from its land projects. The author does not want to gainsay the difficulty of working both these sides of the fence in a given Bank project, and yet it is important that the Bank try to find ways to do so.

These two issues concern the substance of property rights reform, but what about process? The Bank has considerable experience in this area, and most task managers of land projects understand that land law reform is not just a matter of enacting good laws but of translating them into reality on the ground. This cannot be dealt with at any length in this article, but some remarks are appropriate, given the importance of the topic and the fact that some Bank land projects have in fact worked quite effectively to achieve land law reform.

This had happened primarily in the Bank's land investment projects. Those projects may lack the weight of policy lending to leverage reform, but they have other advantages that may be more important in the end. First, land projects more often involve Bank specialist staff members who understand land policy and law reform well. In a policy lending project, a great diversity of staff are needed and a land specialist may or may not be included on the team. The specialist staff are important because they understand that it is not useful to simply postulate "the good property rights system" and demand that it be enacted. Different countries begin reform processes from quite different places, and how far governments can go at a point in time will differ from case to case. It is a political matter, and Bank task managers with specialist knowledge recognize this, implicitly if not explicitly.

Second, these land investment projects work with the bureaucracies that often are important opponents of reform, having vested interests in the corruption that is all too common in systems with weak, heavily "administered" property rights. In fact, growing land administration systems offer substantial revenue and an opportunity to move to self-

supporting land administration institutions with salary levels that make it more realistic to eliminate corrupt practices. Land administration projects that incorporate such changes, rather than those which focus too exclusively on the need for high-level political "champions", will produce more sustainable impetus for change. With such a vision in hand, champions for reforms sometimes emerge within the land administration institutions themselves.

Third, these investment projects can provide effective support for an extended process of land law reform, for public and stakeholder consultation, for legal education, for legal aid to those struggling with problems under the new systems.

Fourth, where it is property rights reforms that are involved, the investment projects provide immediate opportunities for piloting and then more broadly implementing the reforms. In a remarkable number of cases, policy studies and debates sponsored by the Bank under policy lending have resulted in enactment of major new land legislation, in Uganda, Tanzania and Mozambique in particular, only to have the Bank to drop the ball when it came to support for implementation.

Finally, the role of conditionality in property rights reform needs to be reassessed. Conditionality is not objectionable in principle, as the Bank clearly has the right to attach conditions to its loans. They should of course have some logical connection to the purposes of the loan, and that is usually the case. The important question is whether conditionality is an effective way in which to achieve broad property rights reform. It may do the job well enough in technical matters, but it does not work as well where a broad reform of property rights is needed. If the objective is to change reality on the ground, then a law with strong country ownership is needed, and in this author's experience this requires a process involving broad public participation in development of the law.

The author has in recent years dealt with two laws that have exhibited such strong ownership, the 1997 Land Law in Mozambique and the 1998 Land Law in Cambodia. Both involved up-front studies and considerable public discussion, leading to the development of a substantial consensus. In the case of the law in Cambodia, the parliamentary debates were broadcast on national television, providing extraordinary exposure of the issues to the public eye. Implementation has not been easy due to limited capacity, but the political will has been there and attempts to weaken these laws have been resisted vigorously by a wide range of government and civil society actors.

Such commitment is produced by extended reasoning together, not by conditionality, though conditionality can help launch such a reasoning process. There is a questioning of conditionality going on within the Bank today, and rightly so (Abdildina and Jaramilla-Vallejo 2005). It should only be used with considerable caution, because it to often produces compliance without ownership, and laws which are DOA (dead on arrival). If overused, it may also render Bank loans, available at concessionary rates, less attractive than commercial bank lending at slightly higher rates, unencumbered by such conditionality.

In conclusion, how should we see these efforts by the World Bank and other donors to support property rights reforms? Is donor-supported land law reform likely to be a feature of land tenure in 2015? In all likelihood it will, and the real question is how to make it better. As a participant in some of these efforts, the author believes they are potentially valuable, with the potential achieved in some cases and squandered in others. A great deal depends on proper diagnosis of local needs, and this will mean spatially targeting reforms, even within a given country. Bromley contrasts European and African circumstances, but it is not in fact possible to lay out prescriptions using such a broad brush. Even within the landscape of a single country, levels of development and land potential differ dramatically, and needs for property rights will vary as well. One set of rules may be needed for urban and peri-urban areas, where pressure on land is considerable and active markets of all kinds exist, and another for deep rural areas. A mechanism is also needed that allow land to shift between these systems. The Thailand model, stressing "whole country" titling and registration, will usually not be appropriate.

The need is not for the Bank or other donor agencies to withdraw from support of property rights reform and land administration. They have staff with a great deal of experience and insight to offer developing countries. But there is a need for those donors to 1) target their efforts more selectively, on areas where they are really needed; 2) recognize and register not only individual but community land rights, and 3) develop more effective strategies and project approaches to support the evolution of customary land tenure systems.

Notes

[1] Among the multilaterals, the Inter-American Development Bank and the Asian Development Bank are both important actors in the land tenure reform field. USAID, DFID, AusAid and GTZ are among the more active bi-laterals.

[2] The Bank established its pre-eminence in this area through the writings of Gershon Feder of the World Bank's Development Research Group. See Feder's landmark Thailand study (1988) and more generally, Feder and Nishio (1999).

[3] The major returns to agrarian reform in China appear to have been from the return to family farming and the relief of farmers from production quotas, rather than tenure reforms. It has only been as the productivity increases due to those initial reforms tapered off that Government has granted increments of tenure security; such security is still only partial, and the potential of full tenure security has still not been tapped. A great deal is at stake in current discussions of a new Property Rights Law in the People's Congress. The author is working on these issues in connection with technical assistance to a World Bank funded study of tenure issues carried out by the Development Research Center, a research institute of the State Council.

[4] It should be noted that the Bank does have two operational policies which have land law content, but these are narrowly focused. Denominated safeguard policies because they seek to avoid or mitigate negative effects of Bank-funded projects, these are Operational Policy 4.12, Involuntary Resettlement (April 2004) and Operational Policy 4.1 Indigenous Peoples (May 2005). The former deals with the protection of land users displaced by Bank-funded activities, the latter with the protection of indigenous land rights.

[5] "Negotiated land reform" seems an appropriate term for the approach, as opposed to the misleading "community-based land reform" used in some later bank documents.

[6] Specialization beyond a certain point is not an advantage for advancement in the Bank, and those who do specialize may do so at some cost to any aspirations they have for advancement into management.

[7] The author served as the "anchor" (management representative for the Rural Development Department) for this group, in his capacity as land tenure expert for that department. With a core group of perhaps fifteen active members and officers elected by the membership, it is one of the most effective thematic groups in the Bank. Its website can be accessed at http//web.worldbank.org/website/external/topics. Its members are heavily but not exclusively from regional operations. The Bank has a matrix management system and most of the TG members are part of the "Rural Family" under that system. The TG serves a knowledge-sharing function but also serves as an advocacy group within the Bank, committed to keeping land matters high on the agenda of the institution.

[8] The countries in which the Bank supports negotiated land reform includes Brazil, Malawi, South Africa, and Bolivia. A 2005 list of countries in which the Bank is supporting land administration reform lists projects in Armenia, Bulgaria, Cambodia, El Salvador, Guatemala, Ghana, Indonesia, Ivory Coast, Kyrgyz Republic, Laos, Moldova, Nicaragua, Philippines, Romania, Russia, Slovenia, Sri Lanka, Ukraine, and West Bank and Gaza.

[9] FY 2005 new commitments consisted of US$16,215.44 million for investment projects and US$6,604.68 for development policy projects. *See* http://web/worldbank.org/external/projects.

[10] Footnote 14 to paragraph 14 on OP 7.0 goes on to explain that: "Development policy loans require often [sic] entail significant changes in existing laws, regulations, and administrative practices. The legislative steps to be undertaken are normally described in the Letter of Development Policy (see para.16), but may also be part of the specific actions incorporated in the Loan Agreement as conditions of Board presentation or conditions of disbursement of particular loan tranches, rather than as covenants."

[11] Letter of Development Policy (May 30, 2003), from the Governor of the Bank of Vietnam to the President of the World Bank, available at http://www.worldbank.org/external/projects.

[12] The Bank's OP 7.00 on Lending Operations: Choice of Borrower and Contractual Arrangements (February 2001) provides in paragraph 14 that: "The Bank does not stipulate covenants that require the member to enact legislation, and tries to work within existing law to the extent possible. If enactment of particular legislation is necessary to achieve the project's objectives, the appropriate steps to be taken for such enactment should be clearly defined; and such enactment is made a condition of negotiation, Board presentation, effectiveness, or disbursement, rather than a covenant." Violation of a covenant has more serious repercussions under a Bank loan agreement than failure to meet a condition.

[13] An anticipated land administration project in Kazakhstan was cancelled in part because an earlier project failed in its attempt to obtain a revision of the 1994 Land Code, which left landholders vulnerable to revocation of their land rights by officials and was not adequate for a market-oriented land economy.

[14] Land Law, promulgated as Royal Decree NS/RKM/0801/14, August 30, 2001, deals with land registration in Articles 226-246. The regulations promulgated under LMAP to date include Sub-Decree No. 46 ANK/BK of May 31, 2002, on the Procedures of Establishment Cadastral Index Map and Land Register; Sub-Decree No. 47 ANK/BK of May 31, 2002, on the Organization and Functioning of the Cadastral Commission; Sub-Decree No. 48 ANK/BK of May 31, 2002, on the Sporadic Land Registration; Prakas (regulation) of the Ministry of Land Management, Urban Planning and Construction No. 112 DNS/BrK of August 21, 2002, on the Guidelines and Procedures of the Cadastral

Commission; and Ministry of Land Management, Urban Planning and Construction, No. 001DNS/SD, Instructive Circular Relating to the Implementation of the Procedure of Establishing the Cadastral Index Map and the Land Register (Systematic Registration), August 19, 2002. .

[15] Regulation of Minister of State for Agrarian Affairs/Head of BPN, No. 5 of 1999, Guide to Settlement of Issues Related to Adat Law, Communities' Ulayat Rights, in art. 4. This is a less than comprehensive legal solution to the issue, however, and the extent of implementation is unclear.

[16] The Land Act 2001 provides for the ownership of land by indigenous peoples and for the titling of that land in Articles 23-28.

[17] Para. 8 of the Land Administrative Order 7–1 (April 30, 1936), "Rules and Regulations Governing the Filing and Disposition of Applications of Alienable Lands of the Public Domain or for Real Properties in the Commonwealth of the Philippines," was repealed by Department of Natural Resources Administration Order No. 13, Series of 2002.

[18] This is an unusually thorough and frank look at the handling of gender issues in four Bank land projects, in Kazakhstan, Laos, Bolivia and Ghana,

[19] The Lao PDR Land Titling Project, 1996 (P004208), incorporated gender sensitivity training for field adjudication staff and public education campaigns that covered, *inter alia,* women's land rights issues, and the Lao Women's Union plays a key sensitization role in implementation of the project (Li 2004). In Vietnam, the 2001 Decree No. 70 on Implementation of the Marriage and Family Law required that all registrations of land use rights must be in the names of both spouses. The Bank supported a pilot program that focused on such activities as ensuring that forms used in adjudication were appropriate for joint titling and that requirements of documentation (for example, tax receipts, usually in the husband's name) did not stand in the way of women asserting their rights. The project substantially increased the number of parcels registered to women, especially the number of parcels registered jointly to husbands and wives. The case makes the point that simply reframing forms can have a major impact (Kumar 2002).

[20] Sub-Decree No. 47 ANK/BK of May 31, 2002, on the Organization and Functioning of the Cadastral Commission.

[21] The prohibition was included in para. 2(b) of OP 12.00 on Disbursement (February 1997), now repealed. Land was listed among items against which Bank funds could not be disbursed.

[22] Ceara Rural Poverty Alleviation Project, Ln 3918-BR. These projects could proceed prior to the removal of the prohibition of Bank expenditures on land because the states themselves funded the land purchases, with the Bank loans funding resettlement and other costs involved.

[23] The relevant laws in Malawi are the Land Act, 1965, and the Registered Land Act, 1967, both of which were utilized for land titling and registration under the Bank's Lilongwe Land Development Project, 1980 (P001598).

[24] Tanzania Land Act, 1999, and Village Land Act, 1999. The role of the Bank in supporting the policy reform and subsequent legal reforms is described online at: http:// web.worldbank.org/external/projects/main?pagePK=64312881&piPK=64302848&theSitePK=40941&Projectid=P002785.

[25] This study documents the land work under this project and gives considerable attention to the legal framework, It is available at http://lnweb18.worldbank.org/External/lac/lac.nsf/0/d56de267ed9a073985256a320063a78d?OpenDocument.

[26] The Laos Land Titling Project, 1997 (P004208), and the Cambodia Land Management and Administration Project, 2002 (P070875).

[27] The problem is real, and the author has recently grappled with this tendency during consultancies in Mozambique and Rwanda. In neither country does government have real confidence in farmers to manage their own holdings. The assumptions inculcated by command economies often live on long after the ideologies which underpinned them have been abandoned.

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