

**INTEGRITY ASSESSMENT OF THE LAND LEGISLATION OF  
THE REPUBLIC OF TAJIKISTAN**

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## INTRODUCTION

This study aims to provide an integrity assessment of the land legislation, including the following legal acts:

- Land Code, which entered into force in 1997;
- Law of the Republic of Tajikistan (RT) No. 1289 of 16.03.2016 on Dekhkan Farms;
- Law of the RT on Lease of 6.12.1990;
- Law of the RT No. 364 of 20.03.2008 on Mortgage;
- Law of the RT No. 464 of 16.05.1997 on Privatization;
- Law of the RT No. 238 of 5.03.2008 on Production Sharing Agreements;
- Law of the RT No. 983 of 20.07.1994 on Subsoil;
- Law of the RT No. 356 of 5.01.2008 on Land Management;
- Law of the RT No. 375 of 20.03.2008 on State Registration of Immovable Property and Rights to It;
- Law of the RT No. 475 of 28.02.2013 on Pastures;
- Law of the RT No. 542 of 5.03.1992 on Land Reform;
- Law of the RT No. 47 of 8.12.2003 on Subsidiary Farming;
- Law of the RT No. 18 of 12.05.2001 on Land Valuation.

The analysis of the legal acts shall reveal corruption risk provisions and regulations that hinder business development in Tajikistan and/or cause additional bureaucratic burdens.

The study is conducted in the framework of “Methodology for Anti-Corruption Assessment” (2014), developed by the author for the OSCE Office in Tajikistan and used by civil servants and state authorities conducting anti-corruption assessments. Based on the Law on Anti-corruption Expertise and according to this manual, the person authorized to carry out an anti-corruption assessment is supposed to analyse provisions of a law and (or) a legal act in terms of corruption risk factors, to describe these factors and to suggest solutions. Thus, any state anti-corruption assessment process should undergo 4 stages:

1) assessment of a legal act in terms of appropriateness of its adoption, systemic coherence and clarity;

2) analysis of a legal act in terms of anti-corruption factors;

3) suggesting solutions to eliminate corruption risk factors;

4) writing a conclusion.

Article 5 of the Law of the RT No. 925 of 28.12.2012 on Anti-corruption Expertise of Legal Acts and Draft Legal Acts mentions 13 corruption risk factors. The most common are:

1. Lack or incompleteness of administrative procedures.

2. Scope of discretionary powers.

3. Defining authority by “has the right” formula.

4. Provisions creating conditions for abuses by state bodies or local authorities.

5. Conflict of legal provisions.

The constitutional basis for land management is Article 13 of the Constitution, which establishes exclusive state ownership of land and state guarantees of its efficient use in the interests of the people, as well as Article 12, according to which the state guarantees freedom of agricultural activities, equality of rights, and protection of all forms of ownership including private ownership.

The land reform in the country started with a delay in 1992; its guidelines and goals were specified in Article 3 of the Law on Land Reform (1992).

In order to increase agricultural production and fight food shortages, citizens were given land plots (without the right to build houses and other household premises and to deforest) in accordance with Decree of the President of the Republic of Tajikistan No. 342 of 9.10.1995 on Allocation of 50 Thousand Hectares of Land for Private Subsidiary Farming of Citizens. Land plots for subsidiary farming were allocated within the limits set by the local authorities. This action proved its worth and continued (allocation of additional 25 thousand hectares of land in accordance with Decree of the President of the Republic of Tajikistan No. 874 of 1.12.1997). However, market reforms in agriculture began with the adoption of the Decree of the President of the Republic of Tajikistan on Reorganization of Agricultural Enterprises and

Organizations 1996, when lands of former collective farms (state farms) were transferred to dekhkans (farmers). Its implementation led to structural changes in agricultural production, functioning of the existing organizational and legal forms of agricultural production (collective and state farms) alongside with the new ones – dekhkan (individual) farms, which were granted land at the expense of the reorganized old farms. Other changes in agriculture are related to the introduction of payment for land plots, levied in the form of land tax and rent, aimed to improve the efficiency of land use.

Thus, transfer of agricultural lands to private ownership began only in 1995.

While analysing the above-mentioned legal acts, a number of regulations will also be taken into account:

1. Decrees of the President:

- No. 1021 of 22.06.1998 on Ensuring the Right to Land Use,
- No. 335 of 25.07.2000 on Protection and Rational Use of Irrigated Land,
- No. 534 of 14.03.2001 on Establishment of State Committee for Land

Management,

- No. 1054 of 15.04.2003 on the Mechanism to Settle Debts Contracted by Reorganized Agricultural Enterprises and Organizations and those in the Process of Reorganization.

2. Resolutions of the Government:

- No. 673 of 9.11.1995 on Programme of Economic Reforms of Agro-Industrial Sector of the Republic of Tajikistan;

- No. 29 of 4.02.1999 on Simplified Procedure for Formation and Registration of Rights to Land Use;

- No. 30 of 4.02.1999 on Simplified Procedure for Determination and Registration of Land Shares;

- No. 398 of 22.09.2000 on the Medium-Term Programme to Overcome Crisis in the Agro-Industrial Sector of the Republic of Tajikistan and the Priorities of the Development Strategy of its Subsectors for the Period until 2005;

- No. 80 of 4.03.2002 on the Program of Cotton Production Development in the Republic of Tajikistan in 2002-2005;
- No. 111 of 5.03.2008 on Approval of the Action Plan for the Cotton Farms Debt Resolution in the Republic of Tajikistan for 2007-2009;
- No. 225 of 3.05.2010 on the State Committee for Land Management and Geodesy of the Republic of Tajikistan;
- No. 447 of 3.10.2006 on the Rules of the State Land Cadastre Maintenance;
- No. 383 of 1.08.2012 on the Program of Agriculture Reform in Tajikistan for 2012-2020.

In addition, the analysis of the land legislation is conducted with consideration of the legislation of Kyrgyzstan, Kazakhstan and the Russian Federation in this field, related legislation – the Tax Code of the RT, Administrative Offences Code of the RT, and the Civil Code the RT, the Survey Report “Assessment of legal issues of farmers in Tajikistan and knowledge of their rights” prepared by the Helvetas Swiss International Cooperation<sup>1</sup>; as well as the joint EU-UN project “Improving Food Security in Selected Rural Areas of Tajikistan through Enhanced Livestock Production and Pasture Rehabilitation” OSRO/TAJ/605/EC and some reports of the World Bank and USAID (“Initial analysis of World Bank “Land Registration and Cadastral System for Sustainable Agriculture” farm data for Khatlon oblast’ 2011”; Policy Note “Household Farm Land Holdings in the Feed the Future/Tajikistan Zone of Influence, 2015” (with Ghulomqadir Safaraliev); “The failure of land reform in Tajikistan” (draft prepared for presentation at the 13<sup>th</sup> Annual World Convention of the Association for the Study of Nationalities, Columbia University, April 11, 2008).

Corruption risk factors of land legislation may be revealed in the process of registration, allocation, taxation and land valuation. The procedures for imposition of administrative sanctions for violation of the land legislation also raise questions. The land legislation is directly related to the regulation of mining operations – the Law on Subsoil and the public-private partnership in this area (the Law on Production Sharing Agreements).

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<sup>1</sup> [https://assets.helvetas.org/downloads/report\\_helvetas\\_survey\\_on\\_farmers.pdf](https://assets.helvetas.org/downloads/report_helvetas_survey_on_farmers.pdf)





## THE LAND CODE 1997

### **Problem 1: Property right**

1. One of the main difficulties of the land legislation reform in Tajikistan lies in the fact that the constitutional basis for land management is Article 13 of the Constitution of November 6, 1994, which establishes exclusive state ownership of land and state guarantees of its efficient use in the interests of the people, as well as Article 12, according to which the state guarantees freedom of economic activities, equality of rights, and protection of farming of all forms of ownership including private ownership. On the one hand, the state monopoly on land is declared, but on the other – agricultural activities can be private and are regulated by civil contracts.

According to Article 241 of the Civil Code of the Republic of Tajikistan (hereinafter – CC of the RT), the right to use land is a right in rem. According to part 2, Article 241 of the CC, “the right to use land shall be a legally secured possibility of an individual or a legal person (land user) to extract useful properties out of land in accordance with intended purpose; any land user shall also have the right to own the land plot which is in his use”. Types of land use are specified in Articles 10-14 of the Land Code of the RT. The first type – life-long inheritable use of land allocated to physical persons or collectives, to citizens for organizing dekhkan (individual) farms or other smallholdings (Article 12). *Differentiation between physical persons and citizens is illogical*, as in accordance with Article 25 of the Land Code of the RT foreign citizens have no right to inherit land. Therefore, terminology should be restricted to the word “citizens”.

The second type – perpetual use of land by individuals and legal entities of Tajikistan (Article 11). The third type – fixed-term use of land allocated to individuals and legal entities for the period from 3 to 20 years (Article 13). The fourth type – land lease (Article 14). The difference between the first and the second types of land use is not clear. In practice, *life-long inheritable land use is granted only to individuals*,

whereas perpetual land use is provided only to legal entities<sup>2</sup>. Such provision can be secured in the Land Code of the RT.

2. Article 2(2) of the Land Code of the RT states:

*“The right to use land with the right of its alienation is a particular object of legal civil relations and can be the subject of sale, gift, exchange, lease, mortgage and other transactions, it can also be transferred to another person in accordance with the procedure of inheritance or universal succession, established by this Code and the civil legislation.”*

However, the types of land use stipulated by Articles 10-14 of the Land Code do not include this right of land use. For this reason, there is a controversial practice, according to which, for example, farmers who want to rent a land plot have to first register “the right of alienation” in order to have the right to lease or mortgage. Thus, **part 1 of Article 45 of the Law on mortgage** directly stipulates that

*“Pledge of land use rights is not permitted with respect to the land, the right to use which was obtained without the right of alienation.”*

3. Article 19 of the Land Code of the RT states, that a primary land user has the right to transfer the right to use a plot of land, as well as to enter into civil transactions including alienation of property (sales contract) on his own without intervention of the state. In accordance with the Constitution, Article 239 of the Civil Code the RT and the Land Code of the RT, land shall be in the exclusive state ownership, which means that no one but the state can be the owner of land; it is allocated to organizations and individuals with the right only to use it.

4. Article 4 of the Law on Lease stipulates that “any person including foreign legal and physical persons owning any type of property have the right to lease it”, but taking into consideration the constitutional limitations on the ownership of land, individuals and legal entities cannot lease land, because they are not its owners. Thus,

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<sup>2</sup> The Land Code of the Russian Federation states: “Plots of land shall not be granted for permanent use to citizens” (Article 20).

**banks cannot acquire the right to use the hypothecated land** as a compensation of debt.

### **Solution**

1. Article 4 of the Law on Lease shall be supplemented with the right of a landlord-individual to lease the land owned by him.

2. The notion “right of alienation” shall be removed from the Land Code of the RT. The “right of alienation” shall be considered an integral part of life-long inheritable use and perpetual use of land.

3. Article 11 of the Land Code shall be amended as follows:

*“Land plots shall be allocated to legal entities of the Republic of Tajikistan for perpetual use.”*

6. According to Article 17 of the Land Code of the RT, the rights of land tenure are certified: a) the right of perpetual use of land, limited use of land and life-long inheritable land use – by a land use certificate; b) the right to lease land plots – by a lease agreement; c) the size of a land share shall be determined in the certificate of land share.

The information contained in the documents certifying the land use right shall comply with the data entered in the land use register. So far, however, not all land users (primarily shareholders) have documents certifying their rights to land use, although it is inadmissible in accordance with Article 18 of the Land Code of the RT.

7. Among other land rights Article 2.1 of the Land Code provides for the right to land share, which is proved by a certificate (Article 17 of the Land Code).

However, the legislation does not specify the **mechanism of allotting a land share** or participation in assets of an entity by means of a land share (except allocation from a subsidiary farm in accordance with Article 12 of the Law on Subsidiary Farming). It can have negative consequences for a shareholder who intends to alienate the land share.

Thus, part 1 of Article 16 states:

*“If a member of a dekhkan farm withdraws his membership, this person acquires the right to use independently his land plot corresponding to his land share, but only at the end of the farming year.”*

However, *the procedure for allotment of a share is not defined.* As for the dekhkan’s share in the joint ownership, according to part 1, Article 17 of the Law on Dekhkan Farms:

*“Every member, who terminates his membership in a dekhkan farm with or without incorporation of a legal entity, is paid the value of the property corresponding to a member’s share in the joint ownership, in the manner and within the time period specified in the charter, foundation agreement or in the joint activity agreement, or a barter is made.”*

Article 17 of the Law on dekhkan farms provides for two types of allotting a share in the joint ownership – by payment for the part of the ownership and in kind. However, **it is not clear how the property is valued – according to the market or cadastral value.**

### **Solution**

1. It is necessary to develop a provision, according to which an in-kind plot of land corresponding to the land share shall be allotted to a shareholder of a dekhkan farm, who wishes to withdraw from such an organization in order to create a farming household.

### **8. Withdrawal of lands for state and public needs**

1. Chapter 6 of the Land Code deals with the compensation for damage caused to land users and for losses related to withdrawal of land. Articles 41-45 of the Land Code provide for the loss compensation mechanism in case of withdrawal of land for state and public needs.

At the same time, it is not specified whose losses shall be compensated, although from the content of Articles 44-45 of the Land Code we can conclude that

they refer to state losses. However, paragraph b) of Article 41 of the Land Code seems rather ambiguous:

“In case of withdrawal of land for **state or public needs**, all losses are valued at market prices taking into account the land location and *must be paid by the persons who benefit from the land withdrawal.*”

This provision implies that land plots may be withdrawn not only for state or public needs, but also in favour of other persons.

2. In addition, the notion “public needs” is not clearly defined, it is also not clear who shall implement the requirements of Article 41 of the Land Code and compensate losses to a land user in case of land withdrawal for public needs. Apparently, it is the state represented by the Ministry of Finance, but it does not follow from the text of the article.

Articles 38-38.1, 41-42 of the Land Code refer to withdrawal of property for state and public needs, but these articles do not specify the difference between the two concepts. The current legislation of the Republic of Tajikistan neither defines state needs, nor specifies their limits, boundaries and criteria. Part 1 of Article 562 of the Civil Code of the RT reads: “*State needs are requirements defined as prescribed by law and financed by budgetary sources*”. It is evident that this definition does not fully reveal the concept of state needs. Public needs are not mentioned in the Civil Code of the RT. In order to guarantee the rights of land users, it is necessary to provide for conditions for withdrawal of land for state needs.

“State” and “public” are synonyms, and therefore we suggest removing the notion “public needs” from the Land Code of the RT.

### **Solution**

1. Article 41 of the Land Code shall be amended as follows: “In case of withdrawal of land for state needs, all losses are valued at market prices taking into account the land location and *shall be financed from national or local budget*”.

2. The word “public” shall be removed from Articles 38-38.1, 41-42 of the Land Code.

3. It is necessary to include in the Land Code of the RT the definition of the notion “state needs” in relation to withdrawal of land. The Land Code shall also be supplemented with Article 40(2):

*“1. Withdrawal of land plots for state needs for the purpose of building and reconstruction of objects of national significance, objects of regional or local significance is permitted, if these objects are provided for by the approved territorial planning documents and the approved projects of territory planning.*

*2. The decision on withdrawal of land for state needs for purposes not provided for in paragraph 1 of this Article shall be justified by:*

*1) a decision on creation or expansion of lands for nature protection purposes (in case of withdrawal of land for creation or expansion of lands for nature protection purposes);*

*2) an international treaty of the Republic of Tajikistan (in case of withdrawal of land for the implementation of international treaties);*

*3) a decision on recognition of an apartment house dangerous and subject to demolition or reconstruction (in case of withdrawal of land caused by the recognition of an apartment house, located on this plot of land, dangerous and subject to demolition or reconstruction).”*

## **9. Conflict of legal provisions**

Since various laws governing land relations were adopted at different times, regulatory conflicts often occur that can potentially be a corruption risk factor.

1. According to Article 4 of the Law on Subsidiary Farming and Article 20 of the Law on Land Reform, land is allocated for life-long inheritable *possession*, but according to Article 10 of the Land Code land is allocated for life-long inheritable *use*.

2. According to Article 8 of the Law on Subsidiary Farming, land is allocated *for permanent perpetual use*, but Article 11 of the Land Code stipulates that land plots are allocated *for perpetual use*. The Land Code of the RT doesn't specify how individuals can realize their right to perpetual use of land, that indicates **lack of**

**administrative procedures**, namely lack of procedure for allocation of land to citizens and legal entities for perpetual use.

3. In accordance with Article 4 of the Law on Lease, land (more correctly “land plots” as in the Land Code) is leased by the corresponding Majlis of people's deputies, collective farms and other agricultural enterprises, but by virtue of Article 14 of the Land Code the right to lease land is transferred to all primary land users.

4. In accordance with Article 8 of Law No. 594 of 5.03.1992 on Land Reform (as revised in 2006) a special reserve fund consists of 6 types of land plots and the rests of this fund (land plots not allocated in the current year) form the state reserve fund, while in Article 22 of the Law on Dekhkan Farms other terminology is used to name the same types of land plots:

<b>Wording of Article 8</b>	<b>Wording of Article 22</b>
farmlands <i>out of exploitation</i> or transferred to the category of <i>less valuable lands</i> ;	lands <i>out of farming business</i> or transferred to the category of <i>not valuable lands</i> ;
the land, the right to use which shall be terminated in accordance with Article 37 of the Land Code of the Republic of Tajikistan;	plots of land, the right to use which is terminated;
reserve lands;	<i>state</i> reserve lands;
lands of the forestry fund not covered with woods, suitable for agricultural production;	lands of the <i>state</i> forestry fund not covered with plantations, suitable for agricultural production;
inefficiently utilized lands;	lands of the categories that were utilized not on target;
other lands of agricultural organizations and enterprises that have not previously been used for agriculture.	newly reclaimed lands.

## **Solution**

1. In Article 4 of the Law on Subsidiary Farming and Article 20 of the Law on Land Reform the phrase “life-long inheritable *possession*” shall be replaced with “life-long inheritable *use*”.
2. Article 11 of the Land Code the RT shall be supplemented with the procedure for allocation of land for perpetual use.
3. Article 4 of the Law on Lease and Article 14 of the Land Code shall be harmonized.
4. The wordings in Article 8 of the Law on Land Reform and Article 22 of the Law on Dekhkan Farms shall be unified.

## **10. Provisions creating conditions for abuses by state bodies or local authorities.**

Local authorities of rayons and cities allocate land plots for *perpetual, fixed-term and life-long inheritable use* and lease up to 5-10 hectares depending on the land category (Article 26 of the Land Code), local authorities of the Gorno-Badakhshan Autonomous Oblast and oblasts allocate land plots up to 20 hectares for perpetual and fixed-term use (Article 26 of the Land Code), and the Government allocates land plots for perpetual and fixed-term use and leases land regardless of size (Article 26.1 of the Land Code).

Conditions of land allocation from the special fund are stipulated by Article 12 of the Law on Land Reform:

1. *Land plots are allocated from the special fund in accordance with land management, generally, as a single area.*
2. *Land plots from the special fund are allocated to individuals and legal entities primarily for agricultural use.*
3. *Priority in allocating land plots is given to the citizens living in the given area, having agricultural knowledge, skills and practical experience in agriculture.*



*Land plots for subsidiary farms of industrial and other enterprises, associations, institutions and organizations are allocated also **on a competitive basis**.*

Also, **Resolution of the Government of Tajikistan No. 30 of 4.02.1999 “Simplified Procedure for Determination and Registration of Land Shares”**, regulating the procedure for granting land shares in accordance with Article 68 of the Land Code, which became invalid by virtue of the Law of 2004, is still in force. According to the Resolution, the Committee on Land Resources and Land Management (since 2004 – the state land management authorities) determines a land plot in the following order:

- the list of the enterprise employees, who are eligible for receiving a land share, is made;
- the list of shareholders shall be approved by the resolution of the supreme governing body of the enterprise, the general meeting or the Enterprise Council;
- the list of shareholders is transferred to the city or rayon land committee for determination of the land share for each enterprise member;
- the size of the land share is approved by a decision of the chairman of the city or rayon;
- the document certifying the right to a land share (Land Share Certificate) is issued by the city or rayon land committee to each shareholder who, at the same time, is registered in the land committee.

However, the procedure for determining the size of the land plots allocated to citizens is not clear. Articles 71-71.3 of the Land Code specify the procedure for allocation of land for **personal subsidiary farms**. According to Article 71 of the Land Code:

*“Land plots for personal subsidiary farms are allocated to citizens by chairmen of cities, rayons, oblasts and by the Government of the Republic of Tajikistan within their competence provided for by this Code.”*

The size of subsidiary plots depends on the discretion of the executive authority, since it is determined with regard to the land reserve of every land user and the population density on the basis of the development master plan and other plans for

development of human settlements and upon availability of the *infield (housing) fund* (Article 71.1 of the Land Code). However, in accordance with part 1 of Article 5 of the Law on subsidiary farming:

*“A plot of land for private subsidiary farming is allocated to a citizen for life-time inheritable possession or permanent use from the **unified state lands** on the proposal of the local government based on the decision of **the relevant state authority** in accordance with the land legislation of the Republic of Tajikistan.”*

Part 2 of Article 5 states that a land plot for subsidiary private farming consists of a subsidiary land plot and additional land for subsidiary farming. It appears that a subsidiary land plot and additional land for subsidiary farming shall be allocated from the **unified state lands**. It follows that paragraph 2 of Article 71.1 of the Land Code is not consistent with parts 1-2 of Article 5 of the Law on subsidiary farming of 2003, which is a special legal act as against the Land Code of the Republic of Tajikistan, so Article 71.2 of the Land Code shall be brought into compliance with this Law<sup>3</sup>.

Blurred powers in the area of land delimitation, lack of a competitive mechanism of land distribution give rise to abuse by state and local authorities and increase competition for land.

## **Solution**

1. The Land Code shall be supplemented with the procedure for allocation of land **on a competitive basis**.

2. Paragraph 2 of Article 71.1 of the Land Code shall be amended as follows:

*“Land plots for subsidiary farming are allocated to citizens by local executive authorities from the unified state lands.”*

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<sup>3</sup> The media tells about the family, which cannot get a land plot for 20 years: “In each rayon land is allocated by the rayon committee. Once a month, the real estate committee conducts an auction and then allocates plots of land. Thus, by 2015 700 hectares of land were allocated for building of residential houses in the Hissar rayon. “People whose names are not even on the list have already become land owners. Some of them were born much later, than we moved to this house.” See: “Controversy over land distribution in Tajikistan” // <https://iwpr.net/ru/global-voices/споры-вокруг-распределения-земельных-участков> (May 25, 2016).

## **11. Broad discretionary powers**

Article 37 of the Land Code of the RT stipulates the grounds for termination of the right to use land. One of the grounds is the “*cessation of land users’ activities*”, but the period after which activities are considered discontinued – a month, a season, a year, two years – is not specified. This makes it possible for unscrupulous officials to abuse office for personal gain.

### **Solution**

We propose to fix a period of 2 years (this term is specified in part 1 of Article 156 of the Administrative Offences Code of the RT), after which the activity of a land user is considered discontinued. Nevertheless, if the land user proves that the non-use of land was due to force majeure including natural disasters, technogenic catastrophes, imposition of the state of emergency on this territory, which lasted at least 3 months, such land cannot be considered unused. Force majeure stops the biennium, after which the land may be considered unused.

## **12. Lack or incompleteness of administrative procedures**

1. Part 2, Article 17 of the Land Code states:

*“the right to lease a land plot is certified by a lease agreement. The information contained in the documents certifying the land use right shall comply with the data entered in the land use register.*

*Lease agreements are subject only to state registration in the land use register.”*

However, part 2 of Article 8 of the Law on State Registration of Immovable Property and Rights to It states that only lease agreements exceeding one year are subject to state registration. Therefore, an agreement for a shorter period is not registered, which leads to the contradiction with part 2, Article 17 of the Land Code of the RT.

Paragraph c) of Article 8 of the Land Code lists the issues under the jurisdiction of jamoats, among which “registration of land lease agreements” is mentioned.

However, in accordance with part 2 of Article 17 of the Land Code, “lease agreements are registered in the land use register”.

The Land Code of the Republic of Tajikistan does not specify, **who is authorized to keep the land use register**, as the list of those, who are authorized to lease land, is vast.

Maintaining the “lists of lease agreements” is redundant and causes additional stress for the officials, who are to manage the lists, and for lessees/lessors. In addition, it is not clear who is obliged to provide information to enter in the list – the lessee or the lessor.

Following the logic that a lease agreement is a type of civil contracts, the additional duties for the subjects of these legal relations are redundant and unreasonable, because they can lead to abuse by officials.

### **Solution**

1. **Part 2 of Article 17 of the Land Code** shall be amended as follows:

*“the right to lease a land plot is certified by a lease agreement. The information contained in the documents certifying the right to lease land for more than one year shall comply with the data entered in the land use register.”*

2. The phrase “lists of lease agreements” shall be removed from **paragraph c) of Article 8 of the Land Code**.

### **13. Gaps in the land valuation procedure**

1. The rules of the State land cadastre maintenance, approved by **Resolution of the Government of the Republic of Tajikistan No. 447 of 3.10.2006**, stipulate that *“the economic valuation of land aims to ground its most efficient use, establish and differentiate the amount of land fee”* (paragraph 27). The procedure for the economic valuation of land is determined by the state land management authority (paragraph 31).

Article 2 of **Law No. 18 of 12.05.2001 on Land Valuation** stipulates that “land valuation is conducted with the aim of objective taxation and rent, creation of

conditions for rational use of land, its protection and development, improvement of soil fertility”.

However, neither the rules of the State land cadastre, nor the Land Code of the RT or the Law on Land Valuation contain provisions indicating that quality control and valuation of land aim, inter alia, to set the starting land price for its distribution and selling by tenders, as well as for the compensation for losses and damages caused by withdrawal of lands for state and public needs.

2. Article 6 of **Law No. 18 of 12.05.2001 on Land Valuation** stipulates that “performing works on land valuation is subject to licensing. Licenses for land valuation work are issued by the Committee on Land Resources and Land Management under the Government of the Republic of Tajikistan in the order set by the Government of the Republic of Tajikistan”.

Upon the termination of ownership, the property is valued at market prices. This valuation is conducted by the authorized structural unit of the State Committee on Investment and State Property Management – SUE “Valuation of property”.

3. It is not clear **whether the debts of the previous owners are included in the land valuation.**

According to paragraph 1 of **Decree of the President of Tajikistan No. 1054 of 15.04.2003 on the Mechanism to Settle Debts Contracted by Reorganized Agricultural Enterprises and Organizations and those in the Process of Reorganization**, debts of the reorganized agricultural enterprises and organizations and those in the process of reorganization are distributed between the dekhkan farms and other farms, founded on the basis of these enterprises and organisations, in proportion to the received land share. It turns out that the cost of allocated land plots includes debts of the previous landowners.

The problem of debts contracted by cotton farmers is solved in another way. Debts of cotton farms of Tajikistan were contracted in the early 2000s, when large futures companies of Tajikistan, such as the holding company “Ismoili Somonis - 21<sup>st</sup> Century”, JSC “Olimi Karimzod”, corporation “KHIMA”, provided cotton farmers

with petroleum products and fertilizers in exchange for future harvests<sup>4</sup>. Investors also financed dekhkans from the funds of the non-bank financial company “Credit-Invest”, which received loans against the guarantee of the National Bank. According to this scheme, the largest debt of \$ 435 million accumulated by January 1, 2008.

90% of 11 thousand cotton farms were in debts, which led to the crisis of this sector. By **Resolution of the Government of the RT No. 111 of 5.03.2007 “On Action Plan for the Cotton Farms Debt Resolution”**, the government assumed reimbursement of financial liabilities and decided to freeze them for 10 years with gradual payment of interest; the system of futures contracts was no longer used because of its inefficiency. In order to implement certain provisions of Government Resolution of the Republic of Tajikistan No. 111 was founded the State Institution “Project Management Centre for resolution of cotton farm debt and cotton sector sustainable development”, which was disbanded by Government Resolution of the Republic of Tajikistan No. 572 of 5.12.2013.

In 2008, the International Monetary Fund (IMF) obliged Tajikistan to reimburse loans of \$47.4 million and interest, accusing the National Bank of “providing false information” on crediting of cotton companies.<sup>5</sup> It appeared that from 1996 to 2008, the bank led by M. Alimardon transferred \$856 million to the account of the company “Credit-Invest”, which was run by M. Alimardon and his family members<sup>6</sup>. Moreover, \$221.5 million allocated in 2004-2007 for investment in the cotton industry disappeared<sup>7</sup>.

4. Mandatory valuation of property is provided for in Article 8 of **Law of the RT No. 196 of 28.07.2006 on Appraisal Activities**, including the cases of mortgage lending, redemption of property for state needs and withdrawal of property for state needs in accordance with the legislation of the Republic of Tajikistan. But property is valued by the SUE “Valuation of property”, *which contradicts to Article 15 of the Law “On Appraisal Activities”*, *stating that valuation is not allowed if the valuer is the*

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<sup>4</sup> More on cotton farmers debts see: *Don Van Atta*, “White Gold” or Fools of Gold? The Political Economy of Cotton in Tajikistan”// Problems of Post-Communism, vol. 56 № 2, March-April 2009, pp.17-35.

<sup>5</sup> <http://www.imf.org/en/News/Articles/2015/09/14/01/49/pr09136>

<sup>6</sup> [http://www.rferl.org/a/Tajik\\_Audit\\_Reveals\\_Huge\\_National\\_Bank\\_Shortfalls/1609233.html](http://www.rferl.org/a/Tajik_Audit_Reveals_Huge_National_Bank_Shortfalls/1609233.html)

<sup>7</sup> <http://ru.reuters.com/article/idRUKAL62469720080306>

founder, owner, shareholder, creditor, insurer of the legal entity or the legal entity is a founder, shareholder, creditor, insurer of the valuation company. The State Committee on Investment and State Property Management is the founder in relation to the state unitary enterprise “Valuation of property”, which leads to conflicts of interest and inadequate valuation (**corruption risk factor**).

However, the terms on which a state unitary enterprise operates, as well as the procedures for collection of payments from the population and determination of coefficients of real estate valuation, taking into account its market value, are not clearly specified. This generates **corruption risk factors**, namely abuses by officials, who charge state services, and leads to a conflict of interest between the founders and state unitary enterprises.

### **Solution**

1. The Land Code shall be supplemented with a new article:

*Land quality and valuation shall be taken into account in order to:*

- *determine the land use efficiency;*
- *calculate the land tax rates;*
- *set the starting land price for selling by tenders,*
- *compensate losses and damages caused by the withdrawal of lands for state*

*and public needs.*

2. Valuation by independent valuers not affiliated with the state bodies of executive power shall be allowed.

## **LAW ON STATE REGISTRATION OF IMMOVABLE PROPERTY AND RIGHTS TO IT 2008**

1. **Excessive requirements.** Landowners associate registration of the right to use land with a cumbersome payment system. Thus, part 2 of Article 19 of the Law on State Registration of Immovable Property and Rights to It states that

*“Charges for the registration activities shall be collected in accordance with the procedure established by the Law on Other Mandatory Payments to the Budget of the Republic of Tajikistan.*

According to part 3, Article 4 of the Law on Other Mandatory Payments to Budget, local payments include **dues for the state registration of rights to immovable property and transactions with it**; the procedure for charging these dues is provided for in Chapter 19 of the Law (Articles 73-75). In addition, part 1, Article 5 of the Law states:

*“National other mandatory payments are paid directly to the revenue part of the state budget, local other mandatory payments are paid directly to the revenue part of the respective (rayon and municipal) budgets, **except for the following mandatory payments directed to special funds of the authorized environment protection body**”.*

Firstly, it is not clear what “other mandatory payments” are stipulated, secondly, the legal status of the special funds of the authorized environment protection body is indistinct. No environmental fee is provided for by the Land Code of the RT, the Tax Code of the RT or this Law. This violates the principle of enshrining the collection of any tax or duty in the Law. Consequently, the uncertainty in the legislation leads to abuse by officials who are entitled to interpret this provision in their discretion (**corruption risk factor**).

Firstly, it is necessary to define the concept “other mandatory payments” and to enshrine them in the Law (if any). Secondly, any mention of payments to special funds of the authorized environment protection body shall be removed from the Law.

2. In addition, in accordance with part 8, Article 4 of the **Law on State Duties, state duty** is charged for the certification of agreements on alienation (sale, gift,



exchange, etc.) of immovable property (houses, apartments, cottages, buildings and other real estate or parts thereof) and issuance of the certificate of the right to inherit immovable property (houses, apartments, cottages, buildings and other real estate or parts thereof).

Accordingly, the subject of legal relations on alienation of real estate and land is charged two types of payments: **fee and state duty**. The first payment is paid to the local budget and the second – to the state budget. Collection of two payments for one type of legal action in respect of the same assessable object is burdensome for the subjects of civil legal relations and can lead to abuse by officials. In addition to these two payments, in accordance with the Law on Licensing the fee of 1% of the transaction is charged **for issuance of a land use certificate**. The fourth additional payment was introduced by Resolution of the Government the Republic of Tajikistan No. 14 of 10.01.2013 **on Rendering Additional Paid Legal Services to Individuals and Legal Entities in Notary Offices of the Republic of Tajikistan**, which provides for a series of payments for registration of contracts of real estate sale<sup>8</sup>.

### **Registering Property Indicator Doing Business Report 2015<sup>9</sup>**

<b>Indicator</b>	<b>Tajikistan</b>	<b>Europe</b>	<b>OECD</b>
<b>Procedures</b>	<b>6.0</b>	<b>5.4</b>	<b>4.7</b>
<b>Period (days)</b>	<b>37.0</b>	<b>23.1</b>	<b>24.0</b>
<b>Cost (%)</b>	<b>3.7</b>	<b>2.7</b>	<b>4.2</b>

It is evident that in Tajikistan is recorded the largest number of property registration procedures (including registration of rights in rem and encumbrances) and, consequently, the registration period takes longer than one month (30 days).

3. **“The Program of Agriculture Reform in Tajikistan for 2012-2020”** (approved by Government Resolution No. 383 of 1.08.2012) states:

<sup>8</sup> More on price formation in the land legislation see: Narinbek Isabekov “Price Formation for Services on Registration of Immovable Property Rights” // USAID’s Report. 2016.

<sup>9</sup> <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB15-Full-Report.pdf>

“Because of the high level of labour migration, the majority of able-bodied population in rural area is comprised of women and elderly people. Much of the work in agriculture sector is, therefore, carried out by women, who in most cases **do not benefit from the same rights as men, such as size of their share in dekhkan farms, lower pay for labour, access to finance and credit**”<sup>10</sup>.

This suggests that women are allocated smaller plots of land than men. However, firstly, it contradicts to the constitutional principle of equality of all citizens before the law and, secondly, leads to a disbalance due to an insufficient number of men employed in agriculture. The USAID report 2014 indicates that land is reluctantly allocated to women.

4. Depending on the type of farming and the number of farmers, the price of land ranges from 500 to 2,000 somonis. In addition, registration of a farm takes up to 6 months<sup>11</sup>.

Part 1 of Article 31 of the Law on registration regulates the procedure for state registration:

- acceptance of documents submitted for state registration;
- taking a decision on registration activities;
- fulfilment of registration activities;
- certification of the completed state registration.

According to Article 35, this registration period varies from 7 days to 1 month, but it often takes longer.

However, time frames for each stage are not specified that potentially leads to extension of registration terms and signals of the **corruption risk factor – broad discretionary powers**.

In addition, an important point about the **check for previously registered and previously announced rights** is missing. This stage is necessary for the check of encumbrances, rights in rem and protection of the rights of property owners.

## 5. Filling legislative gaps with bylaws in the absence of required authority

<sup>10</sup> [http://moa.tj/wp-content/Program\\_Taj\\_Rus\\_Eng\\_ready.pdf](http://moa.tj/wp-content/Program_Taj_Rus_Eng_ready.pdf) P.48.

<sup>11</sup> USAID Land Reform and Gender Specialist Final Report, June 2014

In accordance with part 2 of Article 8 and Article 60 of the Law on State Registration of Immovable Property and Rights to It, an agreement of real estate pledge (mortgage) is subject to registration in the unified state register of real estate and rights to it. Article 5 of the “**Procedure for Registration and Maintenance of the State Register of Agreements of Real Estate Pledge**” (approved by Resolution of the State Committee on Land Management and Geodesy of Tajikistan No. 773 of 17.12.2014) states:

*“Mortgages of immovable property belonging to the state property are registered by the state unitary enterprise “Registration of immovable property” with consent of the Government of Tajikistan and mortgages of immovable property belonging to municipal property are registered by the subsidiary state enterprise “Registration of immovable property” with consent of the Majlis of people's deputies”.*

The Law on Mortgage doesn't provide for the need to obtain the consent of the Government of Tajikistan and the Majlis of people's deputies. Since obtaining the consent is an additional burden on the parties to a mortgage, it cannot be fixed at the level of a by-law and should be enshrined in a special law or the Law on state registration. It is also unclear, whether the requirement to obtain consent is valid for all mortgage contracts or only for those contracts, one party to which is the state.

## **6. Lack or incompleteness of administrative procedures**

**Resolution of the Government of the Republic of Tajikistan No. 225 of 3.05.2010 on the State Committee on Land Management and Geodesy of the Republic of Tajikistan** approved the Regulations on the State Committee on Land Management and Geodesy. According to the Regulations, the State Committee on Land Management and Geodesy of the Republic of Tajikistan (hereinafter – the Committee) is the central body of executive authority responsible for the development and implementation of the unified state policy in the field of land management, land cadastre, topography, geodesy, aerospace, cartography, state registration of immovable

property and rights to it, state control over land use and protection, state control over topographic, geodetic and cartographic surveys.

In particular, the Committee is the founder of several companies: state unitary enterprise “Registration of immovable property” and state subsidiary enterprises “Registration of immovable property” in the Gorno-Badakhshan autonomous oblast, oblasts, city of Dushanbe, cities and rayons, state unitary enterprise “Cartographic map” (**Resolution of the State Committee on Land Management No. 88 of 02.03.2013**).

7. Despite the fact that on January 1, 2016 was put into operation the Unified register of real estate containing inventory information (formerly Markazi Zamin) and the Bureau of Technical Inventory (BTI), which had 64 offices by January 1, 2016. So far, the website of the Unified register does not work and any information support of the register is missing.

### **Solution**

1. It is suggested to charge only a state duty as the payment for performing legally significant actions.

2. Charging of notarial fees shall be streamlined.

3. Provisions regulating the work of state unitary enterprises shall be developed, adopted and then published on the official website of the State Committee on Land Management or the Committee on Investment and State Property Management.

4. The procedure for collection of dues and fees should be made more open, understandable and justified.

5. The procedure for obtaining consent of the Government of the Republic of Tajikistan or the Majlis of people's deputies shall be specified in **Article 60 of the Law on State Registration of Immovable Property and Rights to It**.

6. The procedure for granting consent by the Government of the Republic of Tajikistan or the Majlis of people's deputies shall be specified.

7. Part 1 of Article 5 of the Law **on Other Mandatory Payments to Budget** shall be reformulated and the following words shall be removed:

*“except for the following mandatory payments directed to special funds of the authorized environment protection body”.*

8. In Article 31 of the Law **on State Registration of Immovable Property and Rights to It**, it is necessary to specify time frames for each stage of the state registration and supplement this provision as follows:

*“all activities connected with registration shall be completed within 30 calendar days from the date of application.”*

9. The website of the state register of real estate and rights to it with open or partially open access for public shall be launched and regularly updated.

10. Part 1 of Article 31 of the Law **on State Registration of Immovable Property and Rights to It** shall be supplemented with the following paragraph:

*“The check for previously registered and previously announced rights”.*

## LAW ON MORTGAGE 2008

1. State regulation of mortgage relations is based on the principles of a social state, which acts as a guarantor when certain economic difficulties arise. From the point of view of economic efficiency, the state is interested that citizens possess property, carry out economic activities on it and profit from it. Eviction of debtors (foreclosure) is a necessary but highly undesirable consequence of non-compliance with obligations under a mortgage contract. At the same time, a mortgage contract is a type of civil contracts and, therefore, the parties to the agreement undertake commitments and in case of non-compliance with them negative effects occur.

Consequently, it is necessary to take into account the interest of banks to collect mortgage payments. Currently, overregulation of mortgage legal relations weakens the creditors' rights, which leads to extremely high interest rates (up to 30%), if compared with the CIS countries (the Russian Federation – 13%, Armenia – 15%, Ukraine – 20%) and certainly with the countries of Europe (Bulgaria – 7.5%, the Great Britain – 3.9%, Spain – 3.6%, France – 3%). This reduces the number of those who apply for a mortgage<sup>12</sup>. Under the circumstances, we recommend, on the one hand, to remove unnecessary restrictions put on civil legal relations (see paragraph 2), on the other hand, to **introduce liability insurance for borrowers**. A borrower, a natural person who is the debtor of the obligation secured by mortgage, insures the liability risk for non-fulfilment or improper fulfilment of obligations to repay the principal and interest. We also suggest considering the introduction of insurance of mortgaged property in case of its loss (in the fire).

2. Part 3 of Article 11 and Article 46 of the Law on mortgage. According to part 1 of Article 46:

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<sup>12</sup> For example, by the end of 2015 “Tojiksodirotbank” provides loans with 25% of annual interest rate for up to 5 years against security of the acquired property when you pay 40% of the cost of the purchased property and submit the documentation package, consisting of 16 points. Most of the documents should be provided for two persons: the applicant and the guarantor.

“The cost of the land use right with the right of alienation, indicated in the agreement on mortgage of land use right, *cannot be lower than the cadastral value of the land plot* that is subject to the mortgage.”

A mortgage agreement is a type of civil contracts, so the government regulation of the cost of the right to use land is excessive.

3. Article 48 of the Law on mortgage provides for the peculiarities of foreclosure taken against the mortgaged right of land use with the right of alienation and its implementation. The provisions of this article are economically inefficient, because they impede turnover of mortgaged property. The phrase “**the violation of the basic obligation is extremely minor**” (the same wording is used in part 1 of Article 37) is an evaluative judgment and is difficult to classify and define. Part 3 of Article 33 of the Law on mortgage contains an ambiguous provision:

*“For claims resulting from the non-fulfilment or improper fulfilment of obligations secured by a mortgage, foreclosure **cannot be used** if, in accordance with the terms of this obligation and applicable laws and other legal acts of the Republic of Tajikistan, the debtor has been freed from liability for such fulfilment or improper fulfilment.”*

This provision is too general and ambiguous and does not specify when foreclosure is not used.

4. The courts are granted **broad discretion (corruption risk factor)** in choosing methods of selling property under foreclosure (paragraph c, part 2, Article 37), defining the initial price of the mortgaged property (paragraph d, part 2, Article 37) and postponing the selling of the mortgaged land use rights in case of force majeure (part 4, Article 48), which is a limiting factor for banks and credit institutions to give mortgages.

According to part 3, Article 37 of the Law on mortgage:

*“Upon an application of the mortgagor and if there are legitimate reasons, the court has the right in the foreclosure decision to postpone the sale of mortgaged property for a period of one year in cases when the mortgagor is a citizen, regardless the property mortgaged by him in accordance with the mortgage contract, on*

*condition that the mortgage is not connected with entrepreneurial activity of this citizen.”*

This provision, as well as the provision of part 3, Article 33 of the Law on mortgage, is general and ambiguous.

5. Article 38 of the Law on mortgage regulates foreclosure by extrajudicial procedure. According to part 3 of Article 38, in concluding agreements on satisfaction of mortgagee’s obligations, the parties must indicate, inter alia, the *cost of the mortgaged property*. However, the Article does not specify how this cost is estimated. This provision can be referred to such **corruption risk factor** as incompleteness of administrative procedures.

**The cost of the mortgaged property shall be estimated by an independent valuer.**

6. Methods of selling mortgaged property. In a legal procedure the court decides on “the method of selling mortgaged property”, but hereafter the provision deals with public sales (paragraph c, part 2, Article 37) or auctions (part 2, Article 39), while extrajudicially the parties to the agreement for satisfaction of mortgagee’s obligations shall indicate “the method of selling mortgaged property or the terms of purchase by the mortgagee” (paragraph c, part 3, Article 38). However, the mortgagee has the right to the mortgaged property as a result of non-payment of the mortgage, so it is not clear what “terms of purchase” are meant. According to paragraph b, part 4, Article 38:

*“purchase of the mortgaged property by the mortgagee for himself or third persons, including in the purchase price the mortgagee’s claims to the debtor, secured by the mortgage. The agreement on the mortgaged property purchase by the mortgagee must be concluded according to the regulations of civil legislation of the Republic of Tajikistan regarding agreements on purchase and sale, but in case of the purchase of property by the mortgagee for a third person, the regulations on commission agreements shall be applied.”*

Apparently, the word “purchase” means physical transfer of mortgaged property from the mortgagor to the mortgagee, but not in all cases it is formalized as a sale contract.



7. The Law provides for two methods of selling mortgaged property: public sales (Article 40) and auctions (Article 42). Part 2 of Article 39 stipulates that an auction can be appointed by the court with consent of the mortgagor and the mortgagee.

The main difference between auctions conducted by a mortgagee as a method of selling mortgaged property and public sales consists in the fact that, according to **part 1 of Article 42 of the Law**, the auction for selling mortgaged property is conducted by a specialized organization, selected by the mortgagee with consent of the mortgagor. The auction is held without the participation of a bailiff.

Apart from these two differences, the Law **does not indicate other differences between a public sale and an auction**; for example, who acts as the seller of the pledged property at the auction.

At the auction the sales contract is concluded by the specialized organization on behalf of the seller. The **type of auction** is also not specified: English auction (a type of auction, in which bidding starts at the announced price and increases with every new bid by a fixed increment until one participant who offered the highest price is left) or Dutch auction (a type of auction, in which bidding starts at the announced price and is lowered until some participant is willing to accept the auctioneer's price).<sup>13</sup>

8. The Law on mortgage does not regulate the issues related to the mortgage of land, on which there are buildings and structures owned by the mortgagor, and building of houses and structures by the mortgagor on the mortgaged land plot.

9. Article 239 of the Civil Code of the RT and the Land Code of the RT state that land belongs to the state. According to part 5, Article 48 of the Law on mortgage, if the right of life-long land use owned by a farmer is pledged, this right is subject to be changed to the perpetual use, in case of foreclosure by the bank. On the one hand, it causes inconveniences for banks and credit institutions and, on the other hand, the right to life-long use is a privilege and its change decreases the cost of the object.

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<sup>13</sup> These two types are used to sell state property by auction, according to the Resolution of the Government of Tajikistan No. 98 dated March 1, 2004 “On Approval of the Order of Selling State Property Objects by Auctions”.

**10. Broad discretionary powers** of the court concerning rescission of contracts.

According to part 3, Article 29 of the Law:

*“A subsequent mortgage contract, concluded in spite of the prohibition determined by the prior mortgage contract, **can be** recognized as invalid by the court based on a claim of the mortgagee of the prior agreement, regardless of whether the mortgagee of the subsequent agreement was aware of such a prohibition.”*

The words “can be” shall be replaced with “must”.

**11. Part 5, Article 40 of the Law on mortgage states:**

*“Presence of non-participants at a public sale of mortgaged property can be limited only by the local authority in the interest of maintaining public order.”*

This provision creates conditions for abuse, because the goal of limiting access of the population to a public auction – “*maintaining public order*” is too vague.

**Solution**

1. The words “and in case of mortgage of the land use right with the right of alienation taking into account the requirements of Article 46 of this Law” shall be removed from **part 3, Article 11 of the Law on mortgage**.

2. **Part 1, Article 48 of the Law on mortgage** shall be amended as follows:

*“The collateral value of land to be pledged under the mortgage contract shall be established by agreement of the mortgagor and the mortgagee.”*

3. **Part 3 of Article 33** of the Law on mortgage shall be considered void.

4. **Part 3 of Article 37** of the Law on mortgage shall be considered void.

5. The words “*violation of the basic obligation is extremely minor*” shall be removed from **part 1, Article 37 and part 1, Article 48** of the Law on mortgage.

6. The word “purchase” shall be replaced with “transfer” in **paragraph b, part 4, Article 38** of the Law on mortgage.

7. **Article 42 of the Law on mortgage** shall be supplemented with part 4 as follows:

*“At the auction the sales contract is concluded by the specialized organization on behalf of the seller.”*

8. The Law on mortgage shall be supplemented with the following article:

*42.1 Choice of the auction type:*

*1. The parties can choose one of two types of auctions: English or Dutch.*

*2. English auction is a type of auction, in which bidding starts at the announced price and increases with every new bid by a fixed increment until one participant who offered the highest price is left.*

*3. Dutch auction is a type of auction, in which bidding starts at the announced price and is lowered until some participant is willing to accept the auctioneer's price.*

9. The words “can be” shall be replaced with “must” in **part 3, Article 29** of the Law on mortgage.

10. The Law on mortgage should provide for the liability insurance for borrowers and the insurance of mortgaged property and, therefore, shall be supplemented with the following article:

*“A borrower, a natural person who is the debtor of the obligation secured by mortgage, has the right to insure the liability risk for non-fulfilment or improper fulfilment of obligations to repay the principal and interest and (or) to take out an insurance for the mortgaged property.”*

11. **Part 5, Article 40** of the Law shall detail the goal – “*maintaining public order*”.

## LAW ON DEKHKAN FARMS 2016

1. This Law, adopted in 2016, replaced the eponymous Law No. 151 of 25.05.2009 and is the fourth legal act regulating farming activities (the first two – Law of the Republic of Tajikistan No. 544 of 1992 on Dekhkan Farms (repealed on 22.04.2003) and Law of the Republic of Tajikistan No. 48 of 10.05.2002 on Dekhkan Farms (repealed on 19.05.2009)).

Unlike the previous legal act, this Law distinguishes only two kinds of farms: without incorporation of a legal entity as a self-employed entrepreneur and with incorporation of a legal entity as an economic partnership and community (parts 3-4, Article 3). Farming is a type of business activity as opposed to a subsidiary farm (part 2, Article 3 of the Law on Subsidiary Farming).

According to Article 6 of this Law, state registration of a dekhkan farm is conducted as prescribed by the **Law of the RT on State Registration of Legal Entities and Self-Employed Entrepreneurs** of 2009 (hereinafter – the Law on state registration). Part 3, Article 22 of the Law on state registration in addition to the registration of an individual farm indicates “a family dekhkan farm”, but this type of farms is not mentioned in the new Law on dekhkan farms and the provision remains from the previous Law of 2009.

2. In accordance with Article 18 of the Law on Dekhkan Farms, the property and the right of land use of a member of the dekhkan farm is inherited as prescribed by the Civil Code of the Republic of Tajikistan, regardless of his/her labour input. The **peculiarities of the inheritance of land use rights belonging to dekhkan farms** shall be provided for in the legislation, based on the need to reconcile the legal right to inherit and preserve the integrity of land to continue the activities of the dekhkan farm.

The preferential right to inherit land use rights, guaranteed to the members of the dekhkan farm, shall be assigned to the heirs, who are members of the farm and (or) work on the land plot. It seems possible to draw an analogy between this right and the right of pre-emption. In addition, as provided in Kyrgyzstan, land can be inherited only as a whole. This practice goes back to the legislation of European countries. For

example, in Germany primogeniture of farming lands was enshrined in a law in 1886. Similar measures were taken in 1909 in France and in 1912 in Switzerland. In fact, inheritance in these countries is possible only if the person has relevant qualifications.

In case of inheritance by law, after the death of a member of the dekhkan farm, who had the right to use land, the proprietary right to the land share is gained by heirs – farm members, who continue to do the farm’s business, and heirs – non-members of the farm, the legal relations between whom are not defined.

3. **Chapter 44 of the Tax Code of the RT** is devoted to the single tax for producers of agricultural products. Part 1 of Article 298 states:

*“Simplified taxation regime for producers of agricultural products (hereinafter – single tax) is a special tax regime for subjects of small entrepreneurship engaged in the production of agricultural products **without its further processing**. Single tax shall apply to dekhkan farms and other producers of agricultural products, for whom land is the primary means of entrepreneurial activity (hereinafter – producers of agricultural products).”*

Restrictions on “subjects of small entrepreneurship engaged in the production of agricultural products **without its further processing**” limit the scope of farmers’ activities and do not correspond to the concept of farming, as provided for in Article 1 of the Law on dekhkan farms:

*“Dekhkan (farm) enterprise (hereinafter – dekhkan farm) is a business entity, **production, storage, processing and marketing of agricultural products** of which are based on the individual work of one person or joint activity of group of individuals on the land and property belonging to them”.*

4. The number of taxes, as practice shows, is burdensome for farmers. Part 2, Article 299 of the Tax Code of the RT states:

*“For the purpose of this chapter the agricultural production shall include initial result (product) of cultivation of agricultural production which does not undergo further processing.”*

Firstly, it is not clear **what refers to agricultural production**, for example, whether animal products refer to agriculture or not. Article 7 of the Law “On

**Pastures**” stipulates that “dekhkan farms, other types of agricultural enterprises and individual pasture users may also join the pasture users association”. In other words, having compared the Law on dekhkan farms, the Tax Code of the RT and the Law on pastures, we can conclude that animal products also refer to agricultural production. However, the Tax Code of the RT specifically stipulates that land pastures may be exempt from the single tax for 5 years, if they are used to lay out gardens and vineyards (Articles 274, 301 of the Tax Code of the RT).

Secondly, it turns out that if a dekhkan farm not only cultivates agricultural production, but also **processes and sells** it, it must, in accordance with part 4, Article 298 of the Tax Code except for the single tax under the simplified system (or in the case of excess of the gross income over the threshold income – taxes under the general taxation system), pay other taxes or change for the general taxation system. Non-industrial processing for sale is subject to additional taxation on equal terms with industrial processing that prevents small producers-farmers from access to manufacturers and selling their products directly.

*We suggest including non-industrial processing in the single tax base.*

Thus, there is an **evident contradiction between Article 1 of the Law on dekhkan farms and Articles 298-299 of the Tax Code insofar as it refers to the restrictions on statutory activities of a farm, which are subject to the single tax.**

5. In addition, further collection of the social tax has an adverse effect, particularly on small land users, resulting in unwillingness of farm members to officially register themselves as shareholders, and this is particularly true with regard to women shareholders. Thus, they prefer to receive only land share certificates in order to avoid paying social taxes. This, in turn, leads to the fact that many heads of dekhkan farms deny that their shareholders have land use rights and use many shareholders as farm workers who do not receive income from commercial revenues. Another example of unequal taxation of different crops is reducing the single tax by 50% for the land used for cotton farming. Probably, this measure was taken in order to stimulate cotton production, but it did not help, and, in fact, it turned out to be a discriminatory measure in relation to the farmers not engaged in cotton farming. At the

same time, this measure indirectly encourages farmers to grow cotton instead of badly needed food.

6. It is necessary to harmonize the provisions on farming in Articles 305-307 of the Civil Code of the RT and the new Law on dekhkan farms.

### **Solution**

1. The words “family dekhkan farm” shall be removed from part 3, Article 22 of **Law No. 508 of 19.05.2009 on State Registration of Legal Entities and Self-Employed Entrepreneurs.**

2. **Article 18 of the Law on Dekhkan Farms** shall be amended as follows:

*“The farm’s property and the right to use land, acquired with the right of its alienation, is inherited in accordance with the provisions of the Civil Code of the Republic of Tajikistan taking into account the peculiarities stipulated by this Law. In case of inheritance under a will, the preferential right to use land have the heirs, who are members of the farm and (or) work on the land plot. In case of inheritance by law, after the death of a member of the dekhkan farm, who had the right to use land, the proprietary right to the land share is gained by heirs – farm members, who continue to do the farm’s business, and heirs – non-members of the farm – heirs of the first category.”*

3. **Part 2, Article 299 of the Tax Code of the RT** shall be amended as follows:

*“For the purpose of this chapter the agricultural production shall include initial result (product) of cultivation of agricultural production which does not undergo further **industrial** processing.”*

**LAW ON PRODUCTION SHARING 2008 and LAW ON SUBSOIL 1994**

1. Ownership of subsoil in the Republic of Tajikistan is the exclusive right of the state, i.e. subsoil is solely the subject of state property (the same provision is enshrined in part 1, Article 239 of the Civil Code of the Republic of Tajikistan). However, the issues related to mineral resources rights are not clearly regulated<sup>14</sup>. According to Article 2 of the Law on subsoil:

*“Private ownership of subsoil shall not be allowed in the Republic of Tajikistan. Purchase and sale, gifting, pledging and unauthorized exchange of subsoil plots shall be prohibited.”*

However, the legal regime of mineral resources is not specifically defined. For example, according to Article 3 of the Law on production sharing agreements (hereinafter – the Law on production sharing), compensatory production is transferred to the investor’s property, as well as part of profit production (part 1 of Article 10), in addition, the investor’s right to own the manufactured production with the right to export it from the customs territory of Tajikistan is enshrined in Article 11 of the Law on production sharing.

2. Article 10 of the Law on production sharing provides for two types of agreements (hereinafter – PSA), that affects the tax regimes stipulated by Article 315 of the Tax Code. Restrictions on the PSA type selection are set in part 4, Article 316 of the Tax Code of the RT:

*“The production sharing agreement can stipulate only one method of production sharing provided for in this Article. The production sharing agreement cannot provide a transition from one production sharing method established in this Article to another one. In addition, it cannot provide replacement of one production sharing method with another one.”*

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<sup>14</sup> In Kazakhstan, the Russian Federation and Uzbekistan subsoil can be used by legal entities and individuals. Subsoil can be granted for a fixed-term (temporary) use or perpetual use.



This restriction is not stipulated by the Law on production sharing. Thus, the Tax Code of the RT is beyond the scope of regulation, because if this restriction is necessary (though debatable), it must be provided for by the Law on production sharing, but not by the Tax Code of the RT.

Most experts point out the dual legal nature of a PSA: a civil contract with a public legal element. The public legal element reveals in the imposition on the investor of a special taxation system, which shall not be subject to change for the worse during the entire term of the agreement. This guarantee of non-worsening for an investor is enshrined in Articles 18-19 of the Law on production sharing.

### *Example*

*The story of the Bokhtar production sharing agreement is rather illustrative. The Bokhtar agreement was concluded by three companies in 2013: Tethys Petroleum Limited, China National Petroleum Corporation (CNPC) and Total Exploration and Production (Total), which operated through a single company – Bokhtar Operating Company (BOC). In accordance with this agreement, 56 plots, totalling 37000 sq. km, were transferred to foreign investors for geologic exploration activities.<sup>15</sup> In October 2015, Tethys announced that it could withdraw from the project. According to the information from the official website of Tethys, the company was unable to meet its financial commitment to the project for development of the Bokhtar field. In this regard, other contracting parties (CNPC and Total) demanded from the Canadian company to quit the Bokhtar agreement.<sup>16</sup> After this, the Tax Committee laid tax claims against investors. The judgement for the tax authorities was made in the spring of 2016. Then the Tax Committee on the basis of the court decision on debt recovery arrested the company's accounts and confiscated the tax debt in favour of the budget.*

*Initially, the claim amount was 67.3 mil somonis; a small part of it, 1.8 mil somonis, was awarded to Total. The remaining 65.2 mil somonis (total amount, together with financial sanctions) were imposed on Total. Despite the fact that all*

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<sup>15</sup> <http://news.tj.ru/news/neftegazovaya-revoljutsiya-otmenyaetsya>

<sup>16</sup> <http://www.tethyspetroleum.com/investor-relations/news/release/760>

*these companies on the basis of a PSA are exempt from almost all taxes (except for social and road taxes), in some cases, while concluding additional contracts, they had to pay income taxes.*

*In fact, the companies conducted geologic exploration activities on the territory of Khatlon oblast and income generation was out of the question, since at that time there was no production. However, by profit the Tax Committee means contracts on the employment of the personnel and foreign consultants, as well as contracts on services delivery. Under these agreements, Total transferred money to the account of Bokhtar Operating. BOC covered services costs and paid wages to the hired employees and it was considered profit, which was subject to taxation.*

*It is known that by the end of 2016 Total ceases its activities in Tajikistan. Going out of business in Tajikistan is also considered by Russia's Gazprom, which complains about expropriatory taxation in this area<sup>17</sup>.*

3. Part 2 of Article 5 of the Law on production sharing indicates those, who can be an investor for the purposes of the PSA. However, the legislator does not specify how the liability is divided between investors – solidary or subsidiary liability. It should be indicated that investors are solidarily liable for the obligations under the agreement.

### **Solution**

1. The legal regime of mineral resources shall be clearly defined.

2. The tax regime for the investors, involved in transactions under the Law on production sharing, should be more flexible.

3. Article 5 of the Law on production sharing shall be supplemented with part 3:

*“Such persons are joint owners of the subsoil use right and are solidarily liable for the obligations under the production sharing agreement.”*

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<sup>17</sup> <http://news.tj/ru/news/neftegazovaya-revoljutsiya-otmenyaetsya>

## **ADMINISTRATIVE LIABILITY FOR VIOLATION OF LEGISLATION RELATED TO LAND AND SUBSOIL**

Chapter 9 of the Administrative Offences Code of the RT (hereinafter – the AOC of the RT) contains 23 articles (Articles 141-164), dedicated to offences in the field of land use, Chapter 10 of the AOC of the RT contains 7 articles (Articles 165-172), dedicated to offences in the field of subsoil use.

The dispositions of articles are blurred and blanket (refer to the environmental legislation). For example, Article 142 of the AOC of the RT stipulates liability for mismanagement of land, namely:

*“Failure to take mandatory measures to improve land and to protect soil against wind and water erosion, destruction of arable lands, erasing of the fertile soil layer or to prevent other processes worsening the soil quality and adversely affecting the quality of land, as well as utilization of land in the manner that leads to degradation of soil and deterioration of the ecological state of land.”*

This provision does not specify who sets the standards and frequency of mandatory measures to improve lands. According to part 2, Article 12 of the **Law on pastures**:

*“Pasture users are obliged to:*

*- provide information on real state of pasture to the competent authorized body in due time;*

*- efficiently use allocated pasture land, prevent deterioration of the state of the environment;*

*- implement complex measures with the aim to protect land, state of forests, recovering naturally.*

However, the concepts *“in due time”* and *“efficiently”* are evaluative and do not indicate the frequency of information provision (2 times a year or once a year) and the standards for efficient land use.

Article 29 of **Law No. 760 of 2.08.2011 on Environmental Protection** states:

*“Standards of use of mineral and organic fertilizers, pesticides, insecticides and other chemicals and plant growth stimulants in agriculture, forestry and other sectors*

*of economy shall be established in dozes providing observance of the standards of maximum permissible residual quantities of chemical substances in food products and in a human body, as well as health protection of a man, his genetic fund, preservation of flora and fauna.”*

However, this provision does not define standards of agriculture and non-pollution of lands for the purposes of Articles 142 and 147 (“land contamination”) of the AOC of the RT.

### **Solution**

It is necessary to specify the frequency of providing information on pastures and arable land (e.g. once a year) and to enshrine the standards for efficient land use.

## MAIN CONCERNS WITH LAND LEGISLATION

1. The problem of ownership and alienation of rights in rem. The constitutional provision, stating that the only owner of land and subsoil is the state, imposes significant limitations on the use of land and subsoil. Differentiation between the land use right with the right of alienation and without the right of alienation leads to substantial restrictions on the rights of civil transactions subjects (*this problem is not directly related to corruption, but many experts consider it one of the main problems of the land legislation*).

2. The provisions of the Land Code of the RT devoted to withdrawal of land for state needs do not define “public needs” and do not indicate those, who implement the requirements of Article 41 of the Land Code and compensate losses of a land user in the event of land withdrawal for public needs. The current legislation neither defines state needs, nor specifies their limits, boundaries and criteria.

3. The procedure for determining the size of the land plots allocated to citizens is not clear. The Land Code does not specify the procedure for allocation of land on a competitive basis. Blurred powers in the area of land delimitation, lack of a competitive mechanism of land distribution give rise to abuse by state and local authorities and increase competition for land.

4. Excessive requirements. Landowners associate registration of the right to use land with a cumbersome payment system. The legislation provides for four types of payments for registration, but there are also informal payments.

5. Lack of administrative procedures of state unitary enterprises (SUE), responsible for registration and valuation of real estate. The contradiction between the principle of independence of a valuer and activities of SUEs owned by the state, which may cause a conflict of interest.

6. The courts are granted broad discretion (corruption risk factor) in choosing methods of selling property (paragraph c, part 2, Article 37), defining the initial price of the mortgaged property (paragraph d, part 2, Article 37) and postponing the selling

of the mortgaged land use rights in case of force majeure (part 4, Article 48), which is a limiting factor for banks and credit institutions to give mortgages.

7. The Law on mortgage provides for more protection of mortgagors' rights compared to the rights of mortgagees - credit organizations. This disbalance leads to increased protection measures, such as higher interest rates on mortgages, which restrain the mortgage market.

8. The contradiction between the definition of farming activities as *production, storage, processing and marketing of agricultural products* and the single tax base, covering only *production of agricultural products*.

9. The procedure for land valuation, especially if there are debts of previous landowners is not clearly specified.

10. It is not clear, how debt problems of farmers are currently solved and which organization is responsible for debts restructuring since 2013.

11. 24 articles providing for administrative liability for violations of land legislation are burdensome and allow to punish for any action in agriculture.

12. The Law on production sharing, tax legislation and tax administration contradict the principle of non-worsening for the investor.

## RECOMMENDATIONS

Concerning the Land Code of the Republic of Tajikistan:

1. Free land turnover shall be allowed to the citizens and legal entities of Tajikistan.
2. The definition of the notion “state needs” in relation to withdrawal of land shall be included in the Land Code of the RT.
3. The Land Code shall be supplemented with the procedure for allocation of land on a competitive basis.

Concerning the Law on mortgage:

4. The voluntary liability insurance for borrowers and the insurance of mortgaged property shall be enshrined in the Law on mortgage.
5. The rights and duties of a mortgagor and a mortgagee under the Law on mortgage shall be balanced:
  - a) the ambiguous phrase “**violation of the basic obligation is extremely minor**” (part 1 of Article 37, Article 48),
  - b) exemption from foreclosure on the grounds set forth in other laws.

Concerning the Law on state registration of immovable property:

6. The number of payments for the registration of land and rights in rem (encumbrances) shall be settled. It is suggested to charge only a state duty as the payment for registration.
7. It is necessary to develop provisions on the activities of state unitary enterprises, to detail provisions on conflict of interest, to fix the exact cost of the services, connected with valuation and registration of land and rights in rem. Ideally, independent valuers should be allowed access to the services market.

Concerning the Law on dekhkan farms:

8. It is necessary to enshrine in the Law the preferential right to inherit a land share by heirs, who are involved in agricultural activities and (or) are members of dekhkan farms. This corresponds to the European legislation (Germany, France, Switzerland) and is stipulated by the legislation of Kyrgyzstan.

9. The provisions of the Tax Code of the RT shall be harmonized with the provisions of the Law on dekhkan farms in order to include non-industrial processing of agricultural production and its selling on a non-industrial scale in the single tax.

Concerning the Law on production sharing:

10. The legal regime of mineral resources shall be clearly defined.

11. The tax regime for the investors, involved in transactions under the Law on production sharing, should be more flexible.



**Table 1: Recommended amendments**

No.	Corruption risk factor	Recommended amendment
1.	Lack or incompleteness of administrative procedures.	<p>1. <b>Article 41 of the Land Code</b> shall be amended as follows: “In case of withdrawal of land for state needs, all losses are valued at market prices taking into account the land location and <i>shall be financed from national or local budget</i>”.</p> <p>2. The Land Code shall be supplemented with <b>Article 40(2)</b>:  “1. <i>Withdrawal of land plots for state needs for the purpose of building and reconstruction of objects of national significance, objects of regional or local significance is permitted, if these objects are provided for by the approved territorial planning documents and the approved projects of territory planning.</i>  2. <i>The decision on withdrawal of land for state needs for purposes not provided for in paragraph 1 of this Article shall be justified by:</i>  1) <i>a decision on creation or expansion of lands for nature protection purposes (in case of withdrawal of land for creation or expansion of lands for nature protection purposes);</i>  2) <i>an international treaty of the Republic of Tajikistan (in case of withdrawal of land for the implementation of international treaties);</i>  3) <i>a decision on recognition of an apartment house dangerous and subject to demolition or reconstruction (in case of withdrawal of land caused by the recognition of an apartment house, located on this plot of land, dangerous and subject to demolition or reconstruction).</i>”</p> <p>3. <b>Paragraph 2 of Article 71.1 of the Land Code</b> shall be amended as follows:  “<i>Land plots for subsidiary farming are allocated to citizens by local executive authorities from the unified state lands.</i>”</p> <p>4. <b>Part 2 of Article 17 of the Land Code</b> shall be amended as follows:  “<i>the right to lease a land plot is certified by a lease</i></p>

		<p><i>agreement. The information contained in the documents certifying the right to lease land for more than one year shall comply with the data entered in the land use register.”</i></p> <p>5. The phrase “lists of lease agreements” shall be removed from <b>paragraph c) of Article 8 of the Land Code.</b></p> <p>6. The <b>Land Code</b> shall be supplemented with a new article:  <i>“Land quality and valuation shall be taken into account in order to:</i>  - <i>determine the land use efficiency;</i>  - <i>calculate the land tax rates;</i>  - <i>set the starting land price for selling by tenders,</i>  - <i>compensate losses and damages caused by the withdrawal of lands for state and public needs.”</i></p> <p>7. <b>Article 18 of the Law on Dekhkan Farms</b> shall be amended as follows:  <i>“The farm’s property and the right to use land, acquired with the right of its alienation, is inherited in accordance with the provisions of the Civil Code of the Republic of Tajikistan taking into account the peculiarities stipulated by this Law. In case of inheritance under a will, the preferential right to use land have the heirs, who are members of the farm and (or) work on the land plot. In case of inheritance by law, after the death of a member of the dekhkan farm, who had the right to use land, the proprietary right to the land share is gained by heirs – farm members, who continue to do the farm’s business, and heirs – non-members of the farm – heirs of the first category.”</i></p> <p>8. <b>Part 2, Article 299 of the Tax Code of the RT</b> shall be amended as follows:  <i>“For the purpose of this chapter the agricultural production shall include initial result (product) of cultivation of agricultural production which does not undergo further industrial processing.”</i></p>
2.	Provisions creating conditions for abuses by state bodies or local	<p><b>Article 5 of the Law on production sharing</b> shall be supplemented with part 3:  <i>“Such persons are joint owners of the subsoil use right</i></p>

	authorities.	<i>and are solidarily liable for the obligations under the production sharing agreement.”</i>
3.	Conflict of legal provisions.	The words “ <i>family dekhkan farm</i> ” shall be removed from <b>part 3, Article 22 of Law No. 508 of 19.05.2009 on State Registration of Legal Entities and Self-Employed Entrepreneurs.</b>
4.	Defining authority by “has the right” formula.	<b>Part 1, Article 48 of the Law on mortgage</b> shall be amended as follows: <i>“The collateral value of land to be pledged under the mortgage contract shall be established by agreement of the mortgagor and the mortgagee.”</i>

**Table 2: Corruption risk provisions**

<b>Corruption risk factors</b>	<b>Provisions of legal acts</b>
<b>1. Defining authority by “has the right” formula</b>	Articles 31, 61 of the Law on state registration
<b>2. Scope of discretionary powers</b>	part 1 of Article 37; part 1 of Article 48; part 3 of Article 33; part 3 of Article 37 of the Law on mortgage
<b>3. Excessive freedom in sub-legislative rulemaking</b>	
<b>4. Selective changes to the scope of rights</b>	Article 299 of the Tax Code
<b>5. Lack or incompleteness of administrative procedures</b>	Article 42 of the Law on mortgage; Article 5 of the Law on production sharing; Articles 17, 40-41, 71.1 of the Land Code
<b>6. Waiver of tender procedures</b>	
<b>7. Legal and linguistic ambiguity</b>	Articles 38-38.1, 40(2), 41-42 of the Land Code; Article 38 of the Law on mortgage
<b>8. Conflict of legal provisions</b>	part 1 of Article 306 of the Tax Code; part 3 of Article 22 of the Law on state registration; Article 18 of the Law on dekhkan farms; Articles 3, 10-11 of the Law on production sharing
<b>9. Provisions creating conditions for abuses by state bodies or local authorities</b>	Articles 46, 26-26.1, 63, 71-71.3 of the Land Code; Article 48 of the Law on mortgage
<b>10. Adoption of a legal act with excessive jurisdiction</b>	Articles 315-316, 324 of the Tax Code
<b>11. Excessive requirements</b>	
<b>12. Filling legislative gaps by force of by-laws in the absence of required authority</b>	part 2 of Article 8, Article 60 of the Law on state registration