

# Technical Framework for a *Transitional Land Law* for East Timor

USAID/ARD Strengthening Property Rights in Timor-Leste  
Ita Nia Rai Project

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Ibere Lopes

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## 2. Preface

The USAID *Strengthening Property Rights in Timor-Leste Project* (“*Ita Nia Rai*” – “Our Land” – Project) is managed by ARD with implementation assistance from its partners, ACDI/VOCA, and Land Equity International Pty Ltd. The Project continues USAID-Timor Leste’s support to land reform and land rights strengthening begun in 2003 (and implemented by ARD) as part of its assistance to the Government of Timor Leste (GoTL).

The Project grew out of USAID’s earlier Timor-Leste Land Reform activities and, in particular, from USAID’s *Conflict Vulnerability Assessment* (November 2006) undertaken in the shadow of the 2006 crisis in Timor Leste which was prompted, in part, by underlying insecurity and instability associated with unresolved land tenure issues.

The Project is established under the ***Prosperity, Livelihoods and Conserving Ecosystems (PLACE) IQC*** (USAID IQC Contract Number: EPP-I-00-06-00008-00). It is a five year, \$10 million project. The Task Order is entitled “*Strengthening Property Rights in Timor Leste*” – (USAID Contract No. EPP-I-03-06-00008-00). The purpose of the Task Order is to develop laws, systems, institutions and capacity to clarify and secure property rights for all Timorese. In doing so, the Project will pay special attention to women’s ownership rights; improving land administration systems; eliminating over lapping legal and judicial systems regarding land administration; reducing competing claims over property rights; and promoting transparency in land administration. It is expected that success with these activities will, in turn, have a positive effect on the objectives of improved investment and economic growth in addition to supporting social cohesion and political stability.

These objectives are being met through a series of activities comprised within five main components:

1. *Public Information Awareness*—supporting the implementation of project activities with timely, accurate and effective public information and communication campaigns;
2. *Land Policy Laws and Implementing Regulations* —working with the GoTL to develop an appropriate land policy and implementing legislation to promote the overall project objectives;
3. *Support to a National Land Commission* —assisting the GoTL to establish and support a National Land Commission (or other body established by law) tasked with carrying out the property regularization process, establishing the cadastre and/or dealing with land disputes;
4. *Land Administration (Cadastral, Registration and Land Titling System)*— working with the GoTL to develop a national land cadastre to clarify and record property location, boundaries, assets, and claims; and a national land and immovable property registration and titling system;
5. *Dispute Resolution, Mediation and Processes for Competing Claims to Land* —designing and implementing a dispute resolution process that will resolve most conflicting claims to land and property in Timor-Leste.

The Project is nation-wide including both urban and rural land. Its direct counterpart in the GoTL is the Direcção Nacional de Terras, Propriedades e Serviços Cadastrais - formerly the Direcção Nacional de Terras e Propriedades (National Directorate of Land, Property and Cadastral Services) within the Ministry of Justice.

### 3. References

This framework is based on a series of research reports, comparative studies, existing draft laws, expert inputs and discussions with Government officials and other stakeholders. Written comments from the World Bank, the International Finance Corporation, the International Office for Migrations, Land Equity International and the Center on Housing Rights and Evictions (COHRE) were crucial to the development of this work. Section 14 on Customary Land was largely based on a document prepared by the ANU professors and researchers Daniel Fitzpatrick, Andrew McWilliam and Susana Barnes, the “Policy Notes on Customary Tenure in Timor-Leste” (2008), based in more than 3 years’ field work in the country.

Research studies on existing property records, local perceptions on ownership, local land dispute resolution mechanisms, land administration system, management of State property, existing land claims, land valuation, natural resources management and related issues, prepared under the USAID/ARD Land Law Program (2002-2006) were crucial to the discussions that led to the policy options proposed herein<sup>1</sup>. The Land Law Program published expert studies comparing policies on pre-existing foreign rights, land rights and investment, land title restitution, land administration in post-conflict settings and other related matters, which also contributed to the development of this framework. Previous drafts of the Land Law were also consulted and used as a basis for discussion.

### 4. Introduction

The objective of the proposed framework is to provide policy guidelines to the drafting of a *Transitional Land Law* for Timor-Leste. It draws upon extensive research, international best practices, discussions with government, donors and the public, as well as previous legislative drafts.

The proposed *Transitional Land Law* will establish the process and the criteria for the first legal recognition of ownership rights. On the other hand, the *Civil Code* will govern all matters related to property rights after such rights are legally recognized.

The plurality of legal regimes applied in Timor-Leste throughout its history and the numerous episodes of forced displacement and destruction of properties have left a legacy of confusion and disorder in the Timorese land and property sector, thereby continuing to hamper economic development and fueling social conflict.

There is a vast array of property issues that are yet to be legally addressed by the Timorese State, such as: the existence of overlapping Indonesian and Portuguese titles issued to the same parcel; the lack of a legal mechanism to convert titles issued under Portuguese and Indonesian regimes into Timorese titles; the lack of legal recognition of ownership rights of possessors whose parcels have never been titled (which consist of the great majority of cases in Timor-Leste).

In addition, there are complicating factors that add another layer of confusion to these issues: property records were lost in 1999 and the remaining data is scarce; forced displacement during Portuguese and Indonesian times as well as recent episodes of violence and destruction in 1999 and 2006 have contributed to randomly rearrange

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<sup>1</sup> From 2002 to 2006, ARD Inc. implemented the USAID-funded “Land Law Program” in Timor-Leste, in cooperation with the Ministry of Justice and the National Center for Scientific Research of the University of Timor-Leste (CNIC). During the Land Law program, ARD Inc. and its partners conducted studies aimed at informing the drafting of legislation to promote first registration of property rights. The Land Law Program conducted research studies on existing property records, local perceptions on ownership, local land dispute resolution mechanisms, land administration system, management of State property, existing land claims, land valuation, natural resources management and related issues. The program also commissioned expert studies on compared policies on pre-existing foreign rights, land rights and investment, land title restitution, land administration in post-conflict settings and other related matters.

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the possession of properties. Many of the holders of previous Indonesian or Portuguese titles are no longer occupying their former properties. Several secondary occupants have been living on and using properties (to which they have no formal title) for several years and claim ownership rights based on such long-term possession.

These are only examples of the complexity of the current land and property status in Timor-Leste. However, although much of the attention has been given to such intricate problems, it is important to emphasize that in most cases properties are not disputed and have not been titled before.

Policies on land and property should have as primary objective to ensure security of tenure to this majority of undisputed, untitled cases. The existence of a minority of complex disputed cases should not prevent or delay the recognition of ownership rights to the majority of consensual traditional owners.

Accordingly, the role of the *Transitional Land Law* is to provide the legal basis for first registration by:

- 1) Recognizing ownership rights of consensual owners (undisputed cases);
- 2) Establishing the criteria to resolve disputed cases where overlapping rights exist;
- 3) Converting previous property rights and long-term peaceful possession into ownership rights, according to established legal criteria;
- 4) Establishing the administrative mechanisms and processes that will allow the Timorese State to operate such regularization of property rights in an effective and efficient manner.

It should remain clear that the *Transitional Land Law* will apply specifically to first registration of ownership rights, recognizing such rights and establishing the framework for resolving disputes. Once such rights are registered and legally recognized, all civil matters related to registered properties (transactions, inheritance, mortgages, easements, etc) can be regulated by the Timorese *Civil Code*, which is currently in draft form.

The rules and concepts set forth by the *Transitional Land Law* shall apply to the first formal recognition of ownership rights on every parcel. For example, it is suggested that the *Transitional Land Law* establishes a special type of adverse possession applied only for the purpose of recognizing ownership rights based on long-term peaceful possession. Such special adverse possession differs from the adverse possession described in the draft *Civil Code*. The *Transitional Land Law* adverse possession will apply only to cases of first recognition of rights<sup>2</sup>. The *Civil Code* adverse possession will apply in all other cases. This element justifies the “transitional” nature of the *Transitional Land Law*: once all ownership rights are recognized and registered, such law will be no longer applied.

There is a multitude of possible land issues and there is a great variety in the level of complexity and contentiousness of each type of case. This framework presents a simplified typology of cases, with three categories. Type 1 and 2 Cases are less contentious and require relatively simple solutions. Type 3 Cases are more complex and the potential solutions will depend on the policy options chosen by legislators. Accordingly, it is recommended that the *Transitional Land Law* is developed in two parts: the first would deal with Type 1 and 2 Cases. The second part will be dedicated to Type 3 Cases.

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<sup>2</sup> Commonly referred to as “first registration”.

## Transitional Regime

### 5. Terminology

**Derived possession rule:** The length of time of possession of a land parcel is the sum of the time of possession of the current occupier plus the time of the possession of a previous occupier. The link between the derived and the subsequent possessions should be a legitimate transfer: sale, inheritance, donation, trade, etc. Example: if the current possessor started possession in 2007 after inheriting the property from his father, who started his possession in 2002, the current possessor will be considered to have been in possession since 2002.

**National Property Cadastre:** Database containing the official information on the status of properties. This database should be constantly updated. Public access to the database enhances transparency of property transactions and facilitates accountability. It has been established (and is currently being developed) in accordance with *Ministerial Regulation 229/2008 On the Cadastre*.

**Systematic Cadastral Survey and Collection of Claims:** Process through which information on properties is collected, including ownership claims. The data collection is conducted systematically, i.e., progressively, area by area, following a pre-determined geographical order. Preliminary data collected in each area is displayed publicly and counterclaims may be submitted during a certain timeframe.

**Occupant:** person or group residing in a property. An occupant may or may not be a possessor. Tenants and caretakers are occupants, but not possessors.

**Possession:** is the use of a property by a person or group as if the property belonged to such person or group. Tenants and lessees are not possessors for the purposes of the *Transitional Land Law*; landlords are. Caretakers and nominees are not possessors; the people they represent are. Residential, commercial, industrial and agricultural uses are examples of possession.

**Possessor:** person or group having possession of a property.

### 6. Typology of Cases

- Type 1: parcel without certificate

Type 1 refers to a land parcel to which formal rights have never been issued. This type corresponds to the majority of cases in Timor-Leste. Most Timorese live and work on land to which formal rights have never been issued. This type of case can be resolved by identifying the current possessor recognised as a consensual owner through a systematic cadastral survey and issuing an ownership title.

- Type 2: parcel with certificate; right holder in possession

Type 2 corresponds to a land parcel to which a formal right has been issued and the right holder is in possession (LLP). This type of case can also be resolved by identifying the title holder/current possessor through a systematic cadastral survey and issuing an ownership title.

- Type 3: parcel with certificate; right holder not in possession

Type 3 refers to a land parcel to which a formal right has been issued but the title holder is not in possession of the property. Although it is estimated that this type corresponds to a minority of cases, these are the most complex and contentious situations. The resolution of type 3 cases will depend on policy options to be selected by legislators. This technical framework presents such policy options in detail.

## 7. Categories of claimants

The term “Claimants” refers exclusively to the persons and groups identified as claimants in the National Property Cadastre database currently being developed under the Organic Law of the Ministry of Justice and the *Ministerial Regulation 229/2008 on the Cadastre*. Private claimants can be qualified as Previous System Title Holder claimant; Last-in-time, long-term peaceful possessor claimant; or a simple claimant.

Previous System Title Holder (TH): holders of rights granted under the Colonial Portuguese Regime or the Indonesian Administration. Subsequent holders to whom the property has been legitimately transferred are also considered as Previous System Title Holders. Legitimate transfers are voluntary transfers from the title holder to a third party, by sale, donation, inheritance, trade or other. Claimants recognised as Previous System Title Holders may be granted an ownership right or be entitled to compensation in accordance with the law.

Last-in-time, long-term peaceful possessor (LLP): claimant that took possession before 26<sup>th</sup> of April 2006, as a result of the absence of the previous possessor, without his or her authorization, without resorting to violence or threats, and has maintained such possession in good-faith for at least five consecutive years. Claimants identified as LLP will be granted an ownership right.

Simple Claimant (SC): Claimants that do not meet the requirements to be qualified as any of the claimant types above are considered simple claimants.

The State is a legitimate claimant and the current possession of a property by the State will be automatically recorded as a State claim. Police stations, public schools, ministries and Government departments are examples of properties currently in possession of the State. For properties not currently in possession of the State, the State shall submit a claim through DNTPSC.

## 8. Property in Possession of the State

Immovable property currently in the possession of the State is automatically registered as State property. Ministries, Police Stations, Hospitals and public schools are examples of properties in possession of the State. Properties pertaining to the public domain of the State, such as beaches, lakes and any other property deemed public by law, cannot be registered to private claimants.

## 9. First recognition of ownership rights: undisputed cases

### 9.1. Consensual, traditional owners (Cases Type 1&2)

Timorese nationals in uncontested possession of properties shall be recognized as legitimate owners. In order to establish if a case is uncontested, there should be a procedure whereby all potentially interested parties have the opportunity to submit counterclaims. The systematic cadastral survey and collection of claims process (being undertaken in accordance with *Ministerial Regulation on the Cadastre, n.229/2008*) is the most effective and transparent method of verifying undisputed possession. Through such a process, interested parties will have a real opportunity to contest the traditional owner’s claim, and cases where possession is consensual and uncontested can be easily identified (see Section 18.3).

Current rights based on...	...shall be recognized as
▪ Consensual Possession in undisputed case	▪ Ownership title

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9.2. Consensual, Previous System Title Holders (Cases Type 2<sup>3</sup>)

In undisputed cases, holders of property titles granted under Indonesian or Portuguese systems will have their rights recognised. Lesser rights such as *Hak Guna Bangunan* and *Hak Guna Usaha* will be converted to an ownership right.

Current rights based on...	...shall be recognized as
<ul style="list-style-type: none"> <li>▪ Undisputed case, Title equivalent to freehold (Hak Milik or propriedade perfeita) (TH)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ownership title</li> </ul>
<ul style="list-style-type: none"> <li>▪ Undisputed case, Title of lesser right (Hak Guna Bangunan, Hak Guna Usaha, aforamento) (TH)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ownership title</li> </ul>

10. First recognition of ownership rights: Competing Claims Cases (Cases Type 3)

In cases where a parcel is being disputed by disagreeing claimants and the dispute cannot be resolved through mediation, the dispute will be resolved according to the criteria set forth in the *Transitional Land Law*. There is a wide variety of possible scenarios of conflicting and overlapping rights, but in the great majority of cases one of the claimants will be in possession (use) of the property. If such possession is qualified as a long-term peaceful possession (LLP), the claimant in possession of the property will be favoured as the beneficiary of the ownership right. Tenants and care-takers are not considered as possessors (in these cases, the possessor would be the landlord). Landlords are considered to be in actual possession through the letting of land.

When a LLP claimant is recognised as the owner in a disputed case and one of the losing claimants is in fact the holder of a Previous System Title, the losing claimant will be entitled to compensation (refer to section 16 on Compensation). If there is no LLP claimant in a disputed case, the most recent Previous System Title Holder (TH) will prevail and the losing TH claimant will be entitled to compensation. Simple claimants (not LLP or TH) may be entitled to compensation if earlier possession rights are verified.

*Disputed cases*

Current rights based on...	...shall be recognized as
<ul style="list-style-type: none"> <li>▪ Last-in-time, long-term peaceful possession (LLP)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ownership title</li> </ul>
<ul style="list-style-type: none"> <li>▪ Title equivalent to freehold (Hak Milik) (TH)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ownership title or compensation</li> </ul>
<ul style="list-style-type: none"> <li>▪ Title of lesser right (Hak Guna Bangunan, Hak Guna Usaha) (TH)</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ownership title or compensation</li> </ul>

The typical disputed cases scenarios and proposed solutions are explained and justified below.

10.1. Last-in-time, long-term peaceful possessor (LLP) v. Previous System Title Holder (TH)

Last-in-time, long-term peaceful possessors will have the strongest claim and override all other competing claims to the same property. This seems to be the most reasonable solution in the context of Timor-Leste. Having possession as a primary criterion is in line with the “adverse possession” solution applied in post-conflict contexts. In Cambodia, the post-conflict land policy – embodied in the 2001 Land Law - established a period of continuous possession as a prerequisite for acquisition of land ownership.

<sup>3</sup> Type 3 Cases where the title holder is not in possession of the parcel, and that parcel is not being used (empty land) will also be resolved by this rule.



Recognizing prior rights without taking into account the realities on the ground will have serious social consequences. Giving priority to the legal recognition of Portuguese/Indonesian titles as opposed to rights acquired based on peaceful possession will create an unprecedented demand for forced evictions, which will increase the potential of social unrest and overload the Timorese Judicial system and law enforcement apparatus with thousands of new eviction cases.

In addition, properties that are currently in possession, i.e. land parcels that are presently being used or managed are less likely to have its ownership status contested by others. A survey conducted in 2005 showed that, in rural areas, 95% of primary industry private properties currently in use were not claimed by third parties. Government properties in the same category currently under use in rural areas were undisputed in 92.5% of the cases<sup>4</sup>. Primary industry properties are land parcels used in agricultural, aquacultural and forestry programs. Even though these parcels represent less than 5% of the total of the country land mass, their economic relevance places them among the primary targets for first registration (see Section 18.3).

A solution that privileges the peaceful use and occupancy of land has the advantages of: 1) maintaining the current status of possession (current occupants, if peaceful, are likely to have their rights recognised); 2) Reducing the need to carry out forced evictions as a measure of enforcement of ownership rights, since rights holders will most likely be already in possession of their properties; and 3) avoiding the difficulties of disentangling intricate sequences of deeds transfers and verifying their legitimacy. Recognizing ownership rights based on accepted peaceful possession is not only a measure of social justice, but also the most efficient method of resolving overlapping claims in the Timorese context.

For the purpose of first registration the classic adverse possession mechanism - operated by the Courts through a judicial proceeding - is not adequate. Such mechanism demands long periods of peaceful possession (10-35 years), after which the claimant needs to initiate a judicial proceeding in order to obtain the ownership right. Regular adverse possession recognised by judicial decision or notarial authentication is an ad hoc system that will favour those wealthy enough to take legal action or initiate the notarial proceeding. Such a system is unsuitable for mass first registration exercises, particularly in a post-conflict environment. Furthermore, there is not capacity to process such claims in the existing Court system or in the current Notaries institution (and there is unlikely to be any time soon).

What is recommended in countries such as Timor-Leste is a simplified adverse possession rule only applicable to first titling. The requirements for recognising the special adverse possession are:

- a) *Timorese Nationality*: only Timorese nationals are entitled to private ownership of land (*Constitution*, article 54.4)
- b) *Peaceful*: initiated and maintained without resorting to violence or threats, as a result of the absence and inaction of the previous possessor.
- c) *Unauthorized*: the possessor uses the property without the owner's permission. If a claimant uses a property with the authorization of the owner (or of the previous possessor), such claimant may be only a tenant or a caretaker.
- d) *Open and notorious*: the use of the property by the claimant is visible, open and apparent, as if it were his or her own. Fencing, crops and buildings are confirming elements of such notoriousness.
- e) *Starting before 26-APR-2006*: This requirement was included in the LLP concept to prevent illegal occupation and land grabbing once the criterion of 5 years of peaceful possession becomes public.

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<sup>4</sup> NIXON, Rod. "Non-customary Primary Industry Land Survey – Landholdings and Management Considerations", USAID/ARD Land Law Program II, June 2005.

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There is a concern that further illegal occupation would occur. Individuals could occupy properties hoping that the regularisation process will take more than 5 years, which would potentially allow them to obtain an ownership title. In order to prevent such reaction, there was a need to introduce an earlier cut-off date in the legal design. The 26<sup>th</sup> of April 2006 marks the beginning of the 2006 displacement crisis and is being used as a cut-off date in other Government policies, such as Hamutuk Harii Futuru program (the Government's Recovery Strategy). In the context of the *Transitional Land Law*, this date can be used to set legal presumptions of peaceful and non-peaceful possession, which will alleviate the need for evidence. Possessions starting in or after 26/4/06 are presumed non-peaceful; possessions started before that date are presumed peaceful. Therefore, it seemed convenient to use the same date as a cut-off date for ascertaining last-in-time, long-term peaceful possession.

- f) *Last-in-time*: The most obvious advantage of having special adverse possession as the primary criterion for granting ownership rights is that such system tends to recognise rights of the current occupants of properties, avoiding the social disruptions that would be caused by evictions promoted by non-occupants recognised as owners. Past long-term peaceful possession should not be a chief criterion, since each property might have been through several long-term peaceful possessors (but only one "last-in-time").
- g) *Five years*: the statutory time for adverse possession varies from one legal system to another, and different types of adverse possession require more or less statutory time according to its purpose. In countries with repeated episodes of forced displacement and poor property records, such as Timor-Leste, it is impractical to establish long statutory periods, particularly for the purpose of first registration. On the other hand, short statutory timeframes (1-3 years) could impact the perception of legitimacy of the adverse possession rule. A five-year period effectively balances these two aspects, but other adequate timeframes can be considered. The Cambodian Land Law established a five year period for first registration<sup>5</sup>. A five year period is also consistent with Article 1.215 of the draft Timorese Civil Code, which determines the rules for obtaining ownership rights based on simple adverse possession<sup>6</sup>.

Claimants meeting all the requirements described above are "last-in-time, long term peaceful possessors" (LLP) and their claim will be stronger than any other competing claim. If a property is claimed by an LLP and a Title Holder, the LLP is granted an ownership title, and the Title Holder is entitled to compensation.

Special Adverse Possession only operates in properties that can be legally privately owned. Properties in the public domain of the State (such as beaches, roads, public facilities or any other area deemed public by law) are not subject to adverse possession.

#### 10.2. Legal Presumptions on possession

Peaceful possession is defined by the negative ("possession initiated and maintained without resorting to violence or threats") and is therefore difficult to prove. Establishing legal presumptions of peaceful and non-peaceful possession is a way of reducing the need for evidence and simplifying decision-making.

For the purpose of determining peaceful and non-peaceful possession, it is recommended the establishment of the following legal presumptions:

- a) *If possession of property initiated before 26-APR-2006, possession is presumed peaceful.*

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<sup>5</sup> Cambodian Land Law of 2001, article 30.

<sup>6</sup> Incidentally, the Portuguese Colonial Decree of 5 December 1910 also established a 5-year period for the recognition of ownership rights to "indigenous peoples" by adverse possession.

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Evidence of violence or threats committed by the possessor in initiating or maintaining his or her possession can be presented against such presumption.

*b) If possession initiated on or after 26-APR-06, possession is presumed non-peaceful.*

In presumption “b”, the possessor assumes the burden of proving that he or she was in peaceful possession. A statement from the previous occupant is evidence against such presumption.

It should be remembered that the derived possession rule applies when tallying the length and the initial term of possession (see “Derived Possession Rule” in Section 5).

*c) If possession is interrupted by illegal forced eviction, the period since the dispossession is considered time of peaceful possession for the purpose of determining LLP status.*

This rule aims at discouraging Previous System Title Holders to use violence or to threaten the current possessor as an attempt to prevent him or her to be recognized as an LLP (or to submit his/her ownership claim).

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10.3. Title Holders

In 1991 the Indonesian Government issued a regulation (18/1991 - “Peraturan Pemerintah Republik Indonesia Nomor 18 Tahun 1991”) converting land rights from the Portuguese era into real rights recognised under the Indonesian Basic Agrarian Law<sup>7</sup>. The rules applied to the conversion of rights are presented in the table below:

**Table 1**

Type of right holder / Type of Portuguese Right	National citizen, Government Banks, Cooperatives, Religious and Social Bodies <sup>8</sup>  I	Foreign citizen or foreign legal entity  II	Representative of foreign State, International Agency or Religious facilities  III
<b>Propriedade Perfeita (PP)</b>  x	Hak Milik (HK)  xi	20 years Hak Guna Bangunan (HGB) – non agricultural land 25 years Hak Guna Usaha (HGU) – agricultural land  xii	Hak Pakai (HP), for the duration of the use  xiii
<b>Aforamento (AF)</b>  y	20 years Hak Guna Bangunan (HGB) – non agricultural land 25 years Hak Guna Usaha (HGU) – agricultural land  yi	Hak Pakai (HP), for the duration of the use  yii	Hak Pakai (HP), for the duration of the use  yiii
<b>Arrendamento (AR)</b>  z	10 years Hak Pakai (HP)  zi	10 years Hak Pakai  zii	Hak Pakai (HP), for the duration of the use  ziii

For the purpose of first titling, Previous System Title Holders (TH) are the holders of Hak Milik, Hak Guna Bangunan and Hak Guna Usaha titles. Holders of Hak Milik and valid Hak Guna Bangunan and Hak Guna Usaha titles issued by the Indonesian Government will be considered as Previous System Title Holders (TH). For titles issued under the Portuguese Administration, the conversion rule applies, and claimants holding titles represented in **Table 1** as cases **xi**, **xii** and **yi** are to be considered as Previous System Title Holders (TH).

Holders of Hak Pakai will only obtain an ownership right if they are also last-in-time, long-term peaceful possessors or unique claimants in an undisputed case. Hak Pakai titles are converted “Arrendamentos”, which correspond to Lease Agreements and may be valid for 10 years or for the duration of the property’s use. Holders of expired Hak Pakai<sup>9</sup> titles are not considered Previous System Title Holders (TH), are not entitled to compensation and can only be granted ownership rights based on last-in-time, long-term peaceful possession or undisputed claim. The same applies to holders of Hak Pakai titles of undetermined duration (cases **xiii**, **yii**, **yiii**, **ziii**). If the Hak Pakai holder is

<sup>7</sup> Indonesian Law No 5 of 1960 on the Basic Agrarian Provisions

<sup>8</sup> Indonesian Government Regulation No. 38 of 1963 Regarding the Appointment of Indonesian Legal Entities Which May Obtain Land with a Right of Ownership (June 9, 1963)

<sup>9</sup> Converted Hak Pakai titles that were valid for 10 years have expired in 30<sup>th</sup> of June 2001 (cases **zi** and **zii**).

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still using the property, he or she may be considered as last-in-time, long-term peaceful possessor and obtain an ownership title. However, the Hak Pakai itself does not entitle its holder to an ownership right or to compensation.

Holders of Hak Guna Bangunan or Hak Guna Usaha may be entitled to an ownership right or to compensation. If there is no LLP claimant to the same property, last-in-time valid HGB or HGU will be converted into an ownership right. If there is an LLP claimant to the same property, the LLP claimant will be granted an ownership right, and the holder of the valid HGB or HGU will be entitled to compensation.

The same applies to Hak Milik holders. If there is no LLP claimant, the holder of the last-in-time HM is granted an ownership right. If the same property is claimed by an LLP, the last-in-time HM holder is entitled to compensation.

- Last-in-time, long-term peaceful possessor (LLP) v. TH (Hak Milik) = LLP obtains ownership right. TH is entitled to compensation.
- Last-in-time, long-term peaceful possessor (LLP) v. TH (Hak Guna Bangunan) = LLP obtains ownership right. TH is entitled to compensation.
- Last-in-time, long-term peaceful possessor (LLP) v. TH (Hak Guna Usaha) = LLP obtains ownership right. TH is entitled to compensation.
- Last-in-time, long-term peaceful possessor (LLP) v. Holder of Hak Pakai (**not** TH) = LLP obtains ownership right. Hak Pakai holder is not entitled to compensation.

LLP v. TH is expected to be the majority of the disputed cases.

#### 10.4. Previous System Title Holder (TH) v. Previous System Title Holder (TH)

As noted above, Portuguese rights were converted by the Indonesian Government Regulation 18/1991 and the Indonesian Law n. 5/1960. The conversion did not require any registering of Portuguese rights or other administrative proceeding; it was operated automatically, by force of law. Holders of legitimate Portuguese land rights such as “propriedade perfeita” and “aforamento” had their rights converted into Indonesian land rights as of the 1<sup>st</sup> of July 1991, when Regulation 18/1991 entered into force.

Because of this automatic conversion effect, it is possible that holders of Portuguese titles had their rights converted into Indonesian rights whilst such holders were overseas. There are known cases of Indonesian titles being issued to third parties on a property that already had an owner according to Portuguese rights system (a “propriedade perfeita” holder), while such owner was absent.

There are, therefore, cases where a single property will potentially have more than one recognized Previous System Title Holder (TH). In such cases, the proposed solution is that the holder of the most recently issued title will obtain an ownership right, and the other TH claimant will be entitled to compensation. The principle that operates in this case is the presumption of transfer between the previous and the last title holders. If any of the TH claimants are also a LLP claimant, the LLP primacy applies.

- TH v. TH = Holder of the most recently issued title obtains ownership right. Other TH claimant is entitled to compensation.

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Table 2 below shows the possible cases of overlapping titles over the same property.

**Table 2**

Most recently issued title for same land	Hak Milik (HM)	Hak Guna Bangunan (HGB)	Hak Guna Usaha (HGU)
Earlier issued Title (converted and valid) for same land			
Propriedade Perfeita (PP) [Table 1, cases xi, xii]	HM = Ownership right PP = Compensation	HGB = Ownership right PP = Compensation	HGU= Ownership right PP = Compensation
Aforamento (AF) [Table 1, case yi]	HM = Ownership right AF = Compensation	HGB = Ownership right AF = Compensation	HGU= Ownership right AF = Compensation
Hak Milik (HM)	HM (most recent) = Ownership right HM = Compensation	HGB = Ownership right HM = Compensation	HGU= Ownership right HM = Compensation
Hak Guna Bangunan (HGB)	HM = Ownership right HGB = Compensation	HGB (most recent) = Ownership right HGB = Compensation	HGU= Ownership right HGB = Compensation
Hak Guna Usaha (HGU)	HM = Ownership right HGU = Compensation	HGB = Ownership right HGU = Compensation	HGU(most recent)= Ownership right HGU = Compensation

10.5. Last-in-time, long-term peaceful possessor (LLP) v. Previous System Title Holder (TH) v. Previous System Title Holder (TH)

It is possible that the same property is claimed by a Last-in-time, long-term peaceful possessor (LLP) and two Previous System Title Holders (TH). In this case, the LLP claimant will be granted an ownership right, and only the most recently issued TH claimant will be entitled to compensation. In order to predict and limit the State's liability, there should be only one compensation payment per property. This also prevents collusion to commit fraud (buyer and seller deny the transfer and allege the existence of duplicity).

- LLP v. TH v. TH = LLP obtains ownership right. Latter TH is entitled to compensation. Earlier issued TH is not entitled to ownership right or compensation.

The overall matrix of cases can be outlined by adding an extra column to Table 2. The fourth column of Table 3 illustrates how the ownership right obtained by special adverse possession (i.e. by the last-in-time, long term peaceful possessor) fits into the scheme:

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**Table 3 (Comprehensive Cases of Overlapping Rights)**

Title/special adverse possession  Title	Hak Milik (HM)  1	Hak Guna Bangunan (HGB)  2	Hak Guna Usaha (HGU)  3	Last-in-time, long term peaceful possessor (LLP)  4
Hak Milik (HM) [including converted PP, <b>Table 1</b> , case <b>xl</b> ] A	HM (most recent) = Ownership right  <b>A1</b>	HGB(most recent) = Ownership right HM = Compensation  <b>A2</b>	HGU(most recent) = Ownership right HM = Compensation  <b>A3</b>	LLP=Ownership right HM =compensation  <b>A4</b>
Hak Guna Bangunan (HGB) [including converted PP and AF, <b>Table 1</b> , cases <b>xll</b> and <b>yl</b> ] B	HM (most recent) = Ownership right HGB =Compensation  <b>B1</b>	HGB (most recent) = Ownership right  <b>B2</b>	HGU(most recent) = Ownership right HGB = Compensation  <b>B3</b>	LLP=Ownership right HGB=Compensation  <b>B4</b>
Hak Guna Usaha (HGU) [including converted PP and AF, <b>Table 1</b> , cases <b>xll</b> and <b>yl</b> ] C	HM (most recent) = Ownership right HGU=Compensation  <b>C1</b>	HGB(most recent) = Ownership right HGU =Compensation  <b>C2</b>	HGU(most recent)= Ownership right  <b>C3</b>	LLP=Ownership right HGU=Compensation  <b>C4</b>

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Table 4 includes all the possible cases of overlapping rights and the proposed standard resolution. The next table presents a simplified outlook of possible outcomes in cases of overlapping rights:

**Table 4 (Simplified cases of Overlapping Rights)**

Outcomes Cases	Winner W	Loser L	Comment
LLP v. TH (Table 3, cases A4, B4 and C4)  1	LLP obtains Ownership right  W1	TH is entitled to compensation  L1	Foreign TH is not entitled to compensation
TH v. TH (Table 3, cases A1, A2, A3, B1, B2, B3, C1, C2, C3)  2	Most recent TH obtains Ownership right  W2	Prior TH is entitled to compensation  L2	Prior TH that voluntarily transferred property is not entitled to compensation/Foreign TH is not entitled to compensation

### 11. Statutory Protection Against Eviction

Occupants that took possession before 26<sup>th</sup> April 2006, without resorting to violence or threats, as a result of the absence of the previous possessor and without his or her authorization and inhabit the property whose ownership has been assigned to another party are *temporarily* protected from eviction. The Statutory Protection against Eviction intends to mitigate the social impact that could emerge from further forced displacement in Timor-Leste. Occupants entitled to such protection cannot be judicially evicted until suitable alternative housing is available. The Judge on the eviction proceeding will determine if a claimant is protected from eviction and if/when alternative, suitable housing has been provided.

The requirements for the statutory protection against eviction are:

- a) Peaceful Possession initiated before 26-APR-06 (absolute presumption);
- b) Possession without the owner's authorization;
- c) Inhabits the property and has no suitable alternative housing.

The law will not specify who is responsible for providing the occupant with alternative housing. Such housing can be provided by the State, by the property's owner or by any interested party. Alternatively, the plaintiff in the eviction proceeding may provide evidence that the occupant has other suitable housing options and therefore should not be protected against eviction. As a protected tenant, he or she cannot alienate the right of occupation except to the lawful owner.

### 12. Foreigners

Article 54.4 of RDTL's *Constitution* states that "only national citizens have the right to ownership of land". The constitutional ban on foreign ownership was effective as of May 2002. However, there was no determination made on the fate of private property rights held by foreigners before the entry into force of the Timorese *Constitution*. Such properties cannot be owned by their former foreign owner, but they did not revert to the State



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and there was no timeframe established to allow such previous owners to transfer their properties to Timorese nationals.

If the issue of the foreign owned properties is not resolved within the context of first titling, many of these properties will remain in a juridical ‘limbo’, hindering its economic and social use. The Transitional Land Law opens an opportunity to regulate the implementation of article 54.4 of the *Constitution*, without nationalizing foreign owned properties and the payment of compensation upon expropriation by the State.

It is recommended that an implementation period be established that allows recognized previous foreign owners to transfer their properties to Timorese nationals. The price paid on the land sale can be considered as a private reward *in lieu* of ‘compensation’. Foreign claimants that are last-in-time, long-term peaceful possessors (LLP) or Previous System Title Holders (TH) and are recognized as holders of pre-existing ownership rights (‘winners’ in **Table 3**), will be granted a transitional right of alienation for two years, during which the foreigner will be entitled to transfer the property to a Timorese National.

If the property is not transferred to a Timorese National in two years, then there are two alternative policy options: 1) the property reverts to the State, and the foreigner is granted a right of use for additional 8 years, free of rent, after which the State may use the property for other purposes or start charging rent; 2) the State will auction the property and return the obtained value to the foreigner (less the administrative costs of the auction).

Foreign claimants are not entitled to compensation from the State (‘losers’ in **Table 3**). The Timorese National to whom the property is transferred will have a full ownership right. If the claimant is a couple with a foreign spouse, the property will be registered under the name of the Timorese spouse.

**Table 5 (Foreigners)**

Outcomes Cases	Winner W	Loser L	Comment
1 LLP v. TH ( <b>Table 3</b> , cases <b>A4</b> , <b>B4</b> and <b>C4</b> )	National LLP obtains Ownership right; Foreign cannot obtain Ownership right based on possession  <b>W1</b>	TH is entitled to compensation  <b>L1</b>	Foreign TH is not entitled to compensation
2 TH v. TH ( <b>Table 3</b> , cases <b>A1</b> , <b>A2</b> , <b>A3</b> , <b>B1</b> , <b>B2</b> , <b>B3</b> , <b>C1</b> , <b>C2</b> , <b>C3</b> )	Most recent foreign TH obtains two-year right of alienation  <b>W2</b>	Prior TH is entitled to compensation  <b>L2</b>	Prior TH that voluntarily transferred property and foreign prior TH are not entitled to compensation

### 13. Abandoned property

In order to preserve the land rights of those dispossessed in 1999, Law No 1/2003 has put on hold the identification of land owners, by establishing that properties that were “abandoned” were considered “under State administration”, until a future law would allow the State to unravel the complex set of competing claims to land. The State was authorized to use the abandoned properties or lease them to third parties, for up to six years (two three-year periods).

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Abandoned properties have been leased on regular Lease Agreements and through the Special Leases program. In the special leases program, Timorese nationals occupying abandoned properties were presented the opportunity to regularize their situation by entering into a lease agreement with the State. Each special lease program tenant was charged a \$10/month rent and had the rights to inhabit the property for up to two years.

The objectives of the special leases program were to: 1) increase security of tenure to the occupants, giving them peace of mind and an incentive to look after the property they were inhabiting; 2) allow the society to give use to such properties while the ownership issue was awaiting resolution; and 3) reaffirm the State's control over abandoned properties and obtain recognition by the occupants that such properties did not belong to them.

The legal definition of abandoned property is given by Decree-Law 19/2004: "(...) all immovable properties, empty or illegally occupied according to article 5 and 6 of Law n 1/2003, identified by DNTP as having had private owners in September 1999, are considered 'abandoned properties'(...)". Although the legislation uses the term "illegal occupation", the expression "arbitrary occupation" would better describe the factual situation that the law intends to regulate.

According to this definition, if a property is empty and "had a private owner in September 1999", such property is considered officially abandoned and therefore is put under State administration. Also, if a property is arbitrarily occupied and "had a private owner in September 1999", such property is officially abandoned. A property is arbitrarily occupied when someone that is not the private owner is occupying it. If the occupant is the private owner, it is not "arbitrarily occupied" (it is simply occupied). The closest equivalent of a "private owner" in 1999 is a Hak Milik holder.

The concept of abandoned property contradicts the notion of adverse possession. The point of abandoned properties being under State administration is to protect them from appropriation by third parties. The notion of adverse possession is a legal tool that recognises third parties as owners based on possession only. If such properties are protected by the status of "under State administration", they cannot be subjected to the special adverse possession rule recommended for first registration purposes.

The special adverse possession will only operate as a general rule if the provisions granting State caretaking status to abandoned properties are revoked. If not, all properties identified as "abandoned" will not be subjected to special adverse possession.

Options:

- 1) Abandoned property State-caretaking status revoked

In this option, all cases of disputed private properties will be subjected to the same decision-making criteria, where LLP claimants prevail over TH claimants (**Tables 3 and 4**).

- 2) Special adverse possession applies only to "non-abandoned" properties

In practice, this option will lead to the recognition of Hak Milik holders as winners in all overlapping rights cases, independently of peaceful possession by a third party. Only disputed cases involving non-abandoned properties where none of the claimants are Hak Milik holders will be resolved according to the general criteria (**Tables 3 and 4**).

#### 14. Customary Land

Customary land systems are social rules governing the use, allocation and management of land parcels. Customary land systems prevail primarily in Timor Leste's rural areas, where "origin groups" have the authority to determine the set of rights and obligations regulating the use and access to land and other natural resources. Subsidiary households migrating to origin group land can establish alliances with the origin group through marriage, by then being incorporated into the social hierarchy.

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Since membership of origin group is defined by kinship rather than territory, it is difficult to demarcate the boundaries of customary land. In many cases, origin group land may not be contiguous and will not necessarily correspond to administrative boundaries of the Aldeia, Suco or Sub-District or District<sup>10</sup>.

For several reasons, customary land tenure rules are difficult, if not impossible, to successfully formalize.

The lack of clear territorial boundaries to customary land is one. There is a wide variety of types of customary land systems in Timor-Leste, and such diversity would be difficult to capture in legislation. Moreover, customary land tenure arrangements do not necessarily correspond to statutory notions of private ownership, which adds to the complexity of this type of tenure system.

In addition to being difficult to formalize, the statutory recognition of individual ownership rights in customary land is not expected to have the same benefits that such process may have when implemented in non-customary areas. In fact, establishing western-style individual private ownership in these areas could be highly disruptive to the system of customary rights and obligations operating in such communities.

Customary land systems are thought to provide enough security of tenure to encourage smallholder forms of agricultural production. "There is little evidence of underinvestment due to perceptions of land tenure insecurity"<sup>11</sup>. Recognizing statutory ownership rights to land holders in customary land areas may in fact have a disruptive effect on traditional land use arrangements, jeopardizing agricultural production and impacting food security.

The systematic collection of claims will be implemented in areas where formalization of ownership rights is expected to improve tenure security, create incentives for investment, promote economic development and mitigate tensions related to lack of clear land rights. These areas are identified as "Formalization Areas", and will initially include urban and peri-urban zones as well as non-customary primary industry rural land (sites where Government-driven agricultural programs were implemented<sup>12</sup>). As indicated by the field study on customary land on which this chapter is based, these areas have been identified as sites where customary authority is less influential and, therefore, would be better suited for formal demarcation.

Even though ownership rights will not be individually titled in customary land, there is a need to legally recognize customary rules in order to protect such areas from unwanted private (or State) appropriation. Article 2.4 of the Timorese Constitution states that "(...) The State shall recognize and value the norms and customs of East Timor that are not contrary to the Constitution and to any legislation dealing specifically with customary land law." The proposed solution is to include provisions in the land law establishing:

- A legal presumption establishing that custom governs land tenure outside Formalization Areas; and;
- The recognition of custom as the governing rule outside Formalization Areas as long as they are not contrary to the Constitution or to the law.

These provisions will fulfill the regulatory vacuum outside Formalization Areas, reinforcing the authority of custom and acknowledging existing mechanisms for granting land use rights. While legally recognizing customary rules, these provisions ensure that such legal recognition of custom is not extended to practices that violate constitutional principles and human rights.

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<sup>10</sup> FITZPATRICK Daniel, McWILLIAM Andrew, and BARNES Susana. *Policy Notes on Customary Land in Timor-Leste*, 2008.

<sup>11</sup> Idem.

<sup>12</sup> NIXON, Rod. "Non-customary Primary Industry Land Survey – Landholdings and Management Considerations", USAID/ARD Land Law Program II, June 2005.

## 15. Areas of Common Use

In Timor as in other places it is common to find parcels considered as privately owned (by individuals or groups) located around an area of common use, frequently featuring communal facilities such as wells, water pumps, orchards, football pitches etc. These areas are not privately owned (and normally are not privately claimed) and are of public access.

In order to guarantee continued access to its facilities and resources by community members, it is important that the regulatory framework protects such areas from private appropriation. Once identified by the systematic cadastral survey and collection of claims process, areas of common use may be considered as “public areas” (“public domain of the State”), ensuring their legal inalienability and protecting them from private appropriation.

## 16. Compensation

In cases involving overlapping rights to the same property, only one of the claimants will be granted the ownership right. Even though the Timorese State was not responsible for the issuing of overlapping rights to the same parcel or to the earlier episodes of forced displacement, it is recommended that a compensation mechanism is established to provide losers *in the first titling process* some form of reparation for their loss. This will *not*, however, provide market value for the each loss.

It is contemplated that such compensation could be based on a table of historical land values, updated through a financial formula. The value of the compensation would correspond to the updated value of the claimed property at the time of loss and *not* the current market value. Broad historical values would be applied to *zones* rather than to individual properties and this is similar to like processes used elsewhere in the Pacific (e.g. the Solomon Islands). The values ascribed to individual properties would likely be based on the value zone and the area (per square metre) of the individual property. By applying a clear formula, the opportunity for corruption in the valuation process can be diminished.

It is suggested that the Government establishes adequate budget to a Land and Property Compensation Fund to finance the awarding of compensation. There are different mechanisms that could be established to determine rights to compensation. The compensation mechanism and the Land and Property Fund will be addressed in a separate report.

Government expropriation based on national interest can be made possible in areas where ownership hasn't yet been determined. In such cases, the Government may be required to allocate potential compensation for the expropriated parcel, which would be held in trust for the claimants until ownership is determined. It should be noted though that the compensation from expropriation differs in nature from the compensation in the first titling process. Expropriation by the State demands market value (fair value, according to the Constitution) compensation, which should not come from the Land & Property Compensation Fund.

## 17. Decision Making Authority

Land parcels claimed by disagreeing claimants will be recorded into the National Property Cadastre as disputed cases, and its claimants will be identified. Once the information on a land parcel is definitive, recorded disputing claimants may resolve their dispute by private agreement, mediated or not, and such resolution should also be recorded.

There will be cases where disputes will persist through mediation and will require an external resolution by the competent authority. Currently in Timor-Leste, only the Judicial System is authorized to make such legal determination. There are strong reasons to consider the establishment of an *administrative arbitration authority* to resolve disputed cases according to the criteria set forth in the Transitional Land Law and following the systematic cadastral survey and collection of claims process. The Timorese Courts are notoriously overloaded with judicial cases and do not have the capacity to process land disputes in a timely manner. Also, access to the Judicial

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system is extremely limited and most Timorese will not have the resources to pursue legal action for their land claims.

Administrative arbitration can be established through a light and flexible structure, with simplified procedures, specific scope (only land disputes) and deliver quick resolutions. The arbitration can be done by roving three-person panels formed by Timorese and expatriates arbitrators that would shadow the systematic survey and deliver resolutions on site. Such decisions would still be potentially subjected to Judicial review. In order to operate the arbitration panels, the Timorese Government may work in partnership with international organizations such as IOM, UN-Habitat or UNDP, any of which could provide experienced arbitrators for the process. One option is to utilize existing expatriate legal practitioners working with the Public Defender’s Office, the Prosecutors Office or the Courts as part-time land dispute arbitrators. Another option is to compose a commission with national arbitrators, mixing fixed and roving panelists (see Section 18.2 on implementation).

The following table presents some of the advantages and disadvantages of using Courts and Arbitration.

*Court v. Arbitration + Court*

	<b>Court</b>	<b>Arbitration</b>
<b>Pros</b>	<ul style="list-style-type: none"> <li>- The judicial proceedings are already in place, judges would implement the criteria set in the land law;</li> <li>- If a special chamber for L&amp;P is established, this will develop an expertise in that area</li> <li>- The courts system is already funded and the structure already exists</li> </ul>	<ul style="list-style-type: none"> <li>- Proceedings and institution can be simplified and adapted to the Timorese context;</li> <li>- It is easier to access, less formalized, more flexible</li> <li>- decisions can be made faster and mobile arbitration panels can follow the systematic collection of claims and provide immediate resolution</li> <li>- The Arbitration Panels could set their own procedures</li> <li>- Administrative decision can still be contested in Court</li> </ul>
<b>Cons</b>	<ul style="list-style-type: none"> <li>- Courts in Timor have very limited capacity;</li> <li>- Judicial proceedings are extremely slow, allow several counter arguments, appeals and appellate reviews, which would not be necessary in the majority of cases</li> <li>- Most of claimants would not have access to Courts by lack of means. The Public Defender Office and Legal Services NGOs don’t have the capacity to meet such needs</li> </ul>	<ul style="list-style-type: none"> <li>- Even though simplified, the proceedings still need to be developed;</li> <li>- An arbitration institution would need to be developed and funded;</li> <li>- International assistance is required (UNDP, IOM, etc)</li> </ul>

In this process, arbitration must decide:

1. Who the owner is in accordance with the law;
2. Whether the losing party is entitled to compensation;
3. The amount of compensation due based on a table of values;
4. The State can appeal against any awarded compensation within a specified period.

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To further stream-line the process, it is recommended that:

1. A land and property division be established in the relevant District Courts. Such specialized division would be important in any of the above-described scenarios. This would contribute to processing disputed land claims cases and expedite resolution.
2. Appeal should be based only on an error of law and should not be a *de novo* hearing of facts.

## 18. Implementation

The success of the Transitional Land Law in strengthening property rights in Timor-Leste will depend heavily on how this legislation is implemented. The Transitional Land Law would not operate in the vacuum; it has been conceived as part of a combination of complementary initiatives and processes that will together contribute to the objectives of defining ownership rights and establishing a functioning land administration system.

### 18.1. Implementing body

The implementation of the Transitional Land Law will require the establishment of appropriate institutions to carry out the systematic collection of claims, manage and update the National Property Cadastre, resolve land disputes and develop further policies on land and property issues. The government department currently responsible for these undertakings is the National Directorate of Land, Property and Cadastral Services of the Ministry of Justice. There is, however, a number of shortcomings in this current institutional arrangement. As a mere department of the Ministry of Justice, The National Directorate of Land and Property is not encouraged to develop policy on a highly specialized area such as land and property. Historically, the land and property sector has not been given enough attention by the Ministry of Justice, which has too many other responsibilities in its portfolio (courts, prisons, legislation, etc) and too little expertise to be comfortable making decisions on the issue.

In order to properly implement this framework, develop adequate policies and manage an appropriate land administration system, it is recommended that the Government establishes a high level body responsible for land and property. Such body could be a Secretariat of State for Land and Property, or a High Commission for Land and Property, under the Office of the Prime Minister, independent from other ministries.

The National Directorate of Land and Property could be easily upgraded and become such high level institution, since they already have relative budgetary autonomy, have enough technical capacity to operate independently, and have their offices in an independent building with appropriate infrastructure and equipment<sup>13</sup>. The establishment of a high level land and property institution would not need immediate allocation of additional resources. The development of a standalone institution responsible for land, property and housing has already been recommended by a number of specialists that looked into these issues<sup>14</sup>.

As it acquires expertise and experience, the Secretariat of State for Land and Property could extend its responsibilities and provide inputs on land use and land management policies and function as a clearinghouse for land governance and natural resources management issues.

The new institution would retain the directorate's current responsibilities, such as managing State leases and providing cadastral information, as well as progressively acquire additional duties. Managing and updating the National Property Cadastre is expected to become its main task. Other key responsibilities would be the

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<sup>13</sup> The National Directorate of Land and Property is currently operating from a building independent from the Ministry of Justice. The directorate is expected to relocate to a new autonomous building, in Kolmera, by November 2008.

<sup>14</sup> See UN-Habitat/Displacement Solutions/IOM report "Housing Timor", 2007. Also, "Policy Options for the Resolution of Land and Property Issues", National Directorate of Land, Property and Cadastral Services, 2008.

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development of land use and land management policies, in coordination with the departments responsible for territorial planning and rural development, the resolution of land disputes and the development of relevant legislation.

### 18.2. Arbitration Panel

As previously stated, a certain number of cases in the National Property Cadastre are expected to be under dispute by two or more claimants, particularly in areas with high land value. Some of these cases will not be resolved through mediation and will need to be settled by an external decision-making mechanism. This role can be filled by the courts, which in Timor are still in a developing stage and would have low capacity to process property cases, or by an arbitration body.

The arbitration body would analyze disputed property cases and make decisions based on the criteria set forth in the Transitional Land Law. There are different options for the institutional structure and composition of the arbitration body. These options have been discussed with several national stakeholders, and the model presented below reflects such discussions.

Established under the Secretary of State for Land and Property, the Arbitration Panel would be composed by three permanent and two roving arbitrators.

The permanent arbitrators would be:

- An arbitrator appointed by the Secretary of State for Land and Property
- Two arbitrators appointed by the Prime Minister

At least one of the three arbitrators should be women. The roving arbitrators would be the District Administrator and the Sub-district Administrator of the location of the disputed parcel.

The arbitration panel would examine the case based on a case-file prepared by a technical secretariat, with information recorded in the National Property Cadastre and a legal analysis. The village chief, elders and other community members could provide additional information and participate in the meetings. Decision would be taken by simple majority among the five arbitrators.

The arbitration panel would determine ownership rights and entitlement to compensation, according to the Transitional Land Law and implementing regulations.

Another suitable option is the establishment of an arbitration panel composed by national and expatriate arbitrators, as described in section 17. A detailed analysis on the arbitration mechanism will be presented in a separate report.

### 18.3. Systematic Cadastral Survey and Collection of Claims process

The first step to determine the ownership status of a property is to collect key information on the parcel and find out who the claimants are. Claimants are individuals, groups or institutions that claim to have ownership rights. Ownership rights are *erga omnes*, i.e., opposable against all (enforceable against the world) - once the owner of a property is recognized, his or her right over that particular parcel excludes the rights of all other persons. Therefore, in order to determine first ownership of land, it is paramount that all potential claimants are given the opportunity to state their claim. Once an ownership claim is submitted to public scrutiny it will be possible to identify all claimants and collect their statements, confirmations, objections and rectifying requests.

This opportunity to present claims can be organized in different ways. In countries with high levels of illiteracy and little access to information such as Timor, the mere publication of a claim in the official gazette (as it is done in other countries) is not sufficient to allow interested parties to state their acceptance or objection to a certain

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claim. In order for the public scrutiny process to be transparent and accessible, it needs to be conducted in a systematic way, area by area, community by community, preceded by an effective public information and awareness campaign.

The National Directorate of Land, Property and Cadastral Services (DNTPSC), of the Ministry of Justice, is starting to implement a nation-wide systematic cadastral survey and collection of claims process that will include the public display of property claims. In cooperation with the USAID-funded project “Strengthening Property Rights in Timor-Leste” (also known as “Ita Nia Rai”), DNTPSC will collect property claims on a area-by-area basis, publishing the preliminary results in the concerned communities for examination and receiving counterclaims and objections from any interested party. There will be a timeframe during which individuals, groups or legal entities may submit their counterclaims or rectifications in relation to a particular parcel. Each area surveyed (referred to as “Collection Zones”) will have its own timeframe for public display and reception of counterclaims. This method of progressive demarcation allows the general population to become increasingly aware of the process. The information flows from the residents in the first Collection Zones to neighboring communities, which can then prepare themselves for the process<sup>15</sup>.

The systematic cadastral survey and collection of claims process will be conducted only within “Formalization Areas”. Formalization Areas are areas where the recording of land ownership claims is expected to have a positive impact in terms of security of tenure. Initially, parcels located in urban and peri-urban areas as well as in rural areas of economic relevance, particularly where primary industry activities are being developed. In addition, if a community requests its area to be demarcated, such area can potentially be considered a Formalization Area.

Land outside the formalization areas is considered customary land by default. As observed in Section 14, the expected disadvantages of formalizing ownership rights (and by extension of collecting ownership claims) in customary land outweighs the potential benefits of demarcation. Customary land tenure arrangements in such areas will be generally recognized by the law, but individual parcels and related rights will not be recorded.

After an extensive public information and awareness campaign, data collection teams, supported by a field office, will collect data on the location and boundaries of land parcels as well as on their claimants and occupants. The field office will collate this preliminary information and produce a Public Display Map of the collection zone, containing the parcels, its boundaries, unique identification numbers and identified claimants. After local and national announcements, a period for the submission of counterclaims will be open for claims referring to parcels within the collection zone pictured in the Public Display Map. Once the counterclaim period is over for a particular collection zone, the information collected will be processed and inserted in the database. Every entry in the database will correspond to a particular parcel and its claimants. If a parcel is claimed by disagreeing claimants, the dispute will be submitted to mediation between the registered claimants.

Additional information on the systematic cadastral survey and collection of claims process can be found in the Manual of Procedures for Field Operations – Data Collection<sup>16</sup>.

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<sup>15</sup> Among the collected data, there will be information on the civil status of the claimant, in order to facilitate the enforcement of mandatory joint title, should this be the option chosen by the legislators.

<sup>16</sup> Manual of Procedures for Field Operations - Data Collection. 2008, ARD Inc.



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