

## **Supporting Rationale for LIWG Recommendations: Defining standards of public purpose**

Based upon a comparison of the current drafts of the Land Law and National Land Policy (NLP) with earlier recommendations for improving the policies from the Land Issues Working Group (LIWG), a number of major gaps were found. One important gap found concerns the definition of clear principles for the expropriation of land, under which there were two components: 1) defining public vs. private purpose of expropriations and 2) the criterion for community consent to expropriation. This document focuses on rationale in support of the first recommendation. With regards to standards of public purpose, LIWG specifically recommends that:

The State should be able to requisition land or land use rights only if such requisition is directly and primarily for a public purpose, as opposed to a primarily private purpose. What is public purpose needs to be clearly defined. An expropriation would be considered as ‘for a public purpose’ if the value of the public interest to be advanced by it outweighs the interests of the affected parties.

To support this policy recommendation, this document details the underlying rationale for the LIWG recommendation to clearly define the difference between public and private investment purpose with both reference to its suitability within the Lao context and comparability with best practices from other countries.

### **Rationale for the Lao context**

According to the amended Constitution of the Lao PDR (GoL 2003a) and the amended Land Law (GoL 2003b), all land is owned by the national community, but is represented and managed by the State, which is charged with allocating it to individuals, organizations, collectives, families, enterprises and other units for use, lease or concession. As a result, the State plays an important role in the ownership, control, and management of all land throughout the country and has relatively strong powers to allocate land for development projects, to both public and private entities, particularly through the granting of land concessions (Schoenweger *et al.* 2012). As property rights are often ill-defined in many areas throughout the country, there is a high potential that the allocation of state land for private investments will expropriate private land users from their inherited or previously allocated property, and many cases of this occurring have been documented (Barney 2007, Kenney-Lazar 2012). Due to the high potential for expropriation to occur in service of private purpose projects, it is important that the difference between public and private purpose be clearly defined in national policies. The specific reasons for this can be further elaborated as: 1) preventing abuse of expropriation powers and 2) securing private property rights.

### *1. Preventing abuse of expropriation*

As per the LIWG recommendations, expropriation should be voluntary for purposes of private investment and only involuntary for public purpose projects. However, the distinction between what is a public versus private investment is not always clear. Thus, it is important to clearly define the difference between the two so that private investors do not abuse the power of the State to expropriate property from Lao citizens involuntarily for private and profit oriented projects. If public and private purpose forms of investment are defined clearly then it will be easier for all involved parties to identify which process of land acquisition and expropriation to follow. Without such clear definitions, a number of different types of abuses can occur, three examples of which follow:

1. State land may be allocated to private investors in the form of a land lease or concession, but in actuality the land provided by the state was used and owned by individual Lao citizens, with both customary and statutory land use rights. As a result, the citizens lose their property without choice.
2. Public purpose projects may acquire more land than is necessary and sell or lease the additional land to private investors to generate government revenue. In such a case, although the State is implementing a nominally public purpose project with legitimate benefits to the public, the project may be abused by certain agencies to make a profit from the acquisition.
3. Private, profit-oriented investment projects may become inaccurately defined as public purpose projects because of their indirect or vague connection to a public benefit, such as generating tax revenue or economic development, broadly speaking. This could occur if the definition of public purpose is not clear, does not contain key conditions that must be satisfied, and/or does not list which types of projects are commonly public and which are private (e.g. mineral extraction vs. road construction projects).

### *2. Securing private property rights*

As the Lao PDR has progressively moved toward a market-based economy subsequent to the formulation of the New Economic Mechanism in 1986, the GoL has implemented a number of policy reforms to ensure that Lao citizens have access to and are able to own private property, whether for residential, agricultural, or business purposes. Two prominent examples include the Land Use Planning and Land Allocation (LUPLA) program that began in 1996 and the Land Titling Project, phases I (1997-2003) and II (2003-2007). The government has recognized that private property ownership is a key component of a market-oriented economy in that it allows citizens and businesses to confidently make long-term investments without fear that they will lose their property and their associated investment. Access to property ownership or long-term property lease are key components of ensuring the confidence of foreign investors. If Lao citizens can be expropriated from their land involuntarily for private purpose investments, then such expropriation can also affect foreign investors who may rent land from Lao citizens or enter joint investments with them. Generally, investment confidence

increases when property rights for all stakeholders are secure from arbitrary expropriation.

### **Best practices internationally**

A review of international standards of public purpose below show that there are a number of countries worldwide that have instituted strong legal approaches of differentiating between public and private purpose of proposed expropriations or takings, and have developed methods of weighing the public benefit of a project in comparison with the losses incurred by individual property owners and land users.

## Europe

### *European Union*

The European Convention on Human Rights places a strong emphasis on the importance of an individual's private and family life and on the protection from interference by public authorities. Specifically, Article 1 of Protocol 1 states that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties”. In applying the Convention to disputes, the European Court of Human Rights has used the requirement of proportionality. Thus, when a taking or expropriation is proposed, a fair balance must be struck between the demands of the community's general interest and the requirements of the individual's fundamental rights. If the individual property owner will bear an excessive burden, then a fair balance has not been achieved (Allen 2006). While these principles may contradict the laws of some European Union countries and thus cannot be imposed upon national legal regimes, it is the approach used by the Council when analyzing and deciding upon specific cases that have been brought to them.

### *Finland*

The Constitution of Finland, section 15, mandates that the property of all citizens is protected and that property can only be expropriated for public needs and with full compensation if based upon parliamentary legislation. Whether expropriation meets the necessary criteria is further outlined in the Law 603, the Act on Expropriation of Immovable Property and Special Rights. First, the act states that if the objectives of expropriation can be reached by other means then it should be done so. Second, it states that if the inconvenience caused to private parties exceeds the public gain then this is grounds for not executing the expropriation. Although an exact definition of public purpose is not provided by the Finnish government, it is notable that the legal system provides a mechanism for refuting the alleged public purpose of a project.

*France*

In France, the Declaration of the Rights of Man and of the Citizen, which is a fundamental document of the French Revolution and maintains a heavy influence upon the country's current legal framework, states that just and preliminary compensation must be provided to affected property owners prior to any expropriation by the state. Additionally, article 545 of the Civil Code maintains that private property can only be expropriated for public purposes and that such expropriations must first go through a process of *déclaration d'utilité publique* (DUP), or declaration of public utility, to demonstrate public benefit. In order for a DUP to be granted, a public enquiry must be initiated to collect the views of all affected parties. The responses from such parties are considered by a commissioner who decides whether the proposal has overall benefit to the public. Thus, although the French legal process of expropriation does not maintain a strict definition of what public purpose is, it importantly contains a moderately democratic process of deliberation on the actual quality of a projects purported public benefit.

*Germany*

Article 14 of Germany's Basic Law, or its constitution, passed in 1949, mandates that expropriation can only be permitted when it benefits the public good. The German Constitutional Court, equivalent of a Supreme Court in other countries, has further specified the conditions under which expropriation, or a taking, is constitutional, in that it must pass a four-part proportionality test. First, there must be legal authority for the purpose of the taking. Second, the taking must be an appropriate means of accomplishing the government's purpose. Third, the taking must be necessary and the government must use the least intrusive means possible to accomplish its purposes. Fourth, the taking must pass a balancing test through which the value of the public interest advanced by the taking outweighs the owner's property interests. Under the third component of the test, the Court has further specified that a taking is unconstitutional if the property is not needed immediately afterward and also that if property is taken that is no longer needed for public purpose, then it must be returned to its former owner. Additionally, the taking would be unconstitutional if the government could have achieved its goals by acquiring a lesser interest in the property such as an easement. Importantly, the Court has also held that the Constitution prevents takings for purely private purposes (McCarthy 2005). What is most unique and exemplary about the German case is that not only does the expropriation need to be in the interest of the public but the public benefit must outweigh the private losses, and this must be demonstrated to be the case.

*Hungary*

The Fundamental Law of Hungary, or the country's constitution, states in article 13 that 1) Every person shall have the right to property and inheritance; and 2) Property may only be expropriated in

exceptional cases and in the public interest, in legally defined cases and ways, and subject to full, unconditional and immediate indemnity (compensation). It is important that Hungarian places emphasis on expropriation only in exceptional cases, but it is not defined what is meant by exceptional and thus the clause is open to interpretation.

### *Armenia*

The Constitution of Armenia also contains an exceptionality clause similar to that of Hungary. Article 28 states that “Everyone is entitled to private property and inheritance [...] Private property may be alienated for the needs of society and the state only under exceptional circumstances, with due process of law, and with prior equivalent compensation”. Like the case of Hungary, it is not further clarified within the Constitution what exceptional circumstances would entail.

### Americas

#### *Chile*

In Article 24 of the Constitution of Chile, the importance of private property and protection against expropriation is stated clearly: “In no case may anyone be deprived of his property, of the assets affected or any of the essential faculties or powers of ownership, except by virtue of a general or a special law which authorizes expropriation for the public benefit or the national interest, duly qualified by the legislator. The expropriated party may protest the legality of the expropriation action before the ordinary courts of justice and shall, at all times, have the right to indemnification for patrimonial harm actually caused, to be fixed by mutual agreement or by a sentence pronounced by said courts in accordance with the law”. Furthermore, “In case of protest regarding the justifiability of the expropriation, the judge may, on the merit of the information adduced, order the suspension of the material possession.” Importantly, the Constitution provides two types of protection to private property owners: insuring the legality of an expropriation and providing the right to protest. First, expropriation can only occur when authorized by the legislative body, which has the power to determine whether the expropriation is in benefit of the public and if it is within the framework of a general or special law, in other words whether or not it is legally permissible. Second, the expropriated party has the right to protest the legality and justifiability of the expropriation in court. Although not clearly stated in the law, justifiability may include the legitimacy of the public benefit of the project and the degree to which the public benefit outweighs private losses.

#### *United States*

At the federal level, the United States legal regime provides partial protections against the abuse of expropriation by the government and private parties, but much of the authority concerning basic property rights rests at the level of individual states. Federal laws largely provide a broad legal

framework for eminent domain within which state laws loosely operate. The 5<sup>th</sup> Amendment of the Constitution includes a clause stating that private property can be taken for public use, but only if just compensation is provided. At the federal level, the term “public use” must be interpreted by the Supreme Court, which has ultimate authority to interpret constitution. The Supreme Court has decided that the condition of public interest is satisfied if the public is directly benefited, such as through public infrastructure projects and public utilities. However, projects that are mostly to the benefit of private parties and not available for public use have been interpreted to satisfy the requirement if they still benefit the public in some way (Sherman and Sterling LLP 2012).

One example of how this loose definition of public purpose has been applied was in the 2005 Supreme Court decision of *Kelo v. New London* in which private developers were granted ownership of condemned property in the city of New London, Connecticut for the development of privately owned property complexes. Although the project provides profits for private investors, it was deemed to be in the benefit of the public as it would revitalize an urban area and thus develop spaces for public use.

Since individual states have significant authority over the use of eminent domain, they also have power to determine how “public use” is defined. Two exemplary cases stand out in particular, the states of Florida and Michigan.

### *Florida*

Florida's State Constitution and the 2013 Florida Statutes provide key provisions preventing the use of eminent domain to clear slums or blighted areas for private property development, which is in direct contrast to the Supreme Court *Kelo v. New London* decision. In Sec. 73.014 of the Statutes it is written that “the state, any political subdivision as defined in s. 1.01(8), or any other entity to which the power of eminent domain is delegated may not exercise the power of eminent domain to take private property for the purpose of abating or eliminating a public nuisance”. Additionally, section 163.335(7) states that “It is further found and declared that the prevention or elimination of a slum area or blighted area as defined in this part and the preservation or enhancement of the tax base are not public uses or purposes for which private property may be taken by eminent domain and do not satisfy the public purpose requirement of s. 6(a), Art. X of the State Constitution.” Thus, just because an area is low income, run-down, or unsafe does not allow it to be expropriated for development, especially when the expropriation does not have a clear and direct public purpose.

### *Michigan*

The State of Michigan has also provided a specific definition of public use for eminent domain by detailing what is *not* suitable public purpose. The State Constitution mandates that “‘Public use’ does not include the taking of private property for transfer to a private entity for the purpose of economic development or enhancement of tax revenues”. This is an important statement as it rules out expropriations that only tangibly or indirectly have a public use, but which are primarily for private benefit or profit.

## References

- Allen, T. 2006. Compensation for Property under the European Convention on Human Rights. bepress Legal Series, Working Paper 1875. <<http://law.bepress.com/expresso/eps/1875>>.
- Armenia. 1995. Constitution.
- Barney, K. 2007. Power, progress and impoverishment: plantations, hydropower, ecological change, and community transformation in Hinboun district, Lao PDR. Field report. Vientiane.
- Chile. 1980. Constitution.
- Finland. 1997. Law 603, Act on Expropriation of Immovable Property and Special Rights.
- Finland. 1999. Constitution.
- Florida. 2006. State Contitution.
- Florida. 2013. The Florida Statutes.
- France. Civil Code.
- France. *Code de l'expropriation pour cause d'utilité publique (Code of expropriation for purposes of public utility)*.
- France. Declaration of the Rights of Man and of the Citizen.
- Germany. 1949. Basic Law.
- GoL (Government of Laos). 2003a. Constitution of the Lao PDR. No. 25/NA. Vientiane: National Assembly.
- GoL. 2003b. Land Law (amended). Vientiane: National Assembly
- Hungary. 2011 [1949]. Fundamental Law.
- Kenney-Lazar, M. 2012. Plantation rubber, land grabbing and social-property transformation in southern Laos. *Journal of Peasant Studies*, 39: 3-4, 1017-1037.
- McCarthy, K.E. 2005. Eminent Domain. OLR Research Report. Accessed on 29 April 2014 at <<http://www.cga.ct.gov/2005/rpt/2005-r-0321.htm>>.
- Schoenweger, O., Heinimann, A., Lu, J., and Epprecht, M. 2012. Land Leases and Concessions in the Lao PDR. Vientiane, Laos: WREA, SDC, CDE, and GiZ.
- Sherman and Sterling LLP. 2012. Expropriation – Examples of Constitutional Provisions and Laws from Various Countries.
- United States. 1787. Constitution.