



# Technical Assistance Consultant's Report

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## TA 7566-REG: Strengthening and Use of Country Safeguard Systems

Subproject: Amending the 2003 Land Law and its  
Implementing Decrees (Viet Nam)

### DEVELOPMENT PARTNERS' RECOMMENDATIONS AND SUGGESTED AMENDMENTS TO THE DRAFT REVISED LAND LAW

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Asian Development Bank

# **Development Partners' Recommendations and Suggested Amendments to the Draft Revised Land Law**

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## **1. Introduction**

This paper presents comments and suggests amendments prepared by the Technical Working Group of Development Partners on the land law revision.<sup>1</sup> These build on the [Joint Policy Brief: Revising the 2003 Law on Land](#).

The commentary is based on the draft revised law released for public consultations and dated 28 January 2013.

The paper presents recommendations on the following aspects: strengthening democratic governance dimensions (section 2), people participation (section 3), ethnic minority related land issues (section 4), land use planning (section 5), compulsory land recovery by the State (section 6), land compensation, support and relocation (section 7), land pricing (section 8) and enhancing consistency and transparency in the legal framework on land (section 9). Each section contains general recommendations for consideration as well as specific suggestions for possible changes and revisions in wording to reflect the aforementioned recommendations.

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<sup>1</sup> The Technical Working Group includes representatives of AusAid, DFID, NZAid, Oxfam, UNDP and World Bank.

## **2. Strengthening democratic governance dimensions**

In the transition from the central planning to a market economy, as Viet Nam reached low level middle income status, its economy integrated further in the global economy, getting more complex and solidly based on market principles, there more and more requirements for a shift in the role of the State in land management.

The experience from other countries undertaking similar transition shows that the State role in land management shifts from the major roles of sole distributor/allocator of land and direct involvement in making short-term decisions of land allocation to (i) long-term land use planning, (ii) regulating and nurturing the market by creating clear legal framework and incentive system (including taxation), (iii) effective and transparent land administration as well as effective and enforceable mechanisms to remedy land disputes, aiming at the achievement of the national socio-economic development goals.

The recent high number of land disputes, issues of inefficient land allocation and use, the land-related real estate bubble that contributed to the macro-economic instability and land related corruption cases are the evidences that the full recognition and realization of (i) the shift of the role of State and (ii) good governance principles in land management are increasingly necessary for Viet Nam to ensure the achievement of its development goals and the realization of its ambition to renovate the growth model.

### *a) General recommendations*

#### **Provide protection of land use rights and ensuring security of land tenure**

- Recognize Land Use Right as property rights in line with the forthcoming Constitution Amendments.
- Grant agricultural land use rights to households for an unlimited term as for residential land, in accordance with the 1992 Constitution.<sup>2</sup>

#### **Guarantee protection of the right to access to land information**

- Establish a national registration system of land use rights derived from the land records of the provincial agencies, based on individual land parcels, and including all obligations and rights registered relating to that piece of land (for example mortgage, securities, neighbor rights, building, easements, and other restrictions in regard of construction or use of land).
- Mandate access of all stakeholders to information in all spheres of land management and land use. The State as duty bearer is responsible for protecting and promoting access of all stakeholders to land information as a fundamental citizen's right. The revised land law should also set forth principles to address the obstacles to access to land information.

#### **Ensure transparency and “check and balance” in land management**

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<sup>2</sup> Experience from different countries including Viet Nam suggests that strengthening land tenure is essential to reducing land disputes. FAO's land tenure working paper no.7: Toward Improved Land Governance, 2009. Research on land governance in Viet Nam

- Provide (in all sections that define roles and responsibilities, at least the basis of) clear divisions of management/regulatory and oversight mandates and functions among state institutions, and enhanced roles of people's/people-elected bodies' supervision and oversight, at different levels from central to grassroots.
- Define "wrong doings"/"violations of the Law" and related responsibilities of the individuals and non-state institutions, define the "violations of the Law" and responsibilities of state agencies; and define the sanction in case of wrongdoing/Law violations by all concerned parties and institutions.

### **Ensure participation and public consultation in land administration and management**

Set forth the principle of people's active participation and consultation in all land administration and management processes with priority given to the functions that affect people's rights and benefits such as the first-time land registration; preparation, appraisal and approval of land use planning; the State's decision-making on land such as land recovery, land use fees and taxes, etc.; supervision and inspection of land legislation enforcement; and resolution of land-related grievances.

### **Create effective, transparent and enforceable mechanism to remedy land disputes**

Disputes always happen, but the importance to the state is to create appropriate, effective and transparent rules, processes and mechanisms to address grievances, manage disputes and to enforce agreements. The use of alternative dispute resolutions and techniques are proved to be effective in many countries and should be considered in revising the land law and related procedural laws. At the same time, independence of the judiciary to decide on land disputes which involved a state party is also necessary and effective.

#### *b) Suggested amendments*

##### Article 20

Roles and responsibilities of state institutions as representative of entire-people ownership should be defined to avoid fusion among regulator, implementer and oversight body on land-related issues.

##### Article 27

- A clear statement that right to access to land information is recognized and respected and protected should be added.
- The responsibility of state as duty bearer to guarantee public access to information in timely and in full manner across all clauses of the different areas of land management should be indicated in the land law.
- Limitation of access to information should be applied solely to those of state-secret categories and to be made explicitly in the revised land law, not vaguely as currently put in the draft "regarded as confidential in accordance with the law".

Articles 93 and 97

- The importance of expanding LURC to all and registration of both spouses is critical. Supporting policies are however required to address the barriers and constraints.
- The LURC as a property right should be made explicitly and be fully recognized, respected, protected and enforced in line with the Constitution, the Civil Code and other related laws. The LURC as a property right should be cover inclusively the basic property rights without limitations by-law, the right to use, the right to earn income from the LURC, the right to transfer and the right to enforcement of property rights.
- The LURC should be granted as long as possible to increase the land tenure security.

Article 196-197

Conciliation should not be a mandatory requirement for other remedy to land disputes.

Articles 200-203

- In addition to individual and administrators wrongdoing, the responsibilities of state agencies as representatives of entire-people ownership should be included.
- Sanction in case of wrongdoing by all concerned parties and institutions should be stipulated in all relevant articles.
- Consider not to criminalize wrong doing, or violation

ALL

- The consistency of the land law provisions with article 17 and 18 of the 1992 Constitution and the forthcoming amendments must be ensured.
- Across all relevant provisions of the law, the responsible of the state and representatives of entire-people ownership to create conditions for the citizen to participate in land management and administration should be included. The principles of openness and transparency in the receipt and feedback to the citizen's opinions and petitions must be clearly stated.
- To enforce monitoring and oversight, not only the Vietnam Fatherland Front and its member organizations, but other social organizations should have the oversight mandate, as described in article 196.3 of the draft amendments and be applied across all relevant provisions of the law.

NEW

Add article in Chapter V on land allocation, land leasing, change of land use purpose.

**Giao đất sản xuất nông nghiệp cho cộng đồng các dân tộc thiểu số để bảo vệ và sử dụng**

1. Nhà nước bảo đảm quỹ đất nông nghiệp cho đồng bào dân tộc thiểu số sử dụng ổn định lâu dài.

2. Nhà nước thực hiện việc giao đất sản xuất nông nghiệp, đất rừng sản xuất, đất nuôi trồng thủy sản cho cộng đồng các dân tộc thiểu số để quản lý, bảo vệ và sử dụng phù hợp với phong tục, tập quán của các dân tộc thiểu số.

3. Đối với những hộ thiếu đất sản xuất, đất ở thuộc diện được giao đất lần thứ hai không thu tiền sử dụng đất thì đất đó được giao cho cộng đồng để quản lý và cộng đồng quyết định giao cho các thành viên có nhu cầu để sử dụng theo các luật tục của cộng đồng.

### **3. People participation**

#### *a) General recommendations*

Người dân thường không được biết về quá trình lập quy hoạch, kế hoạch sử dụng đất và các phương án quy hoạch, kế hoạch sử dụng đất đã được phê duyệt. Người dân thường ở thế bị động, không có thông tin và mất quyền tham gia quyết định quy hoạch trong chế độ sở hữu toàn dân về đất đai. Có nhiều minh chứng về quá trình thực hiện thu hồi đất thiếu minh bạch, người dân không biết gì về các nhà đầu tư được Nhà nước giao đất, cho thuê đất, không được biết gì về phương án bồi thường, hỗ trợ, về nơi ở mới, trong khi tái định cư có tác động rất lớn đến cuộc sống hiện tại của họ. Trong khi đó người dân có nguyện vọng được biết thông tin, được tham gia quyết định, được tham gia quản lý và được tham gia giám sát.

Chế độ sở hữu toàn dân về đất đai được xác lập nên, việc tập thể người dân tại địa phương, nơi có đất, tham gia vào các quyết định về đất đai, quản lý đất đai, giám sát việc thực thi pháp luật đất đai cần được quy định cụ thể trong Luật Đất đai. Trong Dự thảo Luật Đất đai sửa đổi, có nhiều điều luật quy định về việc lấy ý kiến của người dân chứng tỏ có sự đổi mới đáng kể, nhưng như vậy là chưa đủ, mà cần cụ thể hóa khái niệm lấy ý kiến của người dân, phạm vi người dân được lấy ý kiến, phương pháp lấy ý kiến và phạm vi áp dụng.

#### *b) Suggested amendments*

Dự thảo luật đất đai cần bổ sung một số quy định sau về quy trình lấy ý kiến người dân và cơ chế đồng thuận của cộng đồng về các phương án liên quan tới quyết định Nhà nước về đất đai.

### **1. Bổ sung quy định về quy trình lấy ý kiến dân, tham vấn cộng đồng trong Chương 1 Dự thảo Luật Đất đai sửa đổi**

1.1. Chương 1 của Dự thảo luật đất đai sửa đổi cần bổ sung những quy định về các hình thức lấy ý kiến của người dân trong các quyết định của Nhà nước về đất đai, quản lý đất đai, thực thi pháp luật đất đai như sau: (1) hình thức lấy ý kiến người dân thông qua gửi thông tin và tiếp nhận ý kiến, và (2) hình thức lấy ý kiến người dân thông qua tham vấn cộng đồng.

*(1) hình thức lấy ý kiến người dân thông qua gửi thông tin và tiếp nhận ý kiến:*

Thông tin phục vụ việc lấy ý kiến của người dân được chuẩn bị dưới dạng văn bản có nội dung rõ ràng, đầy đủ, dễ hiểu và nơi có cộng đồng lớn người dân tộc thiểu số sinh sống thì văn bản thông tin phải có bản song ngữ, gồm tiếng Việt và tiếng dân tộc thiểu số đó. Việc chuyển tải thông tin và thu nhận ý kiến đóng góp phải được thực hiện công khai, minh bạch và được giám sát. HĐND địa phương, Mặt trận Tổ quốc và các tổ chức chính trị - xã hội thành viên của địa phương, các tổ chức xã hội, xã hội nghề nghiệp có quyền thực hiện việc giám sát việc chuyển tải thông tin và thu thập ý kiến đóng góp.

*(2) hình thức lấy ý kiến người dân thông qua tham vấn cộng đồng*

Tổ chức của Nhà nước có trách nhiệm thực hiện tham vấn cộng đồng phải thực hiện việc lấy ý kiến của người dân thông qua cuộc họp các thành viên của cộng đồng về các phương án liên quan tới quyết định của Nhà nước về đất đai, quản lý đất đai, thực thi pháp luật đất đai. Để đảm bảo phụ nữ có tiếng nói hiệu quả trong tham vấn cộng đồng, cần có các cách thức lấy ý kiến khác nhau. Khi sự tham gia của phụ nữ bị hạn chế ở cuộc họp chung, cần tiến hành thêm tham vấn theo nhóm đặc thù. Đối với những cộng đồng phải tham vấn có tỷ lệ lớn người dân tộc thiểu số thì tài liệu phục vụ họp cộng đồng phải chuẩn bị dưới dạng song ngữ tiếng Việt và tiếng dân tộc thiểu số đó.

Tham vấn cộng đồng được thực hiện với 2 nội dung: một là ghi nhận ý kiến phát biểu của người dân; và hai là điền ý kiến "đồng ý", "không đồng ý" hoặc "ý kiến khác" vào mẫu in sẵn các nội dung cần tham vấn kèm theo tài liệu phục vụ tham vấn cộng đồng.

Sau mỗi cuộc họp tham vấn cộng đồng, tổ chức của Nhà nước có trách nhiệm thực hiện tham vấn cộng đồng phải lập báo cáo về kết quả tham vấn. Báo cáo phải mô tả đầy đủ, trung thực các ý kiến phát biểu đóng góp của các thành viên cộng đồng và tổng hợp kết quả ý kiến "đồng ý", "không đồng ý" hoặc "ý kiến khác" về những vấn đề trọng tâm cần tham vấn. Việc lập báo cáo phải công khai và được giám sát. Báo cáo phải có chữ ký của người lập báo cáo và chữ ký của những người đại diện cho các tổ chức tham gia giám sát. Trong quá trình thực hiện tham vấn cộng đồng, cộng đồng được tham vấn có quyền được mời các tổ chức chính trị - xã hội, tổ chức xã hội, tổ chức xã hội nghề nghiệp tư vấn, trợ giúp cho cộng đồng. HĐND địa phương, Mặt trận Tổ quốc và các tổ chức chính trị - xã hội thành viên của địa phương, các tổ chức xã hội, xã hội nghề nghiệp có quyền thực hiện việc giám sát quá trình tham vấn cộng đồng.

1.2 Chương 1 của Dự thảo luật đất đai sửa đổi cần bổ sung quy định về cơ chế đồng thuận của cộng đồng về các phương án liên quan tới quyết định Nhà nước về đất đai. Các phương án liên quan tới quyết định của Nhà nước về đất đai, quản lý đất đai, thực thi pháp luật đất đai cần đạt được sự đồng thuận của cộng đồng. Nhà nước cần thực hiện việc tham vấn cộng đồng một lần hoặc nhiều lần cho tới khi đạt được sự đồng thuận của cộng đồng. Sau mỗi lần tham vấn, tổ chức xây dựng phương án có trách nhiệm tiếp nhận báo cáo kết quả tham vấn, điều chỉnh lại phương án hướng tới đạt được đồng thuận trong lần tham vấn cộng đồng tiếp theo.

## **2. Khuyến nghị bổ sung quy định về lấy ý kiến dân về quy hoạch, kế hoạch sử dụng đất**

2.1. Đối với các quy hoạch, kế hoạch sử dụng đất cấp quốc gia, cấp vùng và cấp tỉnh cần thực hiện lấy ý kiến của người dân theo hình thức gửi thông tin và thu nhận ý kiến (được đề nghị cụ thể ở phần 1.1).

2.2. Đối với quy hoạch, kế hoạch sử dụng đất cấp huyện: Tổ chức có nhiệm vụ lập quy hoạch, kế hoạch sử dụng đất cấp huyện chịu trách nhiệm thực hiện tham vấn cộng đồng

trong phạm vi cộng đồng những người sử dụng đất theo địa bàn khu dân cư làng, bản, buôn, phum, sóc tại khu vực nông thôn và theo địa bàn phường, thị trấn tại khu vực đô thị theo quy định cụ thể ở phần 1.1 nêu trên.

Tài liệu phục vụ các cuộc họp tham vấn cộng đồng bao gồm các nội dung chủ yếu về phương án quy hoạch, kế hoạch sử dụng đất của huyện và mẫu in sẵn về các khu vực đất thuộc địa bàn xã, phường, thị trấn sẽ phải chuyển đổi mục đích sử dụng trong kỳ quy hoạch, kế hoạch sử dụng đất.

Phương án quy hoạch, kế hoạch sử dụng đất của cấp huyện chỉ được cấp có thẩm quyền phê duyệt khi đạt được sự đồng thuận của cộng đồng.

### **3. Khuyến nghị bổ sung một số quy định về Tham vấn cộng đồng về phương án bồi thường, hỗ trợ, tái định cư**

Tổ chức phát triển quỹ đất có trách nhiệm thực hiện tham vấn cộng đồng về phương án bồi thường, hỗ trợ, tái định cư sau khi hoàn thành việc lập phương án này. Việc tham vấn cộng đồng được thực hiện trong phạm vi cộng đồng những người bị trưng mua, trưng dụng quyền sử dụng đất cho các mục đích an ninh, quốc phòng trên phạm vi đất đai thực hiện dự án đầu tư.

Tài liệu phục vụ các cuộc họp cộng đồng bao gồm các nội dung chủ yếu về phương án bồi thường, hỗ trợ, tái định cư và mẫu in sẵn là đồng ý, không đồng ý hoặc có ý kiến khác đối với các hạng mục gồm diện tích đất, loại đất, số lượng các loại tài sản, cấp hạng các loại tài sản, giá đất, giá tài sản, giá trị bồi thường về đất đai, giá trị bồi thường về tài sản, phương thức tái định cư đối với tất cả các trường hợp bị trưng mua, trưng dụng quyền sử dụng đất.

Đối với trường hợp không đạt được sự đồng thuận của cộng đồng thì tổ chức phát triển quỹ đất cần phải điều chỉnh phương án bồi thường, hỗ trợ, tái định cư. Phương án bồi thường, hỗ trợ, tái định cư chỉ được cấp có thẩm quyền phê duyệt khi đạt được sự đồng thuận của cộng đồng.

Điều 69 và 70 của Dự thảo luật đất đai sửa đổi về trình tự, thủ tục thu hồi đất cần bổ sung các quy định về cơ chế đồng thuận của cộng đồng trong trình tự, thủ tục thu hồi đất.

### **4. Khuyến nghị bổ sung một số quy định về Tham vấn cộng đồng trong cơ chế thỏa thuận giữa nhà đầu tư và cộng đồng những người đang sử dụng đất**

Khi thực hiện cơ chế thỏa thuận trên cơ sở đồng thuận giữa nhà đầu tư và cộng đồng những người đang sử dụng đất được áp dụng đối với các dự án phát triển kinh tế - xã hội gắn với lợi nhuận của nhà đầu tư thì nhà đầu tư có trách nhiệm thuê tổ chức cung cấp dịch vụ định giá đất để thực hiện định giá đất và lập phương án chuyển dịch đất đai có sự chứng kiến của đại diện UBND địa phương. Nhà đầu tư thực hiện tham vấn cộng đồng để lựa chọn tổ chức cung cấp dịch vụ định giá đất.

Nhà đầu tư phải thực hiện tham vấn cộng đồng về phương án chuyển dịch đất đai theo trình tự, thủ tục tương tự như trên.



#### **4. Ethnic minority related land issues**

The draft revised Land Law recognizes the community land use rights and community lands. Community is considered as a land user objects (Article 5) and the State allocates agricultural land for community to use in order to protect their ethnic characteristics, traditions and culture (Article 124). However, we strongly recommend the Government to consider moving further to recognize customary land titles and customary land use and management practice, especially for forest land, and to expand and specify the land support policies for ethnic minorities.

##### *a) General recommendations*

#### **Recognize customary land use and management practice in communities**

Given the critical role that land and forest resources play in the livelihoods of ethnic minorities, the concept of community land use introduced under Land Law 2003 needs to be further advanced under the revised Land Law by recognizing customary land titles in areas of residential, forest and “unused” land dominated by ethnic groups with largely intact traditional social structures. First, there is strong demand from local people for recognition of their customary land use and management practice. In mid-2000s, it was estimated that some 2.5 million ha of forest land in Viet Nam were *de facto* managed by communities. As the long tradition of Vietnamese communities, particularly ethnic minorities, to manage their land – especially communal forest land and unused land – has been confirmed by research and gradually acknowledged in various legal documents, this land is already partially allocated and contracted to local communities by Provincial People’s Committees (PPCs) and certain forest-management rights and obligations have been specified since then. Results so far indicate that in general communities welcome the allocation of the land and forest resources to them and can manage their forest land and forests well after the allocation. Second, customary land use and management practices are often the most appropriate tenure solution for such land, taking into account social (equity, conflict resolution), economic, and environmental objectives. In particular, issuing LURCs to communities in respect of land and forest resources on it would help confirm these existing uses and practices, alienate potential illegal or quasilegal occupants or claimants, and thus support social stability where overlapping claims may occur. Allocation to communities as community property is often socially more acceptable and economically more viable than allocation to individuals. Clear allocation to communities would lead to more responsible utilization of the economic and environmental potential of the forest areas, give them incentives to increase investment and lead to greater economic benefits. For the state, the environmental functions of the land and forest are secured at less cost than if the allocation had been to individuals.

### **Provide access to productive land for ethnic minorities**

The Government effort (as specified in Articles 26 and 105) in supporting ethnic minorities and vulnerable groups with appropriate residential and agricultural land policies is important. However, we are concerned about prohibitions and limitations applied in transferring land use rights of communities (Article 175) and ethnic minorities (Article 186.3). Article 175 states that communities shall not be entitled to exchange, assign, lease or donate the land use right; or to mortgage, guarantee or contribute capital using the land use right. We recommend taking out this regulation allowing the communities – like other land user objects to exchange, assign, transfer, mortgaging their land use rights based on the community members' consensus.

Article 186.3 regulates that ethnic minority households and individuals who were allocated the land in accordance with support policies of the State can only transfer Land Use Right after 10 years from the date of allocation. We understand the rationales behind this limitation – aiming to prevent the land consolidation and land loss that has been seen in several ethnic minorities' areas. However, we encourage the Government to think of other effective and feasible measures to address this sensitive issue. A term of ten years of 'no transfer of Land Use Right' will limit the choice of ethnic minorities in livelihoods, prevent ethnic minorities from economic/investment opportunities including access to credit (as the LUR will not be able to be mortgaged in reality), and create informal/illegal transactions. The reality in some ethnic minority areas has revealed that such administrative measure is not feasible in reality. We, therefore, recommend the Government to remove Article 186.3 in the draft.

Specific administrative measures such as a period of no transfer, fine, compensation can be further developed if and when appropriate in the under-law regulations. The government may pilot allocating agricultural and forest land for communities in some support programs that would lead to more responsible utilization of the economic and environmental potential of land.

### **Recover and re-allocate land of unproductive state farms and state forest enterprises**

In light of a lack of access to productive land for ethnic minorities, the effective and productive use of land allocated to state farms and state forest enterprises should be assessed. Land should be recovered and re-allocated to ethnic minorities in case of unproductive land-use. In addition, sub-leasing of land by state farms should be abolished. Land leased to and used productively by households should be recovered and re-allocated to households or communities. State farms and state forest enterprises must report on land use. Land user fees should apply equally to state farms and state forest enterprises.

### **Allocate forest to households and communities**

In the main, access to forests and forest resources is critical for livelihoods of upland communities. The regulation that production, protection and special forest

can only be allocated for forest management bodies (Articles 130.1, 131.5 and 132 respectively) is not rational. First, in the past years forest land has been allocated to households, individuals and communities. Their management has proven to be sustainable and effective. Second, this regulation is in conflict with other Articles 124.3, 126.3, 130.3 and 132.1 stating that forest land can be allocated to households and communities for various purposes, including protecting and preserving culture that is linked to traditions.

### **Expand definition of spiritual land**

For many ethnic minorities forests or watershed, ponds or lakes are sacred. Yet, they not included in the definition of spiritual land (Article 151). As temples, pagoda and family worship houses, they are important to ethnic minorities for preserving and promoting ethnic and cultural identities, protecting natural resources.

#### *b) Suggested amendments*

##### Article 26

- Supplement a statement that the Government policies recognize customary land use and management practice of ethnic minorities.

##### Article 7

Insert the concept of customary land use and management practices as follows: “A community’s representative is responsible for forest land that is allocated for community to protect and develop forest in accordance with the legal regulations on forest development and protection, and customary land use and management practices of that community”

##### Articles 130, 131 and 132

Insert “community and households” in forest management

##### Article 5.3

Definition on community “Người sử dụng đất bao gồm Cộng đồng dân cư gồm cộng đồng người Việt Nam sinh sống trên cùng địa bàn thôn, làng, ấp, bản, buôn, phum, sóc, hoặc các điểm dân cư tương tự có cùng phong tục, tập quán hoặc có chung dòng họ, có cùng có một qui ước chung về quản lý cộng đồng, và có người đại diện do cộng đồng bầu lên.”

Insert this definition in Article 3

##### Article 186.3

Remove this article

##### Article 130.1

Revise as follows: “production forests which are natural forests near living areas, linked to the protection of watershed of communities, scattered production

forests-natural forests should be allocated to HHs, individuals and communities to manage, protect and develop forests as well as to develop agriculture, to preserve and promote cultural identities.”

Article 131.1

Revise as follows “The state to allocate concentrated protection forests to forest management bodies, forest research organizations to manage, protect and develop forests; allocate the scattered protection forests, near living areas to HHs, individuals and communities to protect forests in combination with developing agriculture, preserving and promoting cultural identities to maximize social responsibilities in management and development of protective natural resources”

Article 132.1

Revise as follows: “State to allocate special forests to special forests management bodies to manage and protect as per land use planning that would have been approved by competent authorities. State to allocate scattered special forests near living areas to HHs and communities to protect in combination with forestry and agriculture development, preservation and promotion of cultural identities.”

Article 151.1

Revise as follows: “spiritual land consists of land that has temples, pagoda, worship houses, land used for spiritual and religious purposes of the ethnic minority communities”.

NEW

Add article in Chapter V on land allocation, land leasing, change of land use purpose.

***Giao đất của nông, lâm trường quốc doanh sử dụng không hiệu quả cho hộ gia đình, cá nhân ở địa phương***

1. Đất đai đã được các nông, lâm trường quốc doanh giao khoán theo hợp đồng giao khoán cho hộ gia đình, cá nhân là thành viên của nông, lâm trường hoặc hộ gia đình, cá nhân ở địa phương nay được Nhà nước giao trực tiếp cho các hộ gia đình, cá nhân đang sử dụng theo quy định của pháp luật về Nhà nước giao đất nông nghiệp cho hộ gia đình, cá nhân để sử dụng ổn định.

2. Đối với đất đai mà nông, lâm trường quốc doanh sử dụng không đạt năng suất và sản lượng trung bình của sản xuất tại địa phương thì Nhà nước thu hồi và giao cho các hộ gia đình, cá nhân thiếu đất sản xuất ở địa phương. Đây là nguồn đất đai để bảo đảm đất sản xuất, đất ở cho đồng bào các dân tộc thiểu số ở địa phương.

## **5. Land use planning**

### *a) General recommendations*

Land use planning remains largely an internal government exercise, characterized by unclear relationships, hierarchy, timing, and accountability among different types of plans such as the Socio-economic Development Plan, Land Use Plans, Urban Development plans, and various sectoral plans, especially at the provincial and district levels. This results in fragmented and ineffective planning processes, and illustrated by the low level of implementation of many of the current land use plans.

The current land use planning methodology focuses exclusively on defining the total area of land to be used by each category in each administrative level, not taking into account the spatial location of the land. This increases the risk of conflicts between different plans and hinders transparency.

The rich body of international experience on this subject shows that the present system of land use planning should be replaced by land use zoning which is characterized by spatial planning. An application of this approach will require completely restructuring the existing planning framework to allow it to provide a more sustainable and future-oriented use of land.

Land use planning is continuous based on dialogue between all participants aiming at the achievement of a consensus on the plan that facilitates effective and sustainable land use and its monitoring and evaluation in the future.

### *b) Suggested amendments*

#### Article 3.2 and 3.3

To better reflect its role in a market-oriented economy, the description of the purpose of land use planning should be amended to make clear:

- First, that the allocation and confirmation are made by the State for the purpose of providing land users and other stakeholders with information on the State's priorities for land uses by land use purpose and locality so that the land resources allocated to them can be used most effectible and efficiently;
- Second, land use projection and planning plans are indicative unless a specific land use negatively affects the neighboring land users; and
- Third, the definitions should promote the concept of land zoning, e.g. land use projection and plan, should define not only total amount of land to be used for each purpose but also their location (zone) and criteria for land use in each zone.<sup>3</sup>

#### Article 34

- In relation to the principles for land use projecting and planning, the clauses should be re-ordered, highlighting a more people-centered planning process.
- The legal rights of current land-users (i.e. those issued with a LURC) and their existing land uses should be respected.

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<sup>3</sup> In fact, term "land projection" reflects better the concept articulated in the Vietnamese draft rather than term "land zoning" used in the English translation.

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- Land use projection and plan should be prepared bottom-up and then approved top-down.
- Consultation with and agreement of people affected should be enshrined during the preparation of the projection/plan and precondition for their approval.
- Both the planning processes and their outcomes should be transparent.

### Article 37

- The basis for the preparation of the national land use projection and plan should also include draft provincial land use projection and plan prepared with duly consultation and agreement with people affected.
- The content of the national land use projection and plan should include maps of main land use locations and their criteria

### Article 38

- The basis for the preparation of the provincial land use projection and plan should also include draft district-level land use projection and plan prepared with duly consultation and agreement with people affected.
- The content of the provincial land use projection and plan should include maps of main land use locations and their criteria.

### Article 39

- The basis for the preparation of the district-level land use projection and plan should also include duly consultation and agreement with people affected both during the preparation and before the final approval.
- The content of the provincial land use projection and plan should include maps of main land use locations and their criteria

### Article 41

Expand on the principles of people's participation, consultation and transparency (incl. publication) in the formulation of land planning:

- Article 41.1: MONRE is also responsible for conducting public consultation on issues of strategic importance during the preparation of the national land use projection or plan.
- Articles 41.2 and 41.3: Provincial DONRE and district SONRE are also responsible for conducting public consultation and reaching agreement of people affected during the preparation of the provincial or district land use projection and plan

Develop specific procedures on the basis of the above principles in Articles 37, 38 and 39 (e.g. as per outcomes of consultation and consensus; esp. district level), 41, 42, 44 and 47. This may be subject of implementation decrees and circulars.

#### Article 42

- Article 42.1.b: MONRE is also responsible for conducting strategic eco-socio-environmental assessment of the national land use projection and plan.
- Article 42.1.c: Provincial and district DONRE are responsible for conducting public consultation to reach agreement of people affected prior final approval of the provincial or district land use projection and plan.
- The outcome of the strategic assessment and public consultation should be disclosed for at least 30 days before the start of the appraisal.
- The membership of the appraisal panel, their governance and transparency need to be more clearly stipulated.
- Articles 42.1 and 42.2: Land use projection and plan can also be amended upon the request of a majority of land users in the area of concern.
- Article 42.3: Insert the requirement for obtaining people's consensus through consultation.

#### Article 46.1 and 46.2

- Land use projection and plan (and their amendments) have to be disclosed fully and publicly within not more than 30 days at the relevant government offices, media, and the internet.

## **6. Compulsory land recovery by the State**

### *a) General recommendations*

Under the current draft Land Law, the power for the State to recover land is very wide, applying not only when land is unused, or not used for its intended purpose, but more generally for purposes of national defense and security, national interests, public interests as well as for the implementation of socio-economic development projects.

From a policy perspective, there is no need for a power of compulsory acquisition of land for economic purposes. Market mechanisms provide adequate incentives to land users to sell their land use rights to developers and investors who can put the land to more productive uses. In fact, some socio-economic development projects can fall into the category of the projects for public interests if a social impact assessment prove that the main gains of these projects will serve public interest (for examples, resettlement, public and social housing projects might serve public interest if they really target the needed groups and not be profit-taking ones)

Moreover, there are additional strong policy reasons against the use of the power of compulsory acquisition of land for economic purposes. It is inequitable, because the economic gains from land conversion should be shared to the land users as well; it increases the risk of corruption and collusion between

developers and state officials; and it causes dissatisfaction of land users whose land is acquired – in most cases, farmers – resulting in social instability, complaints and lawsuits.

With no effective voice in the recovery process, farmers are usually the last people to be informed about what officials intend doing. Currently, there is no requirement to consult with land users in advance of the decision to recovery (just to inform the decision on land recovery plan). Good governance requires transparent procedures which ensure that affected land users have the opportunity to have their objections fairly and impartially considered before a decision on land recovery is made. This includes the right for those affected to be informed in good time of the proposal to recover their land; the opportunity to make objections at a hearing; and the right, if necessary, to have their complaints heard by a fair and impartial tribunal such as the court<sup>4</sup>.

Given that many of those affected will be poor and have little knowledge of their rights, the Government should inform them of their right of appeal, provide free legal assistance for those without the means to pay for a lawyer, facilitate their support by independent civil society organizations; and enable them to lodge an appeal without payment of court fees. Otherwise the right to appeal will be inaccessible to most of those affected in practice. Judgments on appeals should be made public.

Given the grave consequences to land users of losing their land use rights, these procedures (including the determination of any appeal) should be completed before any decision to recover land is implemented.

Therefore, we recommend:

- The power to recover land to be limited to cases of necessity on grounds of national defense, security and the public interest would bring the Land Law into line with international practice. Land for economic investment projects, including all industrial and residential uses, as well as for-profit universities, schools and medical facilities, should be acquired through negotiation and free consent of the land user. For the same reasons, the Land Fund should be used for national defense, security and the public interest only.
- The process of land recovery should follow transparent procedures, including public notification of the intention to recover, an opportunity to submit objections, a hearing for affected parties before the local councils or other representative bodies, and a right of appeal against the decision to recover land and/or against the amount of compensation to the court with a right to free legal assistance and without payment of fees. Land should be recovered only after completion of these procedures and any appeals.

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<sup>4</sup> Article 14 of the International Covenant on Civil and Political Rights provides that “ In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ... any judgment rendered in a suit at law shall be made public ...”.



*b) Suggested amendments*

Overall

Use the term “compulsory land acquisition/purchase by the State” (*trung mua*) as in the law 15/2008 on property purchase and requisition.

Articles 15 and 61

- Remove socio-economic development as one of the purposes for compulsory land acquisition. Only national defense, security and public interests should remain.
- Similarly, this provision should also be removed from the draft revised Constitution (Article 58).

Article 60

- The categories of land acquisition in the public interest need to be more clearly defined.
- Social impact assessment should be included as a means of justification.

Article 59

Remove clauses 8, 9 and 10.

Article 62 and 66

Land recovery must follow transparent consultation process with affected people and communities before decision. Such stipulations should be incorporated and specified.

Articles 69 to 71

Strengthen and expand the provisions for people’s participation and consultation, oversight, monitoring in the process of compulsory land acquisition.

Articles 68, 69.2.a, 70 and 106

The role, functions, governance and oversight of land fund organizations need more clarification and elaboration.

## **7. Land compensation, support and relocation when land is recovered by the State**

*a) General recommendations*

Compulsory land acquisition is one of the hottest issues in the country causing a lot of unfairness, dissatisfaction and long lasting complaint. There is a growing number of grievances from the affected people, who in some cases are impoverished, essentially making them victims of the process of economic development. International experience shows that fair compensation should be provided to those who give up all or part of their land and those who are adversely impacted by development processes. The compensation should cover:

(i) lost or impacted land and other property, (ii) loss of income and livelihood; (iii) re-location costs; (iv) livelihoods rehabilitation; and (v) other losses incurred. This means that the compensation is not just a onetime compensation for lost assets, but should relate to the whole process of income and livelihood rehabilitation to ensure the affected people can restore and improve their livelihood after land acquisition. In many countries, an independent law on land acquisition is enacted, taking into account the critical importance of the issues.

Although the current Land Law states that the State's land prices should be in line with market prices, the past experiences showed that land compensation prices are generally much lower than prevailing market prices. In the 2011 PAPI survey<sup>5</sup>, only 9% of those who had lost land considered that the compensation was close to market value (a decrease from 17% in the same survey in 2010). Similarly, a World Bank case study in 2010 showed that more than 80% of affected people were not satisfied with land compensation price paid for their land acquired by the State.

In turn, this dissatisfaction has led to increasing levels of complaints – as reported above, Government Inspectorate statistics show that 700,000 complaints and denunciations concerning land were filed in the past three years, and more than 70% of these related to land recovery and compensation<sup>6</sup>. These complaints lead in turn to long delays of development projects, negatively affecting both economic development and social stability, as well as reducing the attractiveness of Vietnam's investment environment<sup>7</sup>.

HCM City is a notable exception in paying compensation rates closer to market rates. For every municipal investment project which requires land acquisition, the city hires an independent land appraiser to determine appropriate compensation. The City's experiences have demonstrated the advantages of the approach in terms of (i) more timely agreement with the affected people, thus speeding up the compensation and resettlement process; (ii) enabling people to freely choose the place to relocate to quickly restore and stabilize their new lives and (iii) comparatively few complaints issued by affected parties.

Livelihood restoration has been emerged in some development projects, especially for the farmers who lost most of their agricultural land and could not find alternative means of livelihood.

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<sup>5</sup> The Provincial Governance and Public Administration Performance Index (PAPI) is the first-ever nationwide governance and public administration performance survey carried out in Viet Nam. A total of 13,642 citizens from all 63 provinces in Viet Nam were surveyed on their direct experience of governance and public administration.

The index is a collaboration between the Viet Nam Fatherland Front (VFF), the Centre for Community Support and Development Studies (CECODES), the National Assembly Committee for People's Petitions (CPP) and the United Nations Development Program (UNDP). The full PAPI report and more in-depth analysis can be accessed at: [www.papi.vn](http://www.papi.vn).

<sup>6</sup> Based on information from Government Inspectorate, as announced by NA Chairman Nguyen Sing Hung at the meeting of the NA Steering Committee on 18 September 2012. See <http://vietnamnews.vnagency.com.vn/politics-laws/230281/red-tape-leads-to-property-disputes.html>

<sup>7</sup> A study showed that with the land acquisition delay, the economic losses are much bigger than the differences between actual land compensation price and market price, to say nothing of the social instability caused (WB 2011)

In light of the above:

1. The objective of compensation and resettlement policy should be clearly described to ensure the affected people are not worse off as a result of land recovery.
2. The compensation for recovered land to reflect loss of livelihood and resettlement costs as well as the market value of the land. The market value should be defined using independent and objective professional mechanisms, such as independent land valuer(s) selected by agreement between the parties.
3. Special attention should be given to vulnerable groups, including ethnic minority and poor people, illegal land users, who might have disproportionate adverse impact from the land recovery
4. To ensure meaningful consultation with affected people during project preparation and implementation

*b) Suggested amendments*

Article 72

- The principles of land compensation and support in case of compulsory land acquisition should include:
  - Make best efforts to fully compensate for lost of assets and livelihoods
  - Compensate 'land for land' as first and preferred option; alternatively, compensate on the basis of the market value
  - Lives and livelihoods should be restored "as good, or better"
  - Recognize the need for special provision for vulnerable groups, such as women, children, the elderly and ethnic minorities
- For clause 2, the principle of people's participation and consultation should be included and expanded
- For clause 3, the role of the responsible agency should be defined more clearly (beyond timely payment of compensation)

Article 74.1

Land price for compensation must be valued on the basis of market prices, using an independent land appraisal mechanism.

Article 76.1

Compensation needs to be adequate to compensate for the loss of livelihoods, based on principles of Article 72.

NEW

A new article outline the provisions for support to people losing access to land leased from state farms need to be included.

Article 81

Expand and strengthen this provision to ensure affected people are able to restore lost assets and improve their livelihood.

NEW

The revised Law should assign responsibilities for oversight in relation to the provision of compensation, support and resettlement, with mechanisms for monitoring by social organizations.

Article 82

- Stipulate clearly and strengthen the provisions on people's consultation and consensus for resettlement site selection and quality, as well as for oversight to ensure better living conditions as stipulated in clause 2.
- Local customs need to be considered in preparing resettlement areas.

Article 84

This article should only apply in instances where 'higher' standards compared to the Law are applied.

## **8. Land pricing**

### *a) General recommendations*

As mentioned in previous sections, land compensation price is one of the hottest issues in land recovery, leading to impoverishment of the affected people as well as long lasting complaints and social instability. This issue cannot be resolved without using a proper, independent land pricing mechanism. Therefore, it is critical for land compensation price to be determined on the basis of the market value, using independent land valuers.

### *b) Suggested amendments*

Article 109

Option 2 must be selected, with the following amendments:

1. Make paragraph c under clause 3 a separate additional clause; and
2. Add the role of independent appraisers

The decision on the land price should be made by an entity independent from the People's Committee, based on independent land valuers.

## **9. Enhance consistency and transparency in the legal framework on land**

Beyond the immediate revisions we recommend for the Land Law, it will be important to consider consequential amendments to other laws. To maintain consistency across the legal system, we suggest that the revision of 2003 Law on Land should be related to broader legal changes. Examples include: Revise the 2005 Civil Code (Chapters on Property and Assets); Revise the 2008 Law on Planning to ensure that farmers have the right to participate in planning activities related to their land (specifically the right to be informed on planning activities,

right to be heard, right to claims and access to justice through the judiciary in case of need); Reconsider the need to revise all related laws, including the 2008 Law on Housing, 2008 Law on Real Estate Market.

Therefore, we recommend conducting a systematic and comprehensive evaluation of all relevant laws and subordinate legislation, in order to determine consequential amendments required for harmonization and effective implementation of the revised Land Law, in an open and transparent process including consultation with representatives of all sectors of society.

As with other areas of regulation in Viet Nam, the effectiveness and transparency of the legal framework for land is undermined by a huge and unsystematic body of administrative regulation (decrees, ministerial circulars, decisions and guidelines). In preparing for effective implementation of the revisions to the Land Law, the Government should establish a complete inventory of all this subordinate legislation and seek to rationalize and simplify it for the benefit of the State agencies and land users alike. An example would be to codify the numerous under-law regulations on agricultural land recovery and compensation into a Law on Land Conversion and Compensation.

//ends//