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This policy brief is intended for public policy makers and practitioners; it will also be useful for those groups and individuals seeking to influence the policymaking processes.

This policy brief is also available in Georgian.

THE GEORGIAN LEGAL FRAMEWORK ON EXPROPRIATION FOR URGENT PUBLIC PURPOSES AND ITS COMPLIANCE WITH UN VOLUNTARY GUIDELINES ON RESPONSIBLE GOVERNANCE OF TENURE

Summary

Expropriation, i.e. the power of a government to acquire privately held property to be used for public good without the owner's willing consent - has, always and in all countries, been a complex issue and remains so. Legal procedures on expropriation are in force in Georgia since 1997 and, according to data to date, have been applied to about 750 persons (both, physical and legal) for different projects' needs. In this paper current Georgian legal framework on expropriation, its strengths and weaknesses, is analyzed; different cases of expropriation are considered. Besides, it shows how Georgian law meets the requirements of UN Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security and gives recommendations for the improvement of the national expropriation law.

Introduction

Over the past decades the demand for land, especially agricultural land has increased, both globally and at the national level. In Georgia this trend is manifested in two ways: (1) increased demand for land for agricultural projects; (2) increased pressure on the land, caused by non-agricultural activities (construction of roads and railways, pipelines, hydropower stations and other infrastructure projects, mining and other types of manufacture). This pressure is often exercised with the lands formally or informally (e.g. traditionally) owned or used by local communities. This trend of development, given weak land management system, unfortunately often results in violation of tenure rights and conflict with local communities due to the loss or restriction of access to the land and related resources. This ultimately impedes the projects, poses a threat to stability in the local and national level, and puts at risk the food security.

Problems and risks resulting from increased demand for land and expansion of land acquisition process attracted the attention of different international organizations in recent years. International organizations, working in human rights, agriculture and food security, land and land resources management started to develop standards in this area. A number of guidelines were developed to promote good land governance. These guiding standards were developed not to discourage investments and the development of land, but to avoid human rights violations during the development process and to protect and preserve living environment and places of high conservation value.

The most important recent guiding document, developed by international organizations, is that adopted by Committee of World Food Security (CFS) of the UN Food and Agriculture Organization (FAO) in 2012 and endorsed by 128 countries, which sets out the guiding principles for responsible governance of tenure of Land, fisheries and forests in the context of national food security.

The guidelines, titled *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (hereinafter

“guidelines”)¹, as is clear from the title, are not legally binding - they are voluntary; however they are based on international and regional legal instruments that address human rights and tenure rights (including “the Millennium Development Goals”), which are binding for the states parties to the international legal instruments. Since 2012 to date, many international organizations, including financial institutions, as well as governments and development agencies shared the principles set out in the guidelines and are trying to reflect them in their operational policies.

As indicated in the guidelines, many of tenure problems arise because of weak governance, and attempts to address tenure problems are affected by the quality of governance. Weak governance adversely affects social stability, sustainable use of the environment, investment and economic growth. People can be condemned to a life of hunger and poverty if they lose their tenure rights to their homes and land; they lose their livelihoods because of corrupt tenure practices or if implementing agencies fail to protect their tenure rights. People may even lose their lives when weak tenure governance leads to violent conflict. Responsible governance of tenure conversely promotes sustainable social and economic development that can help eradicate poverty and food insecurity, and encourages responsible investment. “The voluntary guidelines” seek to improve tenure governance by providing guidance on responsible state governance.

The guidelines consist of multiple interrelated chapters and addresses the issues related to Tenure rights and their governance, such as: policy, legal and organizational frameworks; legal recognition of tenure rights of indigenous peoples and other communities with customary tenure systems, as well as of informal tenure rights; transactions in tenure rights as a result of investments, land consolidation and other readjustment approaches, restitution, redistributive reforms or expropriation etc.

The guidelines recognize, that neither form of ownership or tenure, including the private one, is ideal - all property and tenure rights are restricted by other people’s rights and by the arrangements carried out by a state for public purposes. **At the same time the guidelines stresses that these arrangement are given legal recognition, aimed at achieving overall well-being and are consistent with state obligations to protect human rights under national and international law.** This topic - expropriation and compensation issue - is covered in a separate chapter (subchapter 16) of the guidelines. It provides for basic principles, and standards to be met by the law on expropriation.

The follow up chapters of this paper cover first of all the complications, generally associated with expropriation; then current legislation of Georgia on expropriation; consistency of Georgian legislation with UN guidelines; and finally - the conclusion and recommendations.

1. Expropriation and related complications

Expropriation or, according to FAO - **the right of a state to take the ownership and tenure right on private property for public use without the owner’s consent** - has always been a complex issue and remains so. Especially with recent years’ sharp economic growth and the change in land-use pattern. The Governments, for a better performance of public service functions, build new roads, flood protection structures, pipelines, and power lines etc. For these purposes they have to buy land which, by the time of such a need is not for sale. In this case governments retain the power of compulsory acquisition of land at the right place and the right time. Governments can force landowners to sell the land for specific public purposes.

The above process is not painless and often results in tension and conflicts, which in its turn hinders economic growth and sustainable development. In the end the expropriation - more exactly the project requiring expropriation - may turn out beneficial to society, but it is devastating for expropriated land-owner. Expropriation may lead to relocation of families from their place of residence, separation of family members, disruption of social ties, separation of land users from their lands, business contacts damage, estrangement from places of religious and cultural significance etc. If compulsory acquisition is done poorly, it may leave people homeless and landless, with no way of earning a livelihood, without access to necessary resources or community support, and with the feeling that they have suffered a grave injustice. If, on the other hand, expropriation is carried out satisfactorily, there shall be no “looser” - the communities and people remain in equivalent situations while at the same time providing the intended benefits to society.

Power of expropriation can be abused. Unfair procedures for the compulsory acquisition of land and inequitable compensation for its loss can reduce land tenure security, increase tensions between the government and citizens, and reduce public confidence in the rule of law. Conflict is reduced when the government clearly defines the specific purposes for land acquisition, and when there are transparent, fair procedures for acquiring land and for providing equitable compensation. It shall be kept in mind that effective and fair compulsory acquisition cannot exist without good governance and adherence to the rule of law.

¹ Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, available at <http://www.fao.org/nr/tenure/voluntary-guidelines/en/>

Analysis of different countries' legislation show that **the governments have the power of compulsory acquisition (except for the cases when the owner is forced to sell his/her property based on negotiations and /or when the owner is deprived of his/her property for certain compensation- property expropriation) only where rights to land/property are required for a public purpose**. Different countries refer to compulsory acquisition being used for "public purposes", for "public uses" and/or "in the public interest". In practice these terms are often not clearly distinguished and they tend to be used interchangeably².

The studies show that "public purposes" compulsory for acquisition all over the world (both in developed and developing countries) arise when implementing different projects, like³:

- Transportation uses including roads, canals, highways, railways, bridges, wharves, and airports
- Public buildings including schools, libraries, hospitals, factories, religious institutions, and public housing
- Public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams, and reservoirs
- Public parks, playgrounds, gardens, sports facilities, and cemeteries
- National defense purposes

The possibility for judicial review of compulsory acquisition or/and expropriation increases, where "public purposes" are clearly defined in legislation. Clearly defined lists of public purposes in legislation provide an established inventory of permissible purposes beyond which the government may not expropriate land. One other hand, clear and exhaustive lists system may further complicate the situation, e.g. where the purpose not explicitly included in the list but the project really serves public interests. For such cases some legislations, where a clear list of permissible public purposes is accompanied by an open-ended clause (e.g. "or other public purposes"). The open-ended clause grants flexibility when determining whether an executive interpretation of "any other purpose" is outside the scope of the legal definition and therefore violates the law⁴.

In practice "public purpose" is easier to be justified if the project is implemented by the government or a governmental agency; e.g. building public schools, hospitals (not private or commercial ones), highways or airports. Justification of "public purpose" may also be easy when the project is implemented by a private person, but the construction will be used to meet locals' (public) needs. For example, in countries where power generation facilities and transmission networks are privately owned, infrastructural projects implemented by owner companies to provide electricity to the population may also be considered "public purpose"⁵.

"Public purpose" becomes especially arguable when commercial projects are implemented by private companies. In such cases the justification of "public purpose" is as follows: the public will benefit from the project since it contributes to economic growth, creates jobs, taxes go to the budget, which on its turn enables the government to improve public services⁶.

In any case the practice shows that clearly defined "public purpose", and participation of the public, whose "purpose" is the pretext for governmental decision, reduce the likelihood of a dispute.

2. Expropriation in Georgian legislation

2.1 "Urgent public purposes"

The concept of "public purposes" in Georgia, likewise in many other countries was introduced with regard to restriction of property rights or possibility of expropriation. First it provided under the Constitution, later this constitutional norm was specified in legal instruments. Article 21 of the Constitution of Georgia recognizes the right to property. Para 2 and 3 of this Article clarify that when "urgent public need":

- The **restriction**⁷ of the rights shall be permissible for the purpose of the urgent social need in the cases determined by law and in accordance with a procedure established by law (Para 2)

² FAO, 2009. Compulsory acquisition of land and compensation. Food and Agriculture Organization of the United Nations, FAO land tenure studies, #10. Rome 2008 <http://www.fao.org/docrep/011/i0506e/i0506e00.htm>

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Meaning the determination of property essence and limits, definition of regulatory legal framework (Regional Centre for research and Promotion of Constitutionalism, 2015. "Comments to Georgian Constitution: Chapter 2: Basic Human Rights and Liberties of Georgian Citizens")

- **Deprivation of property**⁸ for the purpose of the urgent social need shall be permissible
 - in the circumstances as expressly determined by law, under a court decision;
 - or in the case of the urgent necessity determined by the Organic Law and only with appropriate compensation.

Thus, Georgian Constitution establishes two rules of deprivation of property (expropriation) for “urgent public need”. These two rules are further specified in the Law of Georgia on “**Rules of Expropriation of Property for Urgent Public Needs**” adopted in 1999, and **Organic Law of Georgia on Rules for Expropriation of Property in the Public Interest under Exigent Circumstances** adopted in 1997.

The first legal instrument provides for a possibility of deprivation of property when the government is focused on achieving the **goals of bringing positive results for society**. The organic law is applicable in cases when urgent public need of deprivation of property is associated with the protection of society from the **inevitable negative consequences**.

- ❖ The Law of Georgia on “**Rules of Expropriation of Property for Urgent Public Purposes**” determines rules of granting the Right to Expropriation for urgent public purposes and rules of implementing Expropriation. It also determines the list of activities (projects), which may require expropriation for “urgent public purposes” These are the following:
 - (a) Construction and laying of roads and highways;
 - (b) Laying of railway lines;
 - (c) Laying of gas, natural gas and oil products’ pipelines;
 - (d) Construction of electricity transmission and distribution wires;
 - (e) Laying of manifold lines for water supply, sewerage and atmospheric precipitation;
 - (f) Laying telephone cables;
 - (g) Laying television cables;
 - (h) Construction of buildings and objects that are necessary for public purposes;
 - (i) Works required for national defense;
 - (j) Mining of minerals⁹.

Here noteworthy are two problematic aspects:

- The law, as if, lists exhaustively all the activities/projects that may bring about the “urgent public need” of property expropriation, but at the same time one of the items of the list is so general, that may relate to any project. We mean item (h), with the wording “Construction of buildings and objects that are necessary for public purposes” which can be perceived as so called “open-ended provision”.
- The law does not establish the criteria of justifying “urgent public need”, as well as thresholds of activities; e.g. what are limit values of the pipeline, its length and performance, allowing to deem its construction a “urgent public need”? How many people (10, 100, 1000 or more, and how should benefit from the project in order to consider it “urgent public need”? Shall there be any preliminary study showing project costs and revenues?
- ❖ The Organic Law of Georgia on “**Rules for Expropriation of Property in the Public Interest under Exigent Circumstances**”, as mentioned above, is applicable in cases when urgent public need of deprivation of property is associated with g protection of society from the inevitable negative consequences. The law does not determine “public interest” or its parameters. According to the Law “Urgent need” arises, in the circumstances that endanger human health and safety or state and public security:
 - War or emergency situation;
 - Ecological disaster;
 - Natural disaster;

⁸ Meaning individual, a one-time deprivation of property (the same resource)

⁹ “Mining operations” were added as a result of 2005 amendments to the law (Law of Georgia of 22 April 2005 “On Rules of Expropriation of Property for Urgent Public purposes”. This change is related to the creation of favorable environment for implementation of mining operations projects in Georgia. As a result of this reform mining operations were exempt from the obligation of preliminary “Environment Impact Assessment” and obtaining an environmental permit.

- Epidemic;
- Epizootic.

It is noteworthy that the issue of property expropriation is covered by three other laws of Georgia; among them only one links expropriation with “urgent public need”. These laws are:

- ❖ **The Law of Georgia “On Agricultural land ownership”:** Aliens and legal persons registered abroad are not be entitled to the acquisition of agricultural land in Georgia; but they may inherit it. In this case they shall be obliged to alienate agricultural land parcels owned by them within six months after origination of title to the land to a citizen of Georgia, household and/or legal person registered in Georgia according to the legislation of Georgia. If they fail to do so, they shall be deprived of their title to agricultural land parcels owned by them based on a court decision and with appropriate compensation for the benefit of the State, and the norms determined under the Law of Georgia on Procedures for Deprivation of Property for Urgent Public purposes shall apply. “Urgent public need” is not reviewed in this case; it is only about the fulfillment of legal proceeding for expropriation.
- ❖ **Law of Georgia “on Mobilization”:** this law also provides for deprivation of property. In particular, Article 13 states that in mobilizing for the needs of the Georgian Armed Forces, the “military transport obligation” occurs which implies deprivation of transportation means of government agencies and organizations, and natural and legal persons of private law - for free - with the subsequent reimbursement after the end of hostilities. Here, again, the Law of Georgia on Procedures for Deprivation of Property for Urgent Public purposes is applicable.
- ❖ **Law of Georgia on “Oil and Gas”:** this law provides for deprivation of property for “urgent public need” for the performance of oil and gas operations. The only difference is that this deprivation shall be temporary; Article one of the Law explains the notion of “eminent domain” as follows: in case of public necessity, temporary alienation of land and private property attached to it by the state on the basis of a judicial decision and with an appropriate compensation. Eminent domain shall be implemented according to the Constitution of Georgia and this Law;

2.2 Expropriation procedure

This sub-chapter reviews first - the expropriation procedure under the Law of Georgia “on Rules of Expropriation of Property for Urgent Public purposes”, and then - under the Organic Law of Georgia “on Rules for Expropriation of Property in the Public Interest under Exigent Circumstances”; and in the end of the chapter expropriation procedures for gas and oil operations are described.

2.2.1 Expropriation procedures for development projects

As mentioned above, the Law of Georgia “on Rules of Expropriation of Property for Urgent Public purposes” determines rules of granting the Right to Expropriation for urgent public purposes and rules of implementing Expropriation. The law defines “Right to Expropriation” as a **one-time right to expropriate property for urgent public purposes with proper compensation awardable in exchange**; and the compensation, according to the law, may be of two types: (a) **payment of proper compensatory** money to the proprietor in lieu of the expropriated property, or (b) the transfer of **other property** to the proprietor having the market value of the expropriated property.

The law does not establish any limitation as for the subject who may be granted the Right to Expropriation; a project for “urgent public need”, and respectively the expropriation can be executed by a State body, a local self-governance body¹⁰, a public law entity or a private law entity.

The decision on expropriation under the law shall be made in two stages:

In the first stage - The right to expropriation may be granted through an Order issued by the Minister, which shall determine **the inevitability of expropriation for urgent public purposes and the subject who may be granted (!) the Right to Expropriation**. It is noteworthy that in 1999-2010 the decision on expropriation required a presidential order . In October 25, 2010 this right was granted to the Minister of Economy and Sustainable Development.

It is noteworthy that the law does not define what kind of information (if any) shall submit a person interested in obtaining the rights to the expropriation to the Ministry of Economy and Sustainable Development. The Law says nothing about the

¹⁰ to entities entitled to expropriation, were added local governments as a result of 2010 amendments to the Law (15 October 2010 resolution on amendments to the Law 2005 "On Rules of Expropriation of Property for Urgent Public purposes".)

need for preliminary study/assessment, which would justify (or reject) the necessity/ inevitability of expropriation for urgent public purposes; or would present revenues and expenses as a result of expropriation. The law does not provide for informing or consulting the proprietors/users on the initial stage of decision-making (e.g. in assessing).

The vacuum in the law is partially compensated by the regulations approved by Ministerial #1-1/159¹¹ of 25 March 2016, Order of Ministry of Economy and Sustainable Development, under which a person seeking the right to expropriation is obliged to submit to the Ministry, alongside with other data, the following information:

- the documents confirming starting negotiations with proprietor on the compensation for the property;
- Expert/audit conclusion on a potential compensation amount to be paid (if there is one);
- Description and justification of urgent public need.

It is worth mentioning that the law was adopted in 1999, and the above requirements were established 17 years after the adoption of the Law - in March 2016. Besides, this regulations¹², approved under ministerial order, have not been officially published to date.

On the second stage, according to the Law, district (town) courts are empowered to decide on granting the right to expropriation- a court decision must indicate a person that **has been granted the Right to Expropriation**, detailed description of the property subject to expropriation and a reference to the obligation to provide the proprietor with proper compensation. For this stage the Law establishes a list of documents to included in the application of a person seeking the Right to Expropriation. Pursuant to Article 5 of the Law a decision of the court **shall be subject to immediate enforcement**.

Rule of decision-making on the second stage was also change, equally as the rule of the first stage. In the period of 1999-2006 the court decision was taken by regional courts. As a result of 2006 changes regional courts were replaced by district (town) courts. this change was due to the reorganization of the judicial system. However, it is noteworthy, that before 2006 court of three people took a collective decision on expropriation, whereas now the decision is made unilaterally by a single judge of the district (town) court¹³. Another important amendment was introduced to the Law, in particular a **decision of a district (town) court will be enforced** pursuant to rules applicable to decisions subject to **immediate enforcement**. It means that challenging the district court's decision at the higher levels will not prevent the process of expropriation. Even if a higher court annuls the decision of the lower court it will be difficult to it will be difficult to restore the status quo. This will lead to undue restriction of proprietors' rights guaranteed under Constitution (e.g. if a building belonging to a proprietor was destroyed as a result of expropriation process, or a land plot belonging to him, has become unfit for agriculture)¹⁴.

Article 4 of the Law covers the issue of **access to information**. According to this Article the proprietors shall be informed twice about the planned expropriation:

First - After the relevant ministerial order has been promulgated, the person seeking the Right to Expropriation shall provide every proprietor whose property is subject to Expropriation with information, which shall be published in the central and the relevant local press. The information shall include a brief description of the project, the scope and the territorial area of its implementation, and the property that may be subject to expropriation. It is worth noting here that the Law provides for only one form informing the proprietors - through media.

Second - before starting the second stage of decision-making. The law establishes mandatory informing the proprietors about the date when the application has been lodged with the court and the scheduled date of hearing the application by the court. The law does not specify who are obliged to comply with this requirement of the law and in what ways / methods (e.g. again through media, or by informing each proprietor personally.)

It should be mentioned that the law does not specify when shall this information be publicized -how soon after the relevant ministerial order has been promulgated, or/and how early before beginning the second stage (before going to court).

Articles 6 and 7 refer to the stage after the court decision - i.e. **the stage when the person seeking the Right to expropriation has been granted the right to expropriation**.

The Law establishes that is on this stage that expropriator agrees with the proprietor on rules of compensation for the

¹¹ Order #1-1/159 of the Minister of Economy and Sustainable Development "On establishment of the Commission to address the issue of granting the right to expropriation for public purposes"

¹² This 2016 Order was preceded by similar ministerial orders passed in 2013 and 2010, which have not been published.

¹³ Green Alternative, July 2012 "Forced displacement due to development projects: modern approaches and challenges facing Georgia <http://bit.ly/2aug6Nn>

¹⁴ Ibid.

property subject to Expropriation. Before starting negotiations for the purchase of the property, an Expropriator must, at its own expense, use an independent expert to evaluate the property and determine a potential compensation amount to be paid to the proprietor or other property to be transferred to the proprietor, according to the market value of the property subject to Expropriation. A proprietor is authorized to use another independent expert at his/her own expense. Alongside with other details, the Law provides that *an offer for the purchase of property shall also include a proposal about compensation for a piece of property, which is insignificant due to its size, form or condition or is of a low value due its economic infeasibility but is linked with the property subject to purchase in a way that it is unusable without that property.* The Law obliges the expropriator to submit the evaluation results to the proprietor in writing indicating the basis used to determine the compensation. The law also establishes the list of documents that an expropriator shall handover to the proprietor of the property before expropriation is implemented.

Where the expropriator and the proprietor reach the agreement they sign the **contract on compensation for expropriated property**. if they do not reach the agreement, each party shall have the right to file a lawsuit with a court.

A court is authorized to appoint an independent expert to have the property evaluated. Based on the expert's report and evidence submitted by the parties, a court will make a **final determination about the value of compensation**. Besides, under this Law a court is authorized to determine the type of compensation of the property subject to expropriation on its own, based on a reasoned motion of a party.

One of the final Articles of the Law deals with **evaluation of an agricultural land and determining the compensation value**. The Law provides that evaluation of an agricultural land shall also take into account the value of any crops seeded in the land, which should be calculated by taking into account the revenues the proprietor would receive during the current economic year. The value of any crops seeded in an agricultural land after the property evaluation has been carried out will not be taken into account in determining the compensation value.

Thus the Law covers only general issues of compensation for material damage (land and general property). The law does not touch the issue of compensation for non-pecuniary and other forms damage.

2.2.2 Expropriation procedures under exigent circumstances

Organic Law of Georgia "on Rules for Expropriation of Property in the Public Interest under Exigent Circumstances" adopted in 1997 supposed to describe in details the procedures of expropriation of property under the urgent need. However it, in fact, is very general and gives rise to several questions. The Law consists of six articles, one sentence each. There have been no changes introduced to the Law from 1997 to 2013. And in 2013 the Law was amended twice - in January and in September. These changes clarified some issues, but the whole picture remains unchanged - the Law still consists of six articles defining the general principles, which cannot be transformed into specific procedures.

As mentioned above, Article 2 of the Law defines the situation that can be deemed "Exigent Circumstances". Until 2013 this did not include **state of war and emergency situation**. As a result of 2013 changes state of war and emergency was added to the list, alongside with ecological disaster, natural disaster epidemic, and epizootic. It is noteworthy that until 2013 there was an Article in the Law (Article 5) which stated that the provisions of this law would not be applicable in the state of war and emergency situation; in the event of declared war or emergency the decision would be made on the basis of "statutory rules of war or emergency". This entry in the law exists until today; as regards rules of decision-making, they are not determined by law neither before, nor after 2013 amendments.

By law, until 2013, the following persons had the right to decide on expropriation: President of Georgia, the Ministry, Ministry of an Autonomous Republic or local government body on whose territory is the property. As a result of 2013 amendments President of Georgia no longer has this authority; the other entities retain expropriation right. Note shall be taken of the fact that the law does not define which specific body is responsible for the decision on a specific case, and what are the applicable procedures.

Articles 4 and 5 of the Law relate to compensation issues. However, the law does not clarify what shall be compensated: in one case (Article 4) it is the price of the property subject, in another case (Article 6) - acquisition of property and the damage. Article 4 states that compensation amount shall be defined by "an authorized state agency". At the same time, before 2013 amendments a state agency would determine compensation amount on the basis of its market price. After 2013 amendments an authorized agency shall determine the compensation amount "proceeding from the principles of preliminary, full and fair compensation".

Article 4 clearly indicates that the cost of object of property has to be paid to the proprietor before deprivation of property.

And Article 6, the last one, makes it more precise that the decision on expropriation and compensation (or as provided in the law - “the decision on deprivation of property on the basis of preliminary, full and fair compensation principles and compensation for damage”) can be challenged in court only after the termination of the state of emergency, because of which the expropriation was considered to be an urgent need.

Summing up one can say that organic law of Georgia “on Rules for Expropriation of Property in the Public Interest under Exigent Circumstances” is too general and vague. The Law has never been applied so far. Application of the Law in its present form increases the risk of litigation.

2.2.3 Expropriation procedures in oil and gas operations

As mentioned above, there is another Law regulating expropriation for oil and gas operations. It is the Law of Georgia “on Oil and Gas” adopted in 1999. Only a few paragraphs of the Law are devoted to expropriation issues. One of the paragraphs explains “Eminent Domain”, and three paragraphs of Article 20 (“the Land Allotment”) refer to the implementation of Eminent Domain. Below is a short review of legal procedures under this Law:

- the Law explains “Eminent Domain” as follows: “in case of public necessity, temporary alienation of land and private property attached to it by the state on the basis of a judicial decision and with an appropriate compensation.” This explanation demonstrates the following elements of Eminent Domain:
 - the need for “public necessity”;
 - the land is alienated temporarily and not for good; however the law does not clearly specify the timeframe of temporary alienation, and says nothing about what happens after the expiry of this timeframe;
 - a court makes the decision on alienation;
 - the alienation shall be exercised “with an appropriate compensation”.
- Eminent Domain shall be implemented according to the Constitution of Georgia and the Law of Georgia on Oil and Gas”. In other words **the regulations established under the Law of Georgia “on Rules of Expropriation of Property for Urgent Public purposes” shall not apply in oil and gas operations.**
- Pursuant to Para 2 of Article 20 an investor shall, before the contract with the State on oil and gas operations is signed, sign an agreement with the landowner (if he is a natural or legal person) for transfer of an exclusive right to use the land to the investor for the effective period of the oil and gas contract.
- Pursuant to Para 4 of Article 20, if an investor fails to reach an agreement with the landowner about the use of his/her plot of land to carry out oil and gas operations for a specified period of time, the investor may apply to the Oil and Gas State Agency - a LEPL under the Ministry of Environment and Natural Resources Protection - “for the initiation of an eminent domain proceeding”. Thus, comparative analysis of the explanation of “eminent domain”, and Para 2 and 4 of Article 20 makes it clear that **If an investor fails to reach an agreement with the landowner about the use (not acquisition) of his/her plot for a certain period of time, the investor, having successfully passed the eminent domain procedure, will to get the land for temporary use.** The Law gives no explanation on when, how and on what terms (at least general principles) shall the land be returned in the ownership to the landowner.
- The Law grants the Agency the following rights:
 - take the decision on initiating eminent domain proceeding at the investor’s request;
 - file an application with the court to start a case on eminent domain;
 - develop and adopt “appropriate rules and normative acts” to exercise eminent domain.
- The court determines a compensation amount to be passed to the landowner
- After the application is filed with the court, the investor shall be obliged to pay all expenses required for the eminent domain proceeding, including a compensation amount determined by the court;
- The last, Para 5 of the Law is likely to determine the process publicity, but in fact says nothing about accessibility of information and ensuring public participation in decision-making. According to the Law “ all parties involved may participate in public hearings of the eminent domain proceeding” but the Law does not clarify who are “parties involved?” When, on which stage of decision-making, to conduct a public review? etc.

2.3 Review of the cases of expropriation

Cases of practical application of Organic Law of Georgia “on Rules for Expropriation of Property in the Public Interest under Exigent Circumstances “ are unknown. Hence, this chapter shortly reviews the cases of expropriation of property “for urgent public purposes” in implementing development projects under the Law of Georgia “on Rules of Expropriation of Property for Urgent Public purposes” from 1999 until 10 July 2016.

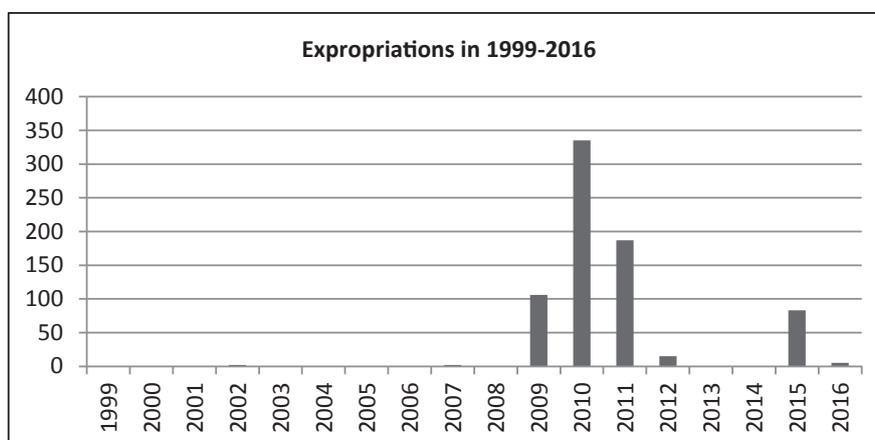
The review is based on the analyses of administrative and legal acts on expropriation for the needs of a particular development project that are posted on “ Legislative Herald of Georgia” web-page. These acts were adopted on the **first stage** of decision-making described in chapter 2.2.1 of this paper - determination of the inevitability of expropriation for urgent public purposes and the subject who may be granted the Right to Expropriation.

As revealed, 35 legal acts on expropriation cases have been adopted since the time of enactment of the Law up to now. Since, at the initial stage of the Law, the authority of taking the decision on expropriation laid upon the President, ten of them were issued by the President (1999-2010) and 25 - by Minister of Economy and Sustainable Development (2010-2016).

All, except one, acts on expropriation relate to transport infrastructure projects: 22 - on construction of roads and associated buildings; 11- railway construction projects, and 1- cableway project. The only exception is the Presidential Order N#263 of 27 May 2002 concerning the construction of “Sameba” (Trinity) Cathedral in Tbilisi. Whereas road and railway construction are included in the list of activities allowed under the Law of Georgia “on Rules of Expropriation of Property for Urgent Public purposes”, it is disputable whether construction of religious building can be considered urgent public need. It is unclear which provision of law governed the President in his decision. Presumably, it was a general , provision, so called “open-ended “ provision of law (“construction of buildings and public facilities”) allowing for a variety of interpretations. Later, in 2016 Minister of economy and Sustainable Development, was also governed by open-ended clause of the Law in justifying the need for expropriation for a cableway project. A construction of cableway is not included in the list provided for by law; however, essentially it is close to the activities listed there. In this case the issue may be less disputable than in the case of religious building, especially given the fact that the project was implemented in Chiatura where cableway, in fact, is public transport.

In this context one of the road construction projects - reconstruction of 13-th and 14-th kilometers of Batumi-Akhhaltsikhe road is noteworthy. As becomes clear from Ministerial Order about the inevitability of expropriation for the needs of this project¹⁵, the construction of the road and associated buildings became necessary due to the construction of a hydropower station by “Ajar Energy 2007” company; in other words, the road construction project (which implies raising roads, construction of diaphragm wall and protective stone mound to avoid flooding the territory adjacent to the hydropower station) is part of the hydropower station project, and the latter is a commercial one. Regardless this fact, the expropriation was justified by “urgent public need”, the company was granted expropriation right and four landowners were forcibly deprived of their property. The Minister, when issuing the order, was governed by the list of activities allowed under the Law of Georgia “on Rules of Expropriation of Property for Urgent Public purposes”, in accordance to which expropriation of property for “road and highway construction” can be deemed urgent public need.

The timing of the cases of expropriation is also interesting. The diagram below shows the number of cases of expropriation¹⁶ in 1999-2016 by years.



¹⁵ Order #1-1/177 of 5 May 2015 by Minister of Economy and Sustainable Development "on granting the right of expropriation for urgent public need to "Ajarenergy-2007"

¹⁶ The diagram covers expropriation cases involving both, natural and legal persons. For this period there were only 6 cases of deprivation of property of legal persons which is only 0,8% of total number of cases (735)

When reasoning about the number of cases of expropriation and trends of growth or reduction, it should be borne in mind that the orders about expropriation often do not contain the name of those who suffered damage, the property, or at least the amount. Thus, it is a strong signal to, that real number of persons deprived of their property much exceeds that indicated in the above diagram.

As can be seen from the diagram, only few cases of expropriation were recorded before 2009 (two - in 2002, and two - in 2007). In 2009 more than 100 natural persons were deprived of their property; next year, in 2010 the expropriation cases tripled as compared to previous year, and exceeded 300 (only one of 335 cases involved a legal person, the rest 334 were natural persons). In 2011 the number of cases reduced as compared to previous year, but remained quite high (187 cases); and in 2012 it rapidly reduced to 15 cases. After a short break in 2013-2014, the number of cases again increased and exceeded 80; and in 2016 (as of 10 July), there are only five known cases of expropriation.

Naturally, it is interesting to know the reason for the sharp increase in the number of cases of expropriation in 2009-2011. As is evident from legal acts issued during this period, most of the cases of expropriation were linked with two projects: Batumi highway construction project and Tbilisi railway bypass project. For the first project the expropriation affected 358 persons, and for the second - 259 persons. Yet again, it should be reiterated that real number of affected people is much higher, but even these figures lead to important findings.

From the above data it is clear that the largest number of expropriation - 84 percent - for the entire period of the law (1999-2016) were executed in connection with two transport infrastructure projects in urban areas - in Batumi and Tbilisi. The implementation of infrastructure projects in densely populated areas is especially sensitive due to the fact that they affect private property, state property and the interests of many parties in general. It is for this reason that these projects must be planned with extreme caution, paying special attention to justification of the project and its public need, choosing the alternative that would not infringe upon the rights and interests of the affected sides.

A large number of acts issued in connection with the above mentioned two projects, and their timing suggests that the decisions were being taken in the course of the project, rather than its initial stage. Social impacts of projects and the need for expropriation have not been well enough studied from the very beginning of the project, let alone identification of alternatives in order to avoid expropriation. Moreover, in case of Tbilisi bypass railroad, the very necessity of the project was not justified! "Georgian Railways" started the implementation of the project in 2009; suspension of the project followed the change of the company management. The new management re-examined the project and found that, among other problems, the project would increase the company's operating costs by 35% and is unprofitable. By then 214 million GEL had already been spent, the land for the project was bought (some through negotiations, some - through applying the right to expropriate), and part of project facilities had been built. In 2012 "Georgian Railways, at the consent of Tbilisi municipality and Georgian government, suspended the project for 18 months. This period should have been used for improving the technical and operational parameters of the project. The resumption of the project was scheduled for 2016, but until today it is not clear what to expect¹⁷.

Tbilisi bypass railway project is interesting also for demonstrating another aspect of expropriation system in Georgia. In the event of non-implementation of the project (if no need for land acquisition, i.e. if "Urgent social need" no longer exists, it would be fair to return land to former owners should they wish so. Regrettably, Georgian legislation does not provide right of pre-emption of the former owner. This aspect of expropriation is not at all regulated by Georgian law.

And finally, speaking about legal acts regarding expropriation, the attention should be paid to the decision-making procedures.

According to five acts issued in 1999-2016 Ministry of Economy and Sustainable Development of Georgia gives himself the right to expropriate (all five acts concern Karsi-Akhalkalaki railroad construction project). It appears that the party interested in acquiring the rights to the expropriation, and the agency, that decides whether there is "a public need" are the same organizations. This situation cannot ensure the adoption of unbiased and fair decision.

In this context, the composition of an advisory body of the Ministry of Economy and Sustainable Development - Commission to address the issue of the right of expropriation for public purposes - is also noteworthy. As mentioned in Para 2.2.1 of this paper the Minister makes decision on the basis of this Commission's resolution. From 2010 to 2013 the Commission composed of 7 people was fully staffed by employees of the Ministry of Economy and Sustainable Development (deputy ministers and Ministry officials). In 2013 the number of Commission members increase to 10 and deputy ministers of Justice, Regional Development and Infrastructure and Finances were included in the Commission. In 2013 this Commission

¹⁷ For additional information on the project and project caused forced displacement see "Forced displacement due to Tbilisi bypass railroad", Green Alternative, 2014 <http://bit.ly/2agVIG8>

took decisions on a number of expropriation cases, where the parties interested in acquiring the right of expropriation were Roads Department of Georgia and Municipal Development Fund (See the attachment). The first agency is subordinate to the Ministry of Regional Development and Infrastructure, and the second one - an LEPL under the same Ministry. Hence, here again, one and the same agency (its entities) - Ministry of Regional Development and Infrastructure - are interested in acquiring the right of expropriation and are taking the decision on it.

Here, we briefly touch on the review process and decision-making by the Commission. Minutes of the Commission sessions until 2015 are practically identical: they do not indicate, based on which information (assessment, study) the commission makes decision and, whether the issues were discussed at all. All of them are bare listing of facts - "heard, discussed, decided": "heard" - the information on the issue, "discussed" - the issue, "decided" - grant the right of expropriation. After 2015 the minutes become more "diverse" - "discussed" section of them reflects the dispute between the parties. The dispute between the parties is usually the question of compensation amount. The dispute ends up with the words of a commission member (chair or deputy chair) "the commission is not authorized to discuss compensation issue". The competence of the Commission is to discuss whether implementation of the project is urgent public need, and how inevitable is expropriation. But the Commission does not discuss issues falling within its competence just confining itself to a decision on **granting the right of expropriation** to the party interested in obtaining this right. In the end this Commission decision automatically jump in Ministerial orders, which also grant the right of expropriation to parties seeking the expropriation right.

Here, again we need to recall that the decision on expropriation under the law of Georgia "on Rules of Expropriation of Property for Urgent Public purposes" shall be made in two stages: in the first stage - The Minister shall, with his order, determine **the inevitability of expropriation for urgent public purposes and the subject who may be granted (!)** the Right to Expropriation. Final decision on inevitability of expropriation and granting the right of expropriation to a person seeking such right shall be taken by district (town) court. Practically all except first two (which are generally too vague), acts presented in the attachment **directly grant** the right of expropriation to particular organizations/bodies thus violating the law of Georgia "on Rules of Expropriation of Property for Urgent Public purposes". Besides, this practice diminishes the role of the court in the process of making decision on expropriation; it turns out that the court just approves the decision of Ministry of Economy and Sustainable Development.

3. Compliance of Georgian expropriation law with UN voluntary guidelines on responsible governance of tenure

As mentioned in the introduction, the UN guidelines adopted in 2012 touches upon important issues of tenure of land and land use system including expropriation issues. In particular, its section 16 provides all basic principles to be met by national legislations in expropriation sphere.

After adopting the Guidelines UN itself, and other international organizations started developing themed manuals in support of the Guidelines. In June 2016 World Resource Institute published an analytical research¹⁸ which considers whether national expropriation laws in 30 countries across Asia and Africa follow the international standards established by UN. It analyzes laws against a set of 24 indicators "expropriation indicators" to ascertain the conformity status. We have used these 24 indicators to establish the compliance of Georgian legislation in expropriation sphere with UN guidelines.

In the below tables 24 expropriation indicators are divided into 5 thematic groups as is in the World Resource Institute's research. First appropriate paragraphs of the guideline are presented in the tables; in the end of the tables we give our assessment of compliance status of Georgian legislation with specific indicators. The indicators in World Resource Institute's research ask yes/no questions about the legal provisions established in expropriation laws; where laws partially satisfied the question asked, possible answer was "partially". Thus, here we also base our assessment on three options - "complies", "does not comply", "partially complies". In some instances answers are accompanied by references to previous chapters.

¹⁸ Tagliarino, N. 2016. "Encroaching on Land and Livelihoods: How National Expropriation Laws Measure Up Against International Standards." Working Paper. Washington, DC: World Resources Institute <http://www.wri.org/publication/encroaching-on-land-and-livelihoods>

3.1 Justification of public purpose

VGGT, section 16.1: States should clearly define the concept of public purpose in law, in order to allow for judicial review.	
Indicator	1. Is “public purpose” clearly defined to allow for judicial review?
Georgian legislation	Complies partially (see chapter 2.1 above)

3.2 Limitations on the amount and type of land that can be expropriated

VGGT, section 16.1: [States should acquire only] the minimum resources necessary.	
Indicator	2. Must the government expropriate only the minimum amount of land necessary to achieve a public purpose?
Georgian legislation	Does not comply

VGGT, section 16.2: States should be sensitive where proposed expropriations involve areas of particular cultural, religious or environmental significance, or where the land... [is] particularly important to the livelihoods of the poor or vulnerable.	
Indicator	3. Are areas of cultural, religious, and environmental significance given special protection? 4. Is land that is held by poor and vulnerable groups given special protection?
Georgian legislation	3. Does not comply – Georgian legislation does not contain any provision on these issues. 4. Does not comply – Georgian legislation does not contain any provision on these issues.

VGGT, section 16.5: Where the land... [is] not needed due to changes of plans, States should give the original rights holders the first opportunity to re-acquire these resources.	
Indicator	5. Must the government grant reacquisition rights when the land is no longer needed for a public purpose?
Georgian legislation	Does not comply - Georgian legislation does not contain any provision on this issue.

3.3 Expropriation process

VGGT, section 16.2: States should ensure that the planning and process for expropriation are transparent and participatory. Anyone likely to be affected should be identified, and properly informed and consulted at all stages.	
Indicator	6. Prior to expropriation, must the government identify all affected populations? 7. Prior to expropriation, must the government inform affected populations about the acquisition plan, including the reasons for expropriation? 8. Prior to expropriation, must the government consult affected populations?
Georgian legislation	6. Does not comply (see chapter 2.2 above) 7. Does not comply (see chapter 2.2 above) 8. Does not comply (see chapter 2.2 above)

3.4 Compensation

VGGT, section 16.1: [States] should respect all legitimate tenure rights holders, especially vulnerable and marginalized groups, by... providing just compensation in accordance with national law.	
Indicator	9. Are customary tenure holders with formally recognized tenure rights entitled to compensation? 10. Are customary tenure holders without formally recognized tenure rights entitled to compensation? 11. Are users of undeveloped land (land used for hunting, grazing, and other purposes) entitled to compensation?

Georgian legislation	<p>9. Does not comply – Georgian legislation does not recognize customary tenure rights, even though traditional tenure systems are still in place in the mountainous regions of Georgia. In 1993-2003 the Law on Ownership of Agriculture Land contained provisions which recognized traditional community ownership on pastures. In 2003 the law was amended and these provisions were just cut.</p> <p>10. Does not comply</p> <p>11. Does not comply</p>
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VGGT, section 16.3: States should ensure a fair valuation and prompt compensation... Among other forms, the compensation may be, for example, in cash, rights to alternative areas, or a combination.	
Indicator	<p>12. Must the government follow a gender-sensitive approach to calculating compensation?</p> <p>13. Must compensation reflect the economic activity associated with the land?</p> <p>14. Must compensation reflect the improvements on the land?</p> <p>15. Must compensation reflect the historical/cultural connections associated with the land?</p> <p>16. Is compensation payable in alternative land as an alternative or in addition to cash?</p>
Georgian legislation	<p>12. Does not comply</p> <p>13. Does not comply</p> <p>14. Does not comply</p> <p>15. Does not comply</p> <p>16. Complies</p>

VGGT, section 16.3: States should ensure... prompt compensation in accordance with national law.	
section 16.6: All parties should endeavor to prevent corruption, particularly through use of objectively assessed values, transparent and decentralized processes and services, and a right to appeal.	
Indicator	<p>17. Must compensation be afforded prior to the taking of possession or within a specified time-frame?</p> <p>18. Can affected populations negotiate compensation levels?</p> <p>19. Can affected populations challenge compensation in court or before a tribunal?</p>
Georgian legislation	<p>17. Complies</p> <p>18. Complies</p> <p>19. Complies</p>

3.5 Rehabilitation and resettlement

VGGT, section 16.8: States should, prior to eviction or shift in land use which could result in depriving individuals and communities from access to their productive resources, explore feasible alternatives in consultation with the affected parties... with a view of avoiding, or at least minimizing, the need to resort to evictions. Section 16.9: States should, to the extent that resources permit, take appropriate measures to provide adequate alternative housing, resettlement or access to productive land.	
Indicator	<p>20. Are displaced persons legally entitled to a relocation allowance?</p> <p>21. Are displaced persons granted alternative land and housing?</p> <p>22. Must the alternative land granted to displaced persons be “productive” land?</p> <p>23. Must the government consult displaced persons during the resettlement process?</p> <p>24. Must the government avoid or minimize forced evictions?</p>

Georgian legislation	<p>20. Does not comply</p> <p>21. Complies partially</p> <p>22. Does not comply</p> <p>23. Does not comply</p> <p>24. Does not comply</p>
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As it is clear from the tables above Georgian expropriation law does not largely with the UN voluntary guidelines on responsible governance of tenure. From 24 indicators Georgia fully complies only with four, partially – with two and does not comply at all with 18 indicators.

Conclusion and recommendations

As shows this paper Georgian expropriation law needs significant perfection, including in terms of its compliance with international standards established UN. Below we focus on a number of urgent measures to be implemented shortly.

Georgian transport sector priority today is capacity building and further development, which implies building and reconstruction of roads, railroads, port infrastructure, airports, cargo terminals, and logistics centers. According to the data available most of expropriation cases are related to such projects. As of April 2016 eleven road infrastructure projects are being implemented in Georgia, and 21 more are planned¹⁹. The government deems them “the projects of special national and public importance”. The probability is high that the projects affect privately owned lands, or lands of traditional, or common use. To avoid possible conflict and to protect human rights it is urgently necessary that:

1. Provide a clear conceptualization of “urgent public need” in the law. At the same time decision-making on expropriation for “urgent public need” shall be transparent and participatory; the decision itself shall be well justified. Alongside with clear definitions, the development of so called checklist would facilitate the decision-making process.
2. The list of activities (projects) that may entail “urgent public need” for expropriation under the Law of Georgia “on Rules of Expropriation of Property for Urgent Public purposes” needs to be revised. In particular “mining operations” must be removed from the list because this is commercial activity aiming, first of all at making a profit. This activity can serve public interests and “urgent public need” only in exceptional cases - when it serves to avoidance of negative consequences for the public or reduction of damage.
3. Decision-making on expropriation needs to be revised so, that any biased or unfair decision is ruled out, especially in its first stage when a party seeking the right of expropriation may, at the same time turn out to be the decision-making party (or participate in decision-making process).
4. Laws should ensure that expropriation is maximally avoided (including through examination of the project on it early planning stage, detailed study of alternative ways, and consultations with project affected population) and is applied only as a last resort, when all other possibilities are exhausted.
5. The process of registration of land property rights in the public cadastre in Georgia will last for more than one year. It is important that the rights of land owners, and those who use land, have legitimate right to it but have not registered property rights in public cadastre, are not violated when implementing development projects. It is also important that the rights and interests of local population who use common space (pastures, parables etc.) and depend on it are not infringed. Appropriate amendments need to be introduced in the law so that such owners and users are fairly compensated for the loss or/and restriction of their rights. The same procedures shall be applied to them as would be the case if their rights had been officially registered in public cadastre.
6. Compensation calculation methodology needs to be improved; including, so that both material and non-material damage are fully compensated. Here again, the development of guidelines or a checklist would facilitate the process.
7. The whole expropriation process, from its initiation and justification of its inevitability, to its implementation and monitoring shall be transparent and participatory. Full information on forced displacement caused by the project, including resettlement plans, project documentation, agreements between the government and project initiator (if any), natural and social environment impact assessment report, etc. shall be available to the public In every stage of the project.

¹⁹ Decree of the Government of Georgia #655 of 15 April 2016 "On approval of the list of development projects of special national and public importance to be implemented by legal entities under the Ministry of Economy and Sustainable Development. <https://matsne.gov.ge/ka/document/view/3262370>

8. The law governing not only expropriation procedures but also, more generally, the issues of forced displacement caused by development projects shall be developed and adopted. In other words, not only deprivation of property for certain compensation shall be regulated under the law, but also the stage when a proprietor has to sell the property due to a development project (whether caused by “urgent public need” or a commercial project). The law, governing forced displacement caused by development projects does not exist in Georgia, equally as is no official agency responsible for this process.



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