

LEGAL REPORT SINDH FLOOD EMERGENCY HOUSING RECONSTRUCTION PROJECT

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PREPARED FOR:

SINDH PEOPLES HOUSING FOR FLOOD AFFECTEES

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ABBREVIATIONS AND DEFINED TERMS

Unless otherwise specified / defined herein, all capitalized terms used in this Report shall bear the meanings set out below. References to any law, rule, regulation, policy or order include any amendments, modifications or any re-enactment thereof.

TERM	DEFINITION
Beneficiary / Beneficiaries	Has the meaning set out in Section 2.1 of this Report.
CDC	Has the meaning set out in Chapter 5 of this Report.
CDC Act	Has the meaning set out in Chapter 5 of this Report.
CDS	Has the meaning set out in Chapter 5 of this Report.
Colonization Act	The Sindh Colonization of Government Lands Act, 1912.
Companies Act	Companies Act, 2017.
Constitution	The Constitution of the Islamic Republic of Pakistan, 1973.
DLTRS	Digital Land Title Registration System.
EDTS	Has the meaning set out in Section 5.2 of this Report.
ELN	Has the meaning set out in Section 5.2 of this Report.
ELRA	Has the meaning set out in Section 5.2 of this Report.
ENTA	Has the meaning set out in Section 5.2 of this Report.
GoP or Government	Government of Pakistan ¹ .
GoS	Government of Sindh ² .
Goth-Abad Act	The Sindh Goth-Abad (Housing Scheme) Act, 1987.
Goth-Abad Rules	The Sindh Goth-Abad (Housing Scheme) Rules, 2008.
HMCO	Haidermota & Co.
KETR	Has the meaning set out in Section 5.2 of this Report.
KLRA	Has the meaning set out in Section 5.2 of this Report.
KLRR	Has the meaning set out in Section 5.2 of this Report.
Land Acquisition Act	The Sindh Land Acquisition Act, 1894.

¹ Where any matter is required to be referred to or determined by the Federal (GoP) or Provincial Government (e.g., GoS), in light of the Mustafa Impex Judgment this should be construed as requiring consent from, referral to or determination by the Federal Cabinet or Provincial Cabinet (as applicable). Paragraph 84(iii) of the Mustafa Impex Judgment in summarizing the conclusions of the SC states as follows: “Neither a Secretary, nor a Minister and nor the Prime Minister are the Federal Government and the exercise, or purported exercise, of a statutory power exercisable by the Federal Government by any of them, especially, in relation to fiscal matters, is constitutionally invalid and a nullity in the eyes of law. Similarly, budgetary expenditure, or discretionary governmental expenditure can only be authorized by the Federal Government i.e., the Cabinet, and not the Prime Minister on his own”.

² Ibid.

MPR	Has the meaning set out in Section 5.2 of this Report.
NAPR	Has the meaning set out in Section 5.2 of this Report.
NLTA	Has the meaning set out in Section 5.2 of this Report.
NLTR	Has the meaning set out in Section 5.2 of this Report.
Project	Has the meaning set out in Section 2.1 of this Report.
Proposed Legislation	Has the meaning set out in Section 6.1 of this Report.
Registration Act	The Registration Act, 1908, as adopted by the Province of Sindh.
SC	The Supreme Court of Pakistan.
Land Revenue Act	The Sindh Land Revenue Act, 1967.
SLTA	Has the meaning set out in Section 5.2 of this Report.
SLTR	Has the meaning set out in Section 5.2 of this Report.
SPHF	Sindh Peoples Housing for Flood Affectees.
Stamp Act	The Stamp Act, 1889, as adopted by the Province of Sindh.
Transfer of Property Act	The Transfer of Property Act, 1882, as adopted by the Province of Sindh.

IMPORTANT NOTE

This Report aims to provide a high-level conceptual framework to SPHF for the implementation of the Project.

Please note that the action points or recommendations identified in this Report are purely to assist SPHF with the implementation of the Project and is not an exhaustive list of recommendations and considerations that SPHF should evaluate in proceeding with the Project.

In the preparation of this Report, we have exercised as much care as can reasonably be expected. HMCO has assumed and not verified the validity, accuracy or completeness of the factual information shared by SPHF.

EXCLUSIONS & RELIANCE

- As per our agreed scope of work, we have not commented on any (direct or indirect) technical, financial and taxation matters in preparing this Report. It is our view that experts in the relevant fields should be better able to render an opinion on such issues and matters as the same is outside our scope.
- While this Report contains analysis of the electronic land transfer and registration laws of other jurisdictions, our interpretation of such laws and any recommendations based on such interpretation is based on a plain reading and understanding of such laws and should not be construed as an opinion on the meaning and scope of such laws, as we are only qualified to advise on the laws of Pakistan.
- This Report, to the extent of GoS-owned land, has been prepared in reliance of SPHF's intimation that the GoS has legal and valid title to such land and has the authority to further transfer the same to the Beneficiaries.
- HMCO will not, under any circumstances whatsoever, be liable to any person for any loss or damage, whether direct or indirect, resulting from and/or arising out of reliance on any information contained in this Report.
- This Report is not a legal opinion. Issues / observations that have been flagged in this Report are based on HMCO's view of matters to be highlighted for consideration by SPHF. This is based on what HMCO has considered as material, which may differ from the views of SPHF. HMCO shall not be held liable to any person, body or third party for omitting any matter that SPHF considers as material but does not form part of this Report.
- We have not reviewed any information or document relating to any litigation proceedings pending or filed before any court / tribunal in respect of the land to be transferred to the Beneficiaries, as the same falls outside our scope of work.

- This Report is intended solely for the benefit of SPHF. Sharing this Report or disclosure of the contents hereof with any other third party is restricted unless the prior written approval of HMCO has been obtained.

CHAPTER 1 – OVERVIEW OF REPORT

INTRODUCTION

The devastation caused by the floods in Sindh in 2022 has left millions of people homeless.

As part of its rehabilitation program, the GoS / SPHF is assisting the Beneficiaries with the reconstruction of their homes. The GoS / SPHF has also taken a policy decision to transfer (where feasible) ownership rights to the Beneficiaries in the land on which their houses are being built / rebuilt. Some of the Beneficiaries are located on land that is owned by the GoS while others on land which is owned by private parties. GoS / SPHF intends to transfer legal ownership rights to the Beneficiaries in land owned by both the GoS and private parties.

The primary objective of the Project, therefore, is to formulate and implement the necessary legal, technical and administrative framework to enable the transfer of both GoS owned and privately owned land to the Beneficiaries in a fair, transparent and legally efficient manner.

This Report aims to set out: (i) the conceptual legal framework for the implementation of the Project; and (ii) identify certain policy decisions that need to be taken by GoS/SPHF.

NEED FOR A NEW REGULATORY FRAMEWORK

There is a plethora of legislation in Sindh regulating the transfer and registration of land title, as well as the creation and registration of mortgage over land, and we have discussed the relevant legislation in detail in Chapter 3. The provincial laws regulate both the transfer of GoS owned land to individuals as well as the compulsory acquisition of private land. However, majority of these laws are archaic, and the registration process set out therein is cumbersome, expensive, and open to abuse.

There is one legislation in the Province of Sindh that deals with a mechanism to grant land to deserving persons, i.e., the Goth-Abad Act which allows the grant of up to two (2) ghuntas of GoS owned land to deserving persons. The Goth-Abad Act also allows the GoS to acquire land from private owners for transfer to deserving persons. However, for acquiring private land, the GoS requires (in our view) the consent of the private owner even where the land is proposed to be acquired under the Land Acquisition Act.

Given that we have been informed by SPHF, that the GoS wishes to digitalize the land transfer process (along the lines of the CDC for share ownership in a company), the best option would be to enact a new legislation which provides for a modern and efficient mechanism for transfer of both GoS owned and privately owned land to the Beneficiaries.

DIGITALIZATION OF LAND TRANSFER IN OTHER JURISDICTIONS

Given that the objective is to implement a new regulatory framework allowing the digital transfer of land title to the Beneficiaries and the digital creation of mortgage over such land, we have carried out a detailed examination of the digitalization process adopted in other jurisdictions so that we understand and note the key features that should be incorporated in the proposed new law. In this respect, we have examined the laws of Kenya, Estonia, Singapore, Australia, New Zealand, and Georgia, and the key features of these laws have been summarized in Chapter 5 of this Report.

Most jurisdictions (that we have examined) have enacted a specialized law to supplement their existing land transfer and registration legislation. The new law contains provisions that enable the setting up of the digital infrastructure (such as an electronic registry and an online portal) for the electronic transfer and registration of land title. The laws prescribe the process which transferors must follow for transfer of their land and prescribe the criteria that the registrar must apply for accepting or rejecting an application for registration, including the documents that the registrar must review before approving the registration.

The laws contain an appeal process against the registrar's decision and also specify the form of the electronic title issued to the transferee once the process is complete. Of course, the digitization process is not without its own unique set of risks, and we have identified and discussed some of the key risks in Chapter 5 of this Report.

CERTAIN CONSTITUTIONAL MATTERS

Legal / constitutional considerations, when acquiring land from private parties, need careful scrutiny.

As examined in Chapter 4, the right to property is the one of the "*Fundamental Right*" guaranteed under the Constitution, however, the same is subject to reasonable restrictions imposed by law in the public interest. The Government can compulsorily acquire a property for public purpose under the Constitution and is under no obligation to obtain consent from the private landowners. Notwithstanding this, the Government cannot dispense with the payment of compensation for compulsorily acquired land and the private landowner shall be entitled to just, fair, reasonable and adequate compensation.

Furthermore, on the basis of our extensive research into Pakistani jurisprudence, it appears that there is no possibility of carving out an exception (on the basis of an overriding public policy) whereby the GoS can compulsorily acquire a privately owned land without payment of compensation. Any such attempt is likely not only to be unconstitutional but also repugnant to the injunctions of Islam.

The jurisprudence developed over time prescribes three conditions for compulsory acquisition of private land:

- (i) Land must be acquired in accordance with law / authority of law (to be satisfied by the promulgation of the Proposed Legislation);
- (ii) The acquisition must be for a public purpose (rehabilitation of displaced Beneficiaries); and
- (iii) Compensation must be paid for the acquisition based on market value.

The most viable option for acquiring land from consenting private owners, without payment of any compensation, is by way of a voluntary gift. However, the Proposed Legislation will grant sufficient flexibility to SPHF / regulator to acquire private property through any other (legally permissible) manner it deems fit.

We have also explored the possibility of claims of discrimination being brought by non-Beneficiaries on the basis that they are not allotted title to land or funds for the rehabilitation of their houses. As discussed in Chapter 4, the established jurisprudence of the superior courts of Pakistan allows differential treatment of citizens based on a reasonable classification, i.e., an intelligible / objective differentia which distinguishes persons or things that are grouped together from those left out. So long as the Proposed Legislation sets out the basis on which a person would qualify as a “Beneficiary”, the risk of a successful challenge on the basis of discrimination can be greatly mitigated. Certain policy decisions will be required (see Chapters 4 and 7) to establish, as far as practical, such reasonable classification.

NEW REGULATORY FRAMEWORK

The new regulatory framework would involve the enactment of the new GoS Policy and the new Proposed Legislation, which will regulate the transfer of title of both GoS owned and privately owned land to the Beneficiaries. Please note that while we will help identify and draft the enabling policy framework and law, the software and technology to be used at the back end for the safe, transparent, and uninterrupted operation of the DLTRS will have to be developed and structured by SPHF’s technical experts. The Proposed Legislation will, *inter alia*³:

- empower SPHF or establish a new regulatory authority for implementing and regulating the Project. Proposed powers of the new authority have been discussed in detail in Chapter 6.
- provide for the establishment of the DLTRS system through which land will be transferred and registered in favour of the Beneficiaries and will also enable future transfer of land by Beneficiaries, and creation of mortgage over such land in favour of third parties.
- set out the process for transfer of both:
 - (i) GoS owned land and privately owned land to SPHF;
 - (ii) land from SPHF to the Beneficiaries.
- set out an objective criteria and mechanism through which SPHF / new regulatory authority will identify the Beneficiaries and digitally transfer legal title of land to them. The Project is intended to benefit those Beneficiaries who were granted funds by SPHF for rebuilding their homes as part of its flood relief program. However, the Proposed Legislation will be drafted to allow title to also be transferred to individuals whose houses been indirectly affected by the flood, for instance, by virtue of being in the same vicinity as the Beneficiaries or if the house is in the flood affected area.
- allow Beneficiaries to digitally transfer the land to a third party or mortgage the same electronically.

³ For a detailed discussion, please see Chapter 6.

- propose a dispute resolution mechanism to resolve any disputes that may arise regarding the transfer of digital land title to Beneficiaries.
- supersede the Registration Act, the Land Revenue Act and the Stamp Act and nothing contained therein shall apply to the registration, transfer, lease and creation of mortgage over land regulated by the Proposed Legislation.

CHAPTER 2 – INTRODUCTION TO THE PROJECT

2. INTRODUCTION

2.1 BACKGROUND AND OBJECTIVES OF THE PROJECT

SPHF, a special purpose company incorporated by the GoS under Section 42 of the Companies Act, is currently engaged in the implementation of its flood relief program, which, *inter alia*, involves disbursement of funds to flood affectees (the “**Beneficiaries**”) so that they can rebuild their homes which were damaged due to the recent floods in Sindh.

To rehabilitate the Beneficiaries, SPHF intends to transfer ownership rights to Beneficiaries in the land on which their houses are being built / rebuilt. Some of the Beneficiaries are located on land owned by the GoS while others on land owned by private parties. SPHF intends to transfer legal ownership rights to Beneficiaries in land owned by both the GoS and private parties (the “**Project**”).

The primary objectives of the Project, therefore, are to:

- formulate and implement the necessary legal, technical and administrative framework to enable the transfer of both GoS owned and privately owned land to the Beneficiaries in a fair, transparent and legally efficient manner.
- set-up a new authority to oversee the transparent and (ultimately) digital transfer of legal title in land to the Beneficiaries (as well as recording subsequent, purchase, sale, mortgage and inheritance).
- transfer legal ownership rights from both government owned and privately owned land to Beneficiaries.

2.2 SCOPE OF THE REPORT

The scope of this Report is to, *inter alia*:

- identify the existing legal and administrative framework in respect of the implementation of the Project (including relevant constitutional principles and relevant pronouncements of courts relating to Islamic injunctions) and provide pros and cons of the various structures in light of the foregoing;
- identify options available to SPHF for the acquisition of land from GoS and private parties;

- propose amendments to the existing legal and administrative framework for implementation of the Project;
- identify options available to SPHF for transfer of GoS owned and private owned land to Beneficiaries, including legal analysis of steps to be taken in respect of Supreme Court of Pakistan's decision in 2012 banning allotment of Government land;
- analyze the digital transfer of land title and maintenance of digital land records in other jurisdictions and propose the legal framework for the digital transfer of land title to the Beneficiaries together with creation of mortgage over such land for financing purposes through the new digital system;
- propose the structure, powers, governance structure, administrative and funding framework of the new regulatory authority (including, exploring the possibility of SPHF being the regulatory authority for the implementation of the Project) with the objective of replacing the existing land title and transfer system to the maximum extent possible;
- propose conceptual framework / roadmap, including options available to SPHF for implementing the Program; and
- identify certain policy matters that require further input and discussions.

CHAPTER 3 – IMPLEMENTATION STRUCTURE OF THE PROJECT

3. NEED FOR A NEW LAND TRANSFER AND REGISTRATION REGIME

The Project involves transfer of both GoS owned and privately owned land to the Beneficiaries. Accordingly, the question that requires consideration is whether the Project can be implemented under the existing land transfer and registration regime in Sindh or whether there is a need to introduce a new regulatory framework tailored specifically for the transfer of land title to the Beneficiaries.

3.1 EXISTING LAND TRANSFER AND REGISTRATION REGIME OF SINDH

There is a plethora of legislation regulating the transfer and registration of land title, as well as the creation and registration of mortgage over such land. The provincial laws regulate both the transfer of GoS owned land to individuals as well as the compulsory acquisition of private land.

We set out below a high-level overview of the key laws that regulate the transfer and registration of land title in Sindh.

The Goth-Abad Act

Under the Goth-Abad Act, the GoS can transfer up to two (2) “ghuntas”⁴ of GoS owned land to “*deserving persons*” in rural areas for construction of houses, free of cost (please see Sections 3 and 4 of the Goth-Abad Act). The Goth-Abad Act empowers the GoS to establish housing schemes for deserving persons on GoS owned land.

The term “*deserving person*”⁵ has been defined in the Goth-Abad Act as “*a person residing in area notified by the Government as rural areas who is in genuine need of residential accommodation in a village*”. In case it is determined that the relevant land does not fall within “*rural area*”, then the GoS may, in terms of Section 2(2-A) of the Goth-Abad Act, through notification, declare the same to be “*rural area*” for the purposes of the Goth-Abad Act.

The Goth-Abad Act also allows the GoS to acquire land from private owners for transfer to deserving persons. However, based on a plain read of the law it appears that for acquiring private land, the GoS requires consent of the private owner and the land has to be acquired under the Land Acquisition Act. Acquisition of land under the Land Acquisition Act involves a time consuming and cumbersome process, which can take several years to complete,

⁴ One (1) ghunta is equal to (approx.) 1089 sq. ft.

⁵ The term “*deserving person*”⁵ has been defined in the section 2 (1) (f) of the Goth-Abad Act as “*a person residing in area notified by the Government as rural areas who is in genuine need of residential accommodation in a village*”..

and is often subject to lengthy litigation proceedings. Further, under the Land Acquisition Act, land can only be acquired subject to payment of compensation at the prevailing market rate.

The steps involved for transfer of GoS owned land to deserving persons under the Goth-Abad Act are as follows:

Step 1: The Collector⁶ in consultation with the Allotment Committee prepares a housing scheme⁷ in the manner set out in **Steps 2 to 5** below.

The Goth-Abad Act provides that one or more Allotment Committee(s), consisting of not more than seven (7) members, shall be set up by the Collector for dehs⁸ in a taluka or town in the following manner:

(I)	Project Director ⁹ or any Officer nominated by him	Chairman
(II)	Assistant Commissioner	Member
(III)	Mukhtiarkar (Goth-Abad) of the concerned District	Member
(IV)	Mukhtiarkar (Revenue) of concerned Taluka or Town, as the case may be	Member
(V)	Three Nek Mards of the area to be nominated by the Competent Authority	Members

Step 2: The Project Director constitutes a survey team to carry out the survey or demarcation in the deh(s) for the purposes of allotment of land under the Goth-Abad Act.

Step 3: The survey team is required to carry out a survey of: (i) the houses already constructed and existing in the deh; and (ii) the open state land suitable for allotment. The survey team records the results of the survey and demarcation of the houses and open state land in a register.

Step 4: After completion of the survey and demarcation of the houses and the land, the Collector prepares a housing scheme for the establishment of a new village or conferment of proprietary rights to a deserving person who has already built a house in an existing village. Layout plan or sketch of the housing scheme is prepared and approved by the Collector. However, the housing scheme cannot be prepared on any private land which has not been acquired under the Sindh Land Acquisition Act or land which has been reserved by the Government for any other purpose. Further, in order to include private land in a housing scheme, consent of the owner is required.

Please note that Section 8 (*Liability of Acquisition*) of the Goth-Abad Act provides that any land including the Asaish¹⁰ and residential sites on which houses have been built for permanent residence can be acquired at any time for the purposes of the Goth-Abad Act in accordance with the provisions

⁶ "Collector" means collector of the District or any person authorised by the Government of Sindh ("Government") to perform such functions.

⁷ Under Section 2(i) of the Act, "housing scheme" means a scheme prepared under Section 4 of the Act.

⁸ Under section 2 (e) of the Act, "deh" means deh or estate as defined in the Land Revenue Act, 1967.

⁹ "Project Director" means the officer appointed by the Government as the Project Director Sindh, Gothabad, Board of Revenue.

¹⁰ Under Section 2(c) of the Act, "Asaish" means the land adjacent to a village and reserved for grazing and other common use of the village community.

of the Land Acquisition Act, provided that the land or residential site shall not be acquired if the house is built by the owner of such land or residential site.

Step 5: The open state land shall be allotted by the Collector in the shape of plots not exceeding two ghuntas with separate numbers, for the construction of a house to a deserving person in the deh in which he ordinarily resides free of cost. The aforesaid limit shall not apply to the land or Asaish whereupon a deserving person has built a house before the coming into force of the Goth-Abad Act with a view to make up permanent residence in the existing villages.

Please note that the allotment shall only be made after verification as well as on the recommendation of the Allotment Committee.

Step 6: After allotment is made under the Goth-Abad Act, the Grantee¹¹ shall be issued a “Sanad” in the form attached to the Goth-Abad Rules.

Step 7: A deed of conveyance conferring proprietary rights shall be executed, stamped and registered at the cost of the Grantee which shall be termed as the “Land Grant Document”. On the basis of this deed, an entry shall be made in Village Form-II of the Goth-Abad Rules.

Step 8: One deserving member of a family holding an identity card shall be eligible for issuance of allotment of plot.

Step 9: All Grantees of land shall abide by the terms and conditions of allotment grant mentioned in Rule 6 of the Goth-Abad Rules. In addition to this, the Grantees shall execute a separate agreement with regards to the terms and conditions of allotment or grant in the prescribed form in Appendix-II as set out under Rule 7 of the Goth-Abad Rules.

Land is granted to deserving persons under the Goth-Abad Act on the following conditions:

- a. Grantee shall construct the house within a period of three (3) years from the date of issuance of Sanad (which period may, from time to time, be extended by the Collector).
- b. Grantee shall allow the Collector or Project Director or his representative or all of them to enter the plot or house at reasonable hours for the purpose of survey, demarcation or measurement or for the purpose of verifying compliance or non-compliance of any terms and conditions of the allotment or grant.
- c. The plot shall be non-transferable for a period of ten (10) years and the allotment and grant shall be deemed to be held on restricted tenure, and the right, title, interest of Grantee shall not be transferred or changed by any sale, gift, sub-lease or otherwise except the “foti-khata badal” in favor of legal heirs of the deceased Grantee, with the prior permission of the Collector or on attachment by the bank or financial institution for the recovery of the loan¹².

¹¹ Under Rule 2(e) of the Goth-Abad Rules, “Grantee” means the allottee who has been given proprietary rights by a grant under Section 5 of the Act.

¹² Rule 6(3) of the Goth-Abad Rules.

- d. Grantee may mortgage his/her plot or house for obtaining a loan from the House Building Finance Corporation or any bank or financial institution.
- e. No amalgamation of plot shall be permitted without the prior permission of the Competent Authority¹³.
- f. Grantee shall abide by the directions or instructions issued by the Government, provided that such directions or instructions are not inconsistent with the Goth-Abad Act and the Goth-Abad Rules.
- g. If the plot is abandoned by the Grantee, it shall revert to the Government for further disposal.
- h. The Collector may, after giving the Grantee an opportunity of being heard, cancel the allotment or grant and resume the plot, if, he is satisfied that the Grantee:
 - (i) has furnished wrong information for securing the allotment or grant; or
 - (ii) has committed a breach of the conditions of the allotment or grant; or
 - (iii) has failed to fulfill or perform any condition of the allotment or grant.However, the Grantee shall be given reasonable time to rectify the breach committed before the land is resumed by the Collector.

For acquisition and transfer of private land, the Goth-Abad Act does not provide an effective mechanism as it relies on the traditional acquisition process. Given that we have been expressly informed by SPHF, that the GoS does not wish to follow the process under the Land Acquisition Act for acquiring privately owned land, the best option would be to enact a new legislation which provides for a modern and efficient mechanism for transfer of both GoS owned and privately owned land to the Beneficiaries.

The Colonization Act

The Colonization Act allows the GoS to declare any land owned by the GoS as a “colony” and grant property rights to “tenants” in such land. The tenant is generally granted land for a specific use and the grant is subject to compliance with certain specific conditions. Further, the tenant has to make payments to the GoS for use of the land. Likewise, any transfer of tenancy rights or sub-leasing of such land is subject to the prior approval of the GoS and the GoS can reacquire possession of the land from the tenant if there is a violation of the conditions on which the land was granted to it. The Colonization Act, therefore, regulates the conditional transfer of government owned land to tenants. Given that the GoS intends to grant freehold title to the Beneficiaries, without receiving any payment from the Beneficiaries for the use of such land, the Colonization Act will have limited utility for the implementation of the Project.

Also, the Colonization Act applies only to GoS owned land and does not extend to privately owned land.

¹³ “Competent Authority” means the Minister (revenue) or any officer authorized by him in this behalf.

Land Acquisition Act

The Land Acquisition Act has been briefly discussed above in the context of the Goth-Abad Act, and as noted above, it allows the GoS to compulsorily acquire land from private parties subject to payment of compensation. The process for acquiring land under the Land Acquisition Act is a time-consuming process and the actual possession of land can take several years.

Transfer of Property Act

The Transfer of Property Act, *inter alia*, sets out the principles and legal framework for the transfer of property (movable and immovable), creation of leases and mortgage of property. Subject to the amendments that we will propose to the Transfer of Property as part of Phase II of the Project, the Transfer of Property Act, in our proposed scheme, will continue to apply to the land transferred to the Beneficiaries (except to account for digital land transfers that will be regulated pursuant to the Proposed Legislation).

Registration Act and the Stamp Act

Under Section 17 of the Registration Act, a document such as a sale deed, which records the transfer of legal title and interest in land is compulsorily registrable with the relevant sub-registrar. At the time of registration, a registration fee has to be paid to the GoS. The registration process in the Province of Sindh involves the physical registration of the sale deed with the sub-registrar in the presence of the buyer, the seller and witnesses. The registration process is cumbersome and in remote areas, people often have to travel a considerable distance to have their documents registered. The traditional registration process, especially in rural areas, is notorious for requiring parties to engage in corrupt practices to have their legal title registered. Further, manipulation of land records for transfer of land to influential landowners is fairly common.

The Stamp Act prescribes the stamp duty payable to the GoS upon the execution of certain instruments / documents. Stamp duty is payable upon the execution of a sale deed and is calculated on basis of the value of the property.

The need for new legislation

Majority of the laws regulating the transfer, registration and acquisition of land in the Province of Sindh were enacted more than a century ago and, in our view, the transfer, registration and record keeping process set out therein is archaic and is prone to manipulation and abuse.

The Project, therefore, provides the GoS with a unique opportunity to overhaul the land transfer, registration and security creation laws of Sindh on a pilot basis, by creating a new regulatory framework to ensure the transparent, efficient and digital transfer of land title to the Beneficiaries.

In Chapter 5 of this Report, we will analyse in detail the various mechanisms introduced in other jurisdictions for digitalization of their conveyancing and land registration process. In Chapter 6 of this Report, we have discussed the key features of the proposed new legislation.

CHAPTER 4 – ACQUISITION OF PRIVATE LAND

4. ACQUISITION OF PRIVATE LAND FOR THE REHABILITATION OF THE BENEFICIARIES

As noted in the previous Chapters, SPHF intends to transfer legal title of both GoS owned land (including asaish land) as well as private land over which the Beneficiaries are located to such Beneficiaries. We understand that SPHF would like to explore whether SPHF / GoS can compulsorily acquire private land for transfer to the Beneficiaries without seeking the consent of the private land owners and/or without paying market-based compensation to them.

In this Chapter we explore the legal and constitutional vires of SPHF's proposal together with the options available to it for acquisition of private land.

4.1 PROPERTY RIGHTS RECOGNIZED BY THE CONSTITUTION

Article 4 of the Constitution provides that the right of individuals shall be dealt in accordance with law, every citizen shall have the protection of law, and no action detrimental to the life, liberty, body, reputation, or property of any person shall be taken except in accordance with law.

Furthermore, the citizens of Pakistan have been guaranteed certain “*Fundamental Rights*” including the right to acquire, hold and dispose of property. Article 23 of the Constitution states:

“23. Provisions as to property.

Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan subject to the Constitution and any reasonable restrictions imposed by law in public interest.”

It is evident from the aforesaid provisions that the right to hold property is a fundamental right guaranteed by the Constitution. However, the right to acquire and hold property is not an absolute right and can be qualified subject to *reasonable restrictions* being imposed by law in the public interest.

Reasonable restriction has been interpreted to be one which is imposed with due regard to the public requirement which it is designed to meet. It has been held by the Superior Courts of Pakistan that anything arbitrary or excessive will be outside the bounds of reason in the relevant regard. Furthermore, in considering disadvantage imposed upon the individual in relation to the advantage which the public derives, it is necessary that the Court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the Court should consider whether it is a reasonable restraint, in the sense of not bearing excessively on the individual and at the same time being the minimum that is required to preserve the public interest.¹⁴

¹⁴ *Messrs East and West Steamship Co. vs. Pakistan* (PLD 1958 SC 41)

The Honourable Supreme Court of Pakistan has decided that it is the cardinal principle that the “Fundamental Rights” guaranteed under the Constitution are subject to the overriding necessity or interest of community, therefore, a balance must be struck between the rights of individuals and the interests of the community. Hence if in serving the interests of the community, an individual or number of individuals have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable. Thus, the Government can curtail “Fundamental Rights” in public interest and in accordance with law by placing reasonable restrictions, however, the reasonable restriction shall not mean arbitrary exercise of power or unfettered or unbridled powers which would be outside the scope of reasonable restrictions.¹⁵

Furthermore, the Honourable Supreme Court observed that a restriction is unreasonable if it is for an indefinite or an unlimited period or disproportionate to the mischief sought to be prevented or if the law imposing the restrictions has not provided any safeguard at all against arbitrary exercise of power.

Importantly, Clause (1) of Article 24 states that “[n]o person shall be compulsorily deprived of his property save in accordance with law”.

It follows from the above, that notwithstanding that the right to hold property is a fundamental right guaranteed by the Constitution, not only can the said right be qualified by imposing reasonable restrictions but, in certain circumstances, the private property of a person can be compulsorily acquired. The concept of compulsory acquisition of land is discussed in greater detail in the next section.

4.2 COMPULSORY ACQUISITION OF LAND UNDER THE CONSTITUTION

As noted in the previous section of this Report, Article 24 carves out an exception to the right to property guaranteed by the Constitution and states that no person can be deprived of property except as provided by law. Article 24(2) of the Constitution specifies the conditions which must be fulfilled for compulsory acquisition of property:

(2) No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.

The Supreme Court of Pakistan in the case of Federal Government Employees Housing Foundation vs. Malik Ghulam Mustafa and others, 2021 SCMR 201 whilst interpreting Article 24(2) held that the Constitution permits compulsory acquisition of private property if three conditions are met: (i) *the land must be acquired pursuant to some law*; (ii) *the acquisition must be for public purpose*; (iii) *law must provide for the determination of compensation and its disbursement*. The same principle has been upheld by the court in various judgments. The relevant part of the judgment is reproduced as follows:

¹⁵ *Pakistan Muslim League (N) vs. Federation of Pakistan* (PLD 2007 Supreme Court 642)

*“the Constitution permits compulsory acquisition if three conditions are met; **firstly**, the acquisition must be for public purpose; **secondly**, the land must be acquired pursuant to some law; and, **thirdly**, such law must provide for the determination of compensation and its disbursement.”* [Emphasis added]

Accordingly, as per the Supreme Court, the following conditions need to be met for compulsorily acquisition of private property:

- (i) Land must be acquired in accordance with law/ authority of law (to be satisfied by the promulgation of the Proposed Legislation);
- (ii) The acquisition must be for a public purpose (rehabilitation of displaced Beneficiaries); and
- (iii) The compensation must be paid for the acquisition.

Articles 24(3) of the Constitution affirms the validity of certain laws enabling compulsory acquisition of private property and states that:

(3) *Nothing in this Article shall affect the validity of __*

(a) any law permitting the compulsory acquisition of taking possession of any property for preventing danger to life, property or public health; or

(b) any law permitting the taking over of any property which has been acquired by, or come into the possession of, any person by any unfair means, or in any manner, contrary to law; or

(c) any law relating to the acquisition, administration or disposal of any property which is or is deemed to be enemy property or evacuee property under any law (not being property which has ceased to be evacuee property under any law); or

(d) any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or

(e) any law providing for the acquisition of any class of property for the purpose of __

(i) providing education and medical aid to all or any specified class of citizens; or

(ii) providing housing and public facilities and services such as roads, water supply, sewerage, gas and electric power to all or any specified class of citizens; or

(iii) providing maintenance to those who, on account of unemployment, sickness, infirmity or old age, are unable to maintain themselves, or

(f) any existing law or any law made in pursuance of Article 253.

Further, in respect of the compensation specified in any law allowing compulsory acquisition of land, Article 24(4) of the Constitution states that:

(4) *The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any Court.*

We shall now examine in detail the conditions which must be met if SPHF / GoS intend to compulsorily acquire land from private landowners.

4.3 **LAND MUST BE ACQUIRED IN ACCORDANCE WITH LAW/ AUTHORITY OF LAW**

The first condition that must be satisfied for compulsory acquisition of private property is that the proposed acquisition must be carried out under the authority of law.

In the matter of Sub (Retd.) Muhammad Ashraf vs. District Collector, Jhelum, (reported as PLD 2002 Supreme Court 706), the Supreme Court held that:

“There is no cavil with the proposition that the sanctity of private property has been acknowledged in a crystal clear manner but it must not be lost sight of that where a person is deprived of his property under the authority of law and according to the provisions of law, he has no ground for complaint under the Constitution and the only embargo which has been imposed under Article 24 of the Constitution is that no private property can be acquisitioned save in accordance with law and that too for a public purpose and on payment of compensation. It can thus be concluded that a land can be acquired for public purpose subject to payment of compensation to be determined by the competent forums provided under the Act.”

Likewise, the Divisional Bench of the Lahore High Court in the matter of Hakim Ali vs. Member Power WAPDA and others, 2002 Lahore 28, while interpreting Articles 4 and 24 of the Constitution held that:

“From the reading of Articles 4 and 24 of the Constitution the wordings "except in accordance with law" and "save in accordance with law" are of great significance. It means that if a person or authority is performing the functions and doing the work in accordance with law, then these Articles of the Constitution will have no applicability in the set of circumstances. The necessary implication would be that when a person is deprived of his property under the authority of law and according to the provisions of law, he will have no grievance or ground to complaint about the said action under the provisions of the Constitution. Moreover, right to hold property is subject to reasonable conditions, which include the restriction of the same being acquired in accordance with law.”

Accordingly, compulsory acquisition of private property under authority of law (and subject to compliance with the other conditions discussed below) is expressly permitted under the Constitution and recognised by the Courts. Given that in our proposed scheme, acquisition of private property will take place as per the terms of the Proposed Legislation, the acquisition of private property for the Beneficiaries will satisfy the first condition stipulated in Article 24 of the Constitution.

4.4 THE ACQUISITION MUST BE FOR A PUBLIC PURPOSE

The term public purpose has not been expressly defined under Article 24 of the Constitution. However, Courts in Pakistan have interpreted the same as aiming for the promotion of general interest of the community at large as opposed to the particular interest of an individual.¹⁶ Further, the Superior Courts have observed that it is not for the courts but the government to decide what constitutes as a “*public purpose*” and when the government has decided, then the courts must presume that the government was possessed of all the necessary facts which induced it to declare that purpose to be a public purpose.¹⁷

It is imperative to note that provision of housing to a particular class of persons has been held by the Supreme Court of Pakistan to be a public purpose.¹⁸ The Supreme Court observed as follows:

“Provision of residences is not by itself a matter falling outside the concept of a “public purpose” provided that it is a part of a scheme for making general provision of that character. Secondly, the provision of residences for a particular class of persons, even though it may operate so as to provide a particular residence for a particular member of that class is also not excluded from the meaning of the expression “public purpose” nor does it make any difference whether the residences are for completely unprivileged persons like coolies, or for those enjoying patronage of Government in capacity of officers.” [emphasis added].

It follows from the above, that provision of houses generally falls within the ambit of “public purpose” and the acquisition of private land for transfer to the Beneficiaries should meet the public purpose requirement set out in Article 24 of the Constitution. To ensure that there is no ambiguity on this issue, the preamble to the Proposed Legislation should expressly state that the Project and acquisition of land for the Project has been carried out for a “public purpose”, i.e., the transfer of land to the Beneficiaries for their rehabilitation.

4.5 PAYMENT OF COMPENSATION

We will now discuss the view adopted by the Superior Courts regarding payment of compensation for compulsorily acquisition of land.

¹⁶ *Allah Ditta and others vs. Province of Punjab*, PLD 1997 Lahore 499.

¹⁷ *Muhammad Ashraf Khan vs. Revenue E.A.C. and others*, 1980 CLC [Lahore] 1504.

¹⁸ *Pakistan vs. Muhammad Ali*, PLD 1960 Supreme Court 60; and *Federal Government Employees Housing Foundation vs. Malik Ghulam Mustafa*, 2021 SCMR 201.

It has been consistently held by the Superior Courts of Pakistan that since depriving a person of property is an exception to the fundamental right to hold and enjoy property, if a property of a person is being acquired for public purpose, then he should be “*promptly compensated*” for the compulsorily acquired property.¹⁹

In the matter of *Land Acquisition Collector and another vs. Abdul Wahid Chaudhry and others*, 2004 YLR 608, it was held that if the property of a person is being acquired for public purpose, then he should be given adequate, fair, just and due compensation. Moreover, the Court observed that considerations and factors for determining compensation of the land vary from time to time, location to location keeping in view the use present and future, its vicinity and ambience and there cannot be any fixity of criteria thus the assessment of fair compensation is to be made objectively, however, the burden of proving entitlement to higher rate of compensation is on the landowner. The High Court further held that:

“The Land Acquisition Act, 1894 enables the State to acquire property of someone for public purpose. No one can ordinarily object to such acquisition, despite his unwillingness to lose his property, and he can only ask for compensation. If his property is being taken the public purpose and interest, he is to be given adequate, fair, just and due compensation. The property might in a particular case be the only source of his income or the acquisition may render him shelter less. The Court being guardian of the fundamental rights of the citizens thus, has to keep all this in mind while dealing with the cases of this nature and ensure award of due and fair compensation to the erstwhile landowner.”

In the matter of *Federal Government and others vs. MST. Zakia Begum and others*, (reported as PLD 2023 SC 277), a three member bench of the Supreme Court of Pakistan whilst placing emphasis on the fact that the Constitution mandates that if there is any acquisition by the state, it will be under a statute, which provides for due process and compensation, discussed the relevant factors to be taken into consideration while determining the amount of compensation. The Court was of the opinion that the land must be valued as per its market value which is the price a willing buyer would give to a willing seller and must also include its potential value. The Court further observed that the potential value of the land means the value of the land based on the probability that if developed, considering its locations and proximity to the residential, commercial, or industrial areas and with amenities such as roads, water, gas, electricity, communication network and suitability it has the potential to be developed which will increase its value. It was further observed that the land must include the potentiality of the land because this is the value which the landowners would benefit from if they were able to maintain ownership over the land. The Supreme Court held that in absence of any mathematical formula, which is to be applied uniformly in every case, each case is to be seen in the context of its own facts, but potential value has to be factored along with its market value.²⁰ The relevant extract of the judgment is reproduced below:

“land must be valued as per its market value which is the price a willing buyer would give to a willing seller and must also include its potential value. Potential value means the value of the land based on the probability that if developed, considering its location and proximity to residential, commercial or industrial areas with amenities such as roads, water, gas, electricity, communication network and suitability it has the potential to be developed, which will increase its value. The value of land must include the potentiality of the land because this is the value, which the landowners would benefit from if they were able to maintain their ownership over the land. So

¹⁹ *Bibi Shah ban and others vs. Land acquisition collector, A.C Mardan and others* (reported as 2019 SCMR 599).

²⁰)

far as the determination of potential value, there is no mathematical formula, which is applied uniformly in every case. Each case is seen in the context of its own facts but potential value has to be factored along with the market value. The objective is to ensure that the landowner not only gets the actual value of the land at the time it is acquired but also gets the value based on any future prospects attached with the use of land.”

We have examined various other judgments of the superior courts of Pakistan all of whom uphold and reiterate the same principle that if land is to be compulsorily acquired from a private owner, the owner must be fairly compensated. We have not come across any recent judgment of the superior courts where compulsory acquisition of land without payment of any below market-based compensation has been upheld.

4.6 PROPERTY RIGHTS RECOGNIZED BY ISLAM

We have also examined the seminal case of *Qazalbash Waqf and others vs. Chief Land Commissioner, Punjab, Lahore and others*, (reported as PLD 1990 Supreme Court 99), in which the Shariah Appellate Bench of the Supreme Court examined the concept of compulsory acquisition of private land and struck down as un-Islamic the land reforms introduced by the land reforms legislation of 1959, 1972 and 1977 .

The Honourable Court observed that the Quran has specifically stated that the wealth/ property of any individual which is taken away without consent and without paying compensation is not “*Halal*” and the right of private ownership of land must be respected by everyone, including the government.

In order to determine whether the land can be acquired without the consent of the owner, the Honourable Court discussed the concepts of “*Zaroorat*”, “*Hajat*” “*Manfiat*”, “*Zeenat*” and “*Fazool*”.

The concept of “*Zaoorat*” has been defined/ interpreted as a situation “*where a person would die other than certain acts which are not permissible by Islam*”. On the Contrary “*Hajat*” has been defined/ interpreted as “*mere hardship caused to a person if certain actions are not performed*”. Furthermore, the concept of “*Hajat*” has been extended to include the concept of “*Ijtimai Hajat*” (Hardship caused to the Public).

On the contrary the concepts of “*Manfiat*” “*Zeenat*” and “*Fazool*” are situations in which a person would not die nor would he face severe hardships if certain actions prohibited by Islam are not performed.

The Honourable Court carved out an exception to the general rule and observed that only in cases of “*Zaroorat*”, and “*Ijtimai Hajat*” a person is allowed to do something that is not permissible in Islam. Therefore, applying the same principles to the acquisition of land, the government can compulsorily acquire the land, only in the situations of “*Zaroorat*” and “*Public Hajat*”. In respect of the concept of “*Zaroorat*”, it was held that:

“...Falah in both worlds, particularly next one, cannot be achieved by nationalization and compulsory appropriations, as a philosophy. As a rule Islam prohibits these methods. As an exception for what strictly is “ZAROORAT” in Islam it is permitted but very rarely-- that too for the minimum period to tide over specific “ZAROORAT”. Thus the answer is in the negative.

Answer: subject to answer No. 2 the answer here also is to the qualified negative. However in case of exception visualised there in while compensation is a must it is only one of the several alternatives. One being, that the property be returned after utilization for the 'ZAROORAT, with compensation for use' and occupation, the other is that similar property be offered another is that a settlement be reached with consent. Where the, 'ZAROORAT' or 'ZARAR' are Permanent and or imminent and compensation in cash is the only alternative its payment can be postponed, for example, till after a sudden war, Answer: As already stated it will be possible only in cases 'ZAROORAT'. State and public purpose would also have to be defined in the light of the various shades of Islamic "ZROORAT/ZARAR". As to the limitations on such acquisition, the answer is in the affirmative with the qualification that would be necessary on this subject due to modern needs of State."

The Shariat Appellate bench, therefore, was of the view, that even if land is acquired compulsorily because of "Zaroorat", compensation must be paid to the owner. However, in certain instances, such as war, compensation can be deferred.

Accordingly, as per the principles laid down in the Qazalbash judgment, government can acquire the property of an individual without his/her consent in cases of "Zaroorat" and "Public Hajat". However, the government must compensate the landowner for depriving him/her from his/her property.

Prior to the Qazalbash judgment, in the matter of *Hafiz Muhammad Ameen etc. vs. Islamic Republic Pakistan*, (reported as PLD 1981 Federal Shariat Court (FSC) 23), the FSC was of the view that it did not have jurisdiction to review the Land Reforms Act, 1977 and the Land Reforms Regulations of 1972. One of the justifications provided by the FSC was that its jurisdiction was barred by Article 24(3) of the Constitution. However, in the Qazalbash judgement, the Appellate Bench of the FSC held that this view was not tenable and Chapter 3-A of the Constitution granted the FSC powers to examine any law or provision of law to determine whether it was repugnant to the injunctions of Islam. Accordingly, following the Qazalbash judgment, even if a law provides that no compensation is to be paid to a private landowner for compulsory acquisition of land and notwithstanding the protection provided by Article 24(3) of the Constitution, such a law can be challenged and struck down on the grounds that it is contrary to the injunctions of the Islam.

Compensation, therefore, has been held by our courts to be an integral component of compulsory acquisition of land.

4.7 POSSIBILITY OF CARVING OUT AN EXCEPTION TO PAYMENT OF COMPENSATION

In light of the established jurisprudence of the superior courts, we have also examined the merits of some of the arguments that may be raised for carving out an exception to the general principle discussed in the previous section, i.e., that payment of compensation is necessary for compulsory acquisition of private property. We set out the arguments considered by us below:

- i. Article 24(3)(e)(ii) of the Constitution provides that nothing in the Article 24 shall affect the validity of any law providing for the acquisition of any class of property for the purpose of providing housing and public facilities and services to all or any specified class of citizens. From a bare reading of Article 24(3)(e)(ii), it appears that the conditions mentioned in Article 24(2) shall not be applicable to the acquisition of land for providing housing and public facilities and services to any specified class of citizens. However, it is noteworthy that the Honourable Supreme Court of Pakistan (after the Qazalbash judgment) has not interpreted Article 24(3)(e)(ii) as providing an exception to Article 24 and/ or acquiring land without paying compensation. In fact, as noted above, the superior courts have repeatedly held that compensation is an essential condition

for compulsory acquisition and in the Qazalbash judgment, it was expressly held that notwithstanding Article 24(3), a law providing for compulsory acquisition without compensation can be struck down on the basis that it is contrary to the injunctions of Islam.

- ii. We have also examined whether the Beneficiaries and/ or the GoS can acquire the land of a private individual by way of adverse possession²¹. This argument no longer has any force because the Shariat Appellate Bench of the Honourable Supreme Court of Pakistan has held that a person cannot deprive another of his property by merely taking over possession of that property or being in possession for a certain period. Adverse possession of property cannot take away anything from the ownership of the original owner of that property.²² The concept of adverse possession, therefore, is no longer recognised in Pakistan and has been struck down as un-Islamic.
- iii. As discussed in the previous sections, Article 24(4) of the Constitution states that where compulsory acquisition is taking place under law, the adequacy of the compensation provided by such law shall not be called into question.
- iv. An argument can be made that if the Proposed Legislation provides for nominal or no compensation, then under Article 24(4) of the Constitution, the vires of the compensation paid under the Proposed Legislation cannot be challenged. This argument, in our view, has no force as majority of the reported judgments pertaining to compulsory acquisition of land, generally, pertain to the aggrieved party challenging the adequacy of compensation and the superior courts generally do not decline to ascertain whether the compensation paid to the private owner was adequate. In fact, a primary concern of the superior courts has been to ensure that private landowners are adequately compensated and in their recent judgments, such as in the matter of *Federal Government and others vs. MST. Zakia Begum and others* (discussed above), they have gone as far as to set out the criteria for calculating the compensation to be paid to private landowners.

4.8 OPTIONS FOR ACQUISITION OF PRIVATE LAND

We gather from the information shared with us by SPHF that approx. seventy percent (70%) of the land to be transferred to the Beneficiaries belongs to the GoS. We further understand that of the remaining thirty percent (30%) privately owned land, quite a few of the landowners are willing to transfer the land to the Beneficiaries without any compensation (and we have discussed in the next section the manner in which land should be acquired from such consenting owners). The question of payment of compensation, therefore, becomes relevant only in respect of a small percentage of landowners who are not willing to transfer their land to SPHF / Beneficiaries.

In respect of such private owners, the GoS has two options: (i) it can either compulsorily acquire land from such owners under the Proposed Legislation without paying any compensation; or (ii) acquire land after payment of compensation.

²¹ Adverse possession is a legal process recognized in some jurisdictions whereby a non-owner occupant of a piece of land gains title and ownership of that land after a certain period of time by virtue of his uninterrupted and unchallenged possession of land.

²² *Maqbool Ahmad vs. Government of Pakistan* (reported as 1991 SCMR 2063) and *Mst. Kulsoom Bibi and others vs. Muhammad Amin Agha* (reported as 2022 SCMR 929)

4.9 ACQUISITION OF LAND WITHOUT PAYMENT OF COMPENSATION

If land is compulsorily acquired from non-consenting private owners under the Proposed Legislation, without payment of compensation, then such an action could render the Proposed Legislation and the Project susceptible to legal challenge. SPHF should note that even if one landowner challenges the vires of the Proposed Legislation, on the grounds that the said Act deprives private owners from their property without payment of compensation, it could potentially result in all the compulsory acquisition of private land being declared illegal and unconstitutional. A petitioner could potentially also obtain an injunction from the court and prevent SPHF / GoS from implementing the Project. Non-payment of compensation, therefore, carries substantial risk and SPHF / GoS should be aware of the same if they intend to not pay compensation to the non-consenting private owners.

4.10 ACQUISITION OF LAND WITH COMPENSATION

If compensation is to be paid to the non-consenting private owners, then we would propose a simplified acquisition process in the Proposed Legislation, which would override the compulsory land acquisition process set out under the Land Acquisition Act, so that land can be acquired from private owners expeditiously. Be that as it may, we have recommended below that the best course of action for acquiring land from private owners would be in the form of a gift, please see sections 4.11 onwards for further details. The Proposed Legislation would also provide an objective and transparent criteria for providing compensation to private owners. We would require inputs from SPHF's technical and financial teams / consultants for determining the criteria to be set out under the Proposed Legislation for determining compensation.

4.11 ACQUISITION OF LAND FROM CONSENTING LANDOWNERS

The most viable option for acquiring land from consenting private owners, without payment of any compensation, is by way of a gift. This is because unlike a sale, which requires payment of consideration, a gift can be made by one person to another without requiring payment of any compensation. However, the Proposed Legislation will grant sufficient flexibility to SPHF / regulator to acquire private property in any other (legally permissible) manner it deems fit.

4.12 INGREDIENTS OF VALIDLY CONSTITUTED GIFT

Principle 149 of the Muhammadan Law stipulates the following in respect of the essentials for a valid gift:

“The three essentials of a gift. –

It is essential to the validity of a gift that there should be

(1) a declaration of gift by the donor;

(2) an acceptance of the gift, express or implied, by or on behalf of the donee; and

(3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in S.150. If these conditions are complied with, the gift is complete.”

The High Courts of Pakistan have consistently held that a valid gift of immovable property must meet three conditions, i.e., (i) there must be an offer, (ii) acceptance of the gift; and (iii) delivery of possession of the gift without any shadow of doubt²³.

In respect of the gift of immovable property, the superior courts have held that the land being transferred by way of gift by the donor should be in the possession of the donee immediately upon the signing and witnessing of the gift deed. This is because once a gift has been made, the title/ownership of the same transfers from the original donor and vests with the donee²⁴.

Under Section 17 of the Registration Act, a gift deed for immovable property is compulsorily registrable.

SPHF could consider simplifying the gifting process through the Proposed Legislation. For instance, the Proposed Legislation could provide the form of gift declaration which is to be signed by each donor. The Proposed Legislation could stipulate that none of the provisions of the Registration Act or the Stamp Act will apply to the gift and the donor's land will stand transferred to SPHF / regulator and SPHF / regulator will be deemed to have possession of the said land from the date of signing of the declaration form. Further, the Proposed Legislation should expressly bar the donor from subsequently revoking the gift and bar any subsequent challenge to the gift by any third party.

REVOCATION OF GIFT

The principles for revocation of gifts have been set out in Principle 167 of the Muhammadan Law, which states as follows:

“Revocation of gifts.- (1) A gift may be revoked by the donor at any time before the delivery of possession. The reason is that before delivery there is no completed gift at all.

(2) Subject to the provision of sub-section (4), a gift may be revoked even after delivery of possession except in the following cases:

...

(d) when the thing given has passed out of the donee's possession by sale, gift or otherwise;

(3) A gift may be revoked by the donor but not by his heirs after his death. It is the donor's law that will apply to a revocation and not of the donee.

²³ Manzoor v. Mst. Bakhan Mai Khokhar (reported as 2010 CLC 328 Lahore High Court)

²⁴ Mst. Mussarat Iqbal Niazi v. Judge Family Court (reported as 2013 CLC 276 Lahore High Court)

(4) Once possession is delivered, nothing short of a donee of the Court is sufficient to revoke the gift. Neither a declaration of revocation by the donor nor even the institution of a suit for resuming the gift is sufficient to revoke the gift. Until a decree is passed, the donee is entitled to use and dispose of the subject of the gift.” (emphasis added).

Since SPHF will be transferring the land gifted to it by the donors onwards to the Beneficiaries, once the transfer to the Beneficiaries takes place the gift would fall within the exception under Principle 167(2)(d) of the Muhammadan Law, making revocation of the same difficult.

4.13 PRACTICAL DIFFICULTIES

Acquisition of land from private owners may involve certain other challenges. For instance, the land to be transferred to SPHF could be subject to litigation, encumbrances or third party claims. The landowner may not have proper title documents or may have a defective title to land.

Further, if the land is held jointly by two or more landowners and assuming that there is disagreement between the joint owners upon gifting the land to SPHF, then in our opinion, such land would have to be compulsorily acquired under the acquisition process set out in the Proposed Legislation. This is so because if one joint owner/co-owner is not desirous of gifting the land to SPHF and the other, without taking consent from him, proceeds to gift the land to SPHF, the said gift could be challenged by the co-owners. Additionally, as mentioned above, if possession is not delivered to SPHF and one co-owner refuses to depart from the premises, one of the main ingredients required for the purposes of perfecting a gift will not be met and the courts may hold that the gift is invalid.

Please note that conducting due diligence of land to be transferred to the Beneficiaries falls outside our scope of work and we will rely solely on the data / information provided by SPHF and assume that the land to be transferred to the Beneficiaries is free from all defects, third party claims and encumbrances.

4.14 CLAIMS OF DISCRIMINATION

We cannot absolutely rule out the possibility of claims against discrimination being brought by non-Beneficiaries or even from those who were affected by monsoon floods in previous years on the basis that they are not being allotted title to land nor being provided with funds.

Article 25(1) of the Constitution²⁵ *prima facie* envisages equality amongst citizens and guarantees to every person the right to equality before the law and equal protection of the laws²⁶. The guiding principle of Article 25 of the Constitution is that all persons, things and similar circumstances shall be treated alike.

However, the same does not prohibit treatment of citizens by a State on the basis of reasonable classification. In fact, the Supreme Court of Pakistan has consistently allowed “*for the differential treatment of persons who are not similarly placed under a reasonable classification*”²⁷. The superior courts, generally, allow differential treatment of persons on the basis of reasonable classification so long as:

- (i) The classification is founded on an intelligible differentia which may judiciously distinguish persons or things that are grouped together from others left out of the group; and
- (ii) The differentia has a logical and reasonable linkage with the object sought to be achieved.

Accordingly, in light of the established jurisprudence of the superior courts of Pakistan, we are of the view that so long as the Proposed Legislation provides an objective and intelligible criterion for identifying Beneficiaries, it would be difficult to challenge the Project on the grounds of discrimination.

- The best approach to counter claims against discrimination would be that in the Proposed Legislation and the sub-ordinate rules and regulations drafted for the purposes of the Project, certain qualifying provisions are inserted therein which *inter alia* set out the parameters on the basis of which the Beneficiaries are being granted legal title in land and funds for constructing their houses. These would include: (a) limiting the applicability of the Proposed Legislation when the size of the transferred land is small, say two (2) to three (3) ghuntas; (b) the extent to which the Beneficiaries’ houses were destroyed or impacted due to the floods (consideration may also be given to individuals who have been indirectly affected by the floods, for instance, by virtue of being in the same vicinity as the Beneficiaries or if the such house is in the flood affected area); (c) areas which were the most affected due to the floods; and (d) loss of income/livelihood, if applicable, of the Beneficiaries. The criteria for identifying Beneficiaries will need to be discussed in greater detail with SPHF and finalized from a legal as well as policy angle.

4.15 SUPREME COURT OF PAKISTAN’S APPROVAL FOR ALLOTMENT OF GOVERNMENT LAND IN PUBLIC INTEREST

²⁵ Article 25(1) of the Constitution:

“Equality of Citizens:

- (1) All citizens are equal before the law and are entitled to equal protection of law.”

²⁶ 2021 SCMR 747 – *Government of Khyber Pakhtunkhwa v. Syed Sadiq Shah*

²⁷ 2022 SCMR 1691 Supreme-Court – *Hadayat Ullah v. Federation of Pakistan*

The Supreme Court of Pakistan vide its order dated November 28, 2012, in Suo Moto Case No. 16 of 2011 (the “**Order of 2012**”), *inter alia*, restricted the GoS from allotting or transferring any state land to a private party. Relevant extract of the order is reproduced as follows:

“7. ... Moreover, mindful of rampant corruption and organized crime of land grabbing, particularly, regarding prime state land, and mismanagement/forgeries in the revenue record, we hereby, until further orders restrain the Government/Revenue Department from mutation, allotment, transfer and or conversion of any state land and or keeping any transaction or entry in the record of rights in this regard in revenue record of Sindh or till the entire revenue record in Sindh is reconstructed. The conversion of lease for 30 years or of any term upto 99 years shall also be stopped immediately...”

The aforesaid restriction was lifted by the Honourable Supreme Court vide its order dated 23.06.2014 (the “**Order of 2014**”). The Supreme Court, while clarifying the earlier stay order, was of the view that the same was only meant to ensure that the land is either not leased out or allotted for other than bona fide reasons. The Supreme Court clarified that its order was not intended to prevent the competent authority in the Federal or Provincial Government to allot or lease out land for a project approved by the concerned authority in the public interest, in accordance with law. Relevant extract of the order is reproduced below:

“... We may at this stage clarify that this order staying the allotment/ grant of leases was meant to ensure that the land is not either leased out or allotted for reasons other than bona fide and to land grabbers and this would not prevent the competent authority in the Federal or Government of Sindh to allot or lease out land for a project approved by the concerned authority which is directed towards establishment of any industry or automotive plant or power generating plant or any other initiative in public interest and in accordance with law and the relevant rules.”

However, the Supreme Court in 2016 vide order dated August 01, 2016, (the “**Order of 2016**”) reinstated the Order of 2012 as if it was never modified and the Order of 2014 order was never passed. Relevant extract is reproduced below:

“We may clarify that the aforesaid order dated 23.06.2014 was obtained by misleading the Court on the pretext that re-writing/re-construction of the record has been completed by the Sindh Government. Today, the Senior Member, Board of Revenue, concedes that the reconstruction and rewriting of the record has not been completed till date. We hold that the order dated 28.11.2012, passed by a five Member Bench of this Court, was never modified and holds the field.”

It may be noted that by way of the aforesaid proceedings, the Honourable Supreme Court of Pakistan with the majority of two to one, vide its judgment dated May 04, 2018 (*reported as 2018 PLD 468*) held that the grant of land to Malir Development Authority, its exchange with the land of Bahria Town and anything done pursuant thereto was void ab initio. However, the Supreme Court of Pakistan, taking into consideration the exceptional circumstances i.e., the third-party interest created in favour of the allottees, made observations that the subject land could be granted to the Bahria town afresh by the Board of Revenue under the provisions of the Colonization of the Government Land Act 1912.

It follows from the above that in 2014, the Court clarified that the ban imposed by the Supreme Court would not prevent the competent authority from allotting or leasing out land, *inter alia*, for public interest.

However, it seems that this clarification from the 2014 Order was modified in 2016, with the observation that the 2014 Order was obtained through misrepresentation of facts by certain entities. Even though the 2016 Order does not specifically discuss the re-imposition of the ban on granting land for projects of public interest, in our view, there is a compelling argument that the benefit of the 2014 Order cannot be obtained without the permission of the Supreme Court.

Given the lack of clarity regarding the requirement of obtaining permission from the Supreme Court for transferring GoS owned land to SPHF or regulator, we are of the view that the GoS may need to seek permission from the Supreme Court of Pakistan. Additionally, we believe that seeking an opinion from the Ministry of Law and Justice, Government of Pakistan, could provide further guidance in this matter.

CHAPTER 5 – DIGITALIZATION IN OTHER JURISDICTIONS

5.1 EXISTING FRAMEWORK

The digitalization of land records and title transfers is in its formative stage in Pakistan and except for the Province of Punjab where the process of land transfer has somewhat been digitalized, currently there is no legislation in any of the other provinces that allows digital transfer and registration of land title.

The GoS maintains an online land registry, allowing land details including status and ownership of land to be searched online. However, no specific legislation has been passed in this respect.

The Province of Punjab has the Punjab Land Records Authority Act, 2017 (“**PLRA**”). Under the PLRA, the Punjab Land Records Authority has been constituted and is, *inter alia*, responsible for managing, updating and maintaining digital land records. The PLRA now enables issuance of copies of digital record of rights, digital deed registration (in respect of land whose record has been converted into digital form), and electronic mutation of land. However, under the current regime, the buyer and seller are still required to appear personally before the relevant sub-registrar. The sub-registrar records the statements of the parties. Pictures and fingerprints are also recorded electronically. Once a deed is registered, the system automatically assigns it a Bahi Number & Document Number. Time stamp and identity of Sub-Registrar is also recorded. The final document/instrument is stored in the e-Registration system in electronic form. The digital deed registration system is relatively new and the extent to which it is being used is not known to us.

5.2 ANALYSIS OF OTHER JURISDICTIONS

Given that the proposal is to introduce a completely new legal framework to allow the digital transfer of land title to Beneficiaries, we have examined the laws of Kenya, Estonia, Singapore, Australia, New Zealand and Georgia to understand the framework adopted by these countries for enabling electronic land transfer and registration.

We set out below a high-level overview of the relevant laws of the above-mentioned jurisdictions.

KENYA

Electronic transfer and registration of land title is governed by the Land Registration Act, 2012 (“**KLRA**”), the Land Registration (General) Regulations, 2017 (“**KLRR**”) and the recently enacted Land Registration (Electronic Transactions) Regulations, 2020 (“**KETR**”).

The laws of Kenya originally provided for transfer of land title and creation of security interest over land through physical execution and registration of documents. The KETR now enables individuals and companies to electronically transfer and register land title. We set out below a high-level overview of the key features of Kenya’s electronic land transfer and title registration regime.

(i) Electronic Register

The KETR require the Chief Land Registrar to maintain an electronic land registry which forms part of Kenya’s National Land Information System²⁸.

A person can access information in the electronic register by conducting an official search in the system after payment of the prescribed fees²⁹.

The electronic register records all the relevant particulars of land and has a “property section”, a “proprietary section” and an “encumbrance section”³⁰. The information recorded in the electronic land register includes³¹:

- (a) the registration unit, registration section, block number and parcel number of the parcel;
- (b) the approximate area of the parcel;
- (c) any easement and analogous rights benefitting or affecting the parcel;
- (d) the user of the parcel;
- (e) cadastral sheet number of the parcel;
- (f) the name of the proprietor including the identification details in the case of individual or, if the proprietor is a corporate entity, the registration number;

²⁸ Regulation 4(1) and 4(2) of the KETR.

²⁹ Regulation 14 of the KETR.

³⁰ Regulation 9 of the KLRR.

³¹ Please see Regulations 10, 12 and 13 of the KLRR.

- (g) the gender of a proprietor, where applicable;
- (h) the postal and physical address of the proprietor for service in Kenya;
- (i) where available, the telephone numbers and email address of a proprietor;
- (j) the personal identification number of a proprietor;
- (k) the nationality of the proprietor;
- (l) any inhibitions, cautions or restrictions affecting the proprietor's right of disposition;
- (m) the details of any encumbrance or right adversely affecting the land or interest in land; and
- (n) the name and address for service of the encumbrancer.

(ii) Electronic Accounts of Users

Any person seeking to carry out an electronic transaction in respect of their land has to establish a user account on an online portal.

A person becomes “an authorized user” on signing up to the online system by providing the following information in the case of a natural person:

- (a) Name;
- (b) National /Alien Identity Number;
- (c) KRA Personal Identification Number;
- (d) Telephone Number;
- (e) E-mail address;
- (f) Postal Address;
- (g) Passport photo as profile picture; and
- (h) Physical Address.³²

³² Regulation 7(1) of the KETR.

In the case of a legal person;

- (a) the information listed in (a), (c), (d), (e), (f) and (h) (above);
- (b) Incorporation/Registration Number; and
- (c) authorized representative's details.³³

After signing up, the user has a username and password through which he/she can access the system. Users can carry out transactions on the electronic system on their own or through an authorized representative (subject to compliance with certain additional requirements). The KETR holds the user responsible for the safety and security of his/her/its log-in details.

(iii) Electronic Registration

The electronic registration process involves the following key steps:

Pre-Registration Process:

- (a) Preparation of instruments and documents (in electronic form) for electronic registration or filing³⁴.
- (b) Valuation and payment of stamp duty for instruments or documents in electronic form³⁵.

Registration Process:

- (a) The authorized user fills out the requisite electronic form and uploads the relevant supporting documents and pays the prescribed fee and submits its transfer application.

For sale of land, the transferor has to submit the electronic version of Form LRA 33 together with, *inter alia*, the original title documents, land rates clearance certificate (if applicable), a form of valuation of stamp duty, and if the land is subject to encumbrances, consent of the encumbrancer.

³³ Regulation 7(2) of the KETR.

³⁴ Regulation 15 of the KETR.

³⁵ Regulation 16 and 17 of the KETR.

The KETR provides that the authorized user shall manually present documents that cannot be lodged electronically or if the registrar requires the production of the original³⁶ documents.

- (b) As per the KETR, an instrument or document shall be deemed to be received for registration when the system generates a notice of electronic filing with a tracking number for the electronically filed applications, instruments or documents. The tracking number determines the priority of registration³⁷.
- (c) The KETR state that the registrar shall, for the purposes of processing the applications, rely on the documentation and data available within the online system and may, where necessary, refer to the backup of manual records.
- (d) The registrar can reject an application, instrument or document that appears: (a) to be substantially defective; or (b) to have been submitted for registration without the relevant supporting documents. Upon rejection of an application, instrument or document, the authorized user can make the relevant corrections, resubmit the application / document. However, the same will be treated as a new application. The authorized user also has the right to appeal against the decision of the registrar³⁸.
- (e) Once the registration is complete, an electronic notice is issued to inform the parties.
- (f) Upon completion of the registration process, the registrar issues an electronic certificate of title, which contains unique serial numbers and security features which can be used to certify its authenticity. The registered instrument / document can also be downloaded from the electronic system.

The KLRR and the KETR recognize execution of documents through electronic signatures. In fact, Regulation 90(2) of the KLRR states that “[t]ransactions and dealings under the Act shall, where possible, be carried out in electronic form”.

(iv) Appeal Process

A person not satisfied with the decision of the registrar can appeal under the KLRR to the County Registrar and thereafter the Chief Land Registrar, who are required to decide the matter within fourteen (14) days.

³⁶ Regulation 21 of the KETR.

³⁷ Regulations 17 and 18 of the KETR.

³⁸ Regulation 21 of the KETR.

(v) **Transitional Provisions**

Regulation 25 of the KLRR provides that where a transaction cannot be carried out through the electronic system, the person seeking to carry out the transaction shall do so in the manner prescribed by the Chief Land Registrar.

ESTONIA

The primary law governing the electronic land title registrations in Estonia is the Land Register Act of 2019 (“**ELRA**”).

Section 1 of the ELRA states that “[t]he land register is a database aimed at collecting, storing and disclosing information on the creation, transfer and encumbrance of immovable property with real rights, as well as on the transfer, encumbrance, alteration or termination of a real right encumbering an immovable.”

A report prepared by Estonia’s Ministry of Justice and Centers for Registration and Electronic Systems summarizes the land registration regime of Estonia as follow:

“The entire process of registration-conveyancing of immovable property is electronic in Estonia. This means that the preparation, forwarding and processing of registration applications and the making of registration entries takes place in an electronic environment. Almost 70% of all registration applications are submitted through a notary. The law stipulates that most of real estate transactions shall be notarized. This means that a notary prepares the documents for a transaction and the parties of the transaction sign it at the presence of the notary.

After the transaction is signed, the notary submits the documents of the transaction and a registration application to a land registry department to be registered and processed. The exchange of information between a notary and a land registry takes place electronically. A notary prepares documents of a transaction on the E-Notary information system, i.e. the documents are electronic already when they are being prepared. After signing a transaction, a notary forwards the documents and a registration application through a safe data exchange layer, X-Road, to the land register information system, where it is automatically registered. The order of receipt of a registration application is important, which is why a notation on all received applications is available to the public online. Registrars working at the land register of a court commence the processing of a registration application when the turn of that application comes. As said above, the entire process is electronic. This means that additional data from paper is not entered in the system, because that data has already been entered by a notary, and an entry made as a result of the proceeding is also prepared in the information system of the land register. Decisions or entries made are available on the public web interface of the land register immediately after being signed by a registrar. After signing an entry on the information system of the land register, employees of the land registry department send parties to the transaction a notice on the making of a decision by email. Parties will be able to access the decision online and the system registers whether they have received the order.

All other applications not submitted through a notary are submitted through the Immovables Portal.

The Immovables Portal is a public web portal developed especially for the submission of applications to the land register. Anyone who wishes to submit an application to the land register may use the Portal. The law stipulates which applications should be submitted through a notary and which ones can be submitted via the Portal, depending on the content of an application. The Immovables Portal is most commonly used by citizens, bankers, bailiffs, trustees in bankruptcy, state agencies, employees of local governments, etc. Similar to applications received through the E-Notary, applications received through the Immovables Portal are registered automatically in the information system of the land register. After registration, a registrar commences the proceeding of an application and the rest of the proceeding continues just like in the case of documents received from the E-Notary described above. Therefore, anyone who would like to submit an application to the land register, can do it through the Immovables Portal or at a notary. As of 2011, land registry departments do not accept applications submitted on paper or by email.” (Emphasis Added)

The report also highlights the challenges and shortcomings of the digitalization process in Estonia, including:

- Errors or omissions while converting data from physical form to digital form. The report states the following in respect of the conversion process:

“One of the bottlenecks may be the migration of data from the old data structure into the new one. The risk of losing data may be quite considerable. It is advisable to create means of automatic transfer, which are activated only once to transfer data from the old system into the new. If the amount of data is small and/or the development of the algorithm for automatic conversion is too complicated, it is possible to transfer data manually. In this case, it may be necessary to create reports for the extraction of data from the previous system and entry forms or something similar for entering the data manually in the system being implemented. If the electronic data is of informative nature, there is a smaller risk of error. However, if the electronic data has legal effect, the loss of data must be prevented.”

- *“Errors in the information system. In addition to obscure system requirements, errors also cause problems. An error in a software product may bring about the interruption of processes and extensive economic and reputational damage to a company or a public sector agency, because the intended functionality of processes is interrupted, which affects the earning of profit and the provision of a high-quality, fast and reliable service. Even if the system has been well-tested in the test period, it provides no guarantee that there are no errors in the system. The efficiency of testing determines the number of errors discovered, but one can never be sure that all errors have been discovered. Upon planning a software development project, it should be taken into account that in the implementation phase and afterwards there may appear errors which should be eliminated immediately. An organization that is supporting the register and software development process has to be introduced.”*
- *“Human risk. One must also not forget the human risk, which may appear especially in the initial introduction of software. At that time there may appear a strong resistance from users. Some of that risk may be decreased by training. Also, some daily procedures need to be thought through. Can the procedures used so far keep functioning now that the software is being used? The answer is often no. This may bring about confusion among the users and add resistance to using new software. So, in addition to technical training on how to use the software system, employees need to be taught to conduct proceedings in a new way which has been carefully considered. Generally, upon implementation of a software system, the reorganisation of processes may be necessary. This endeavour has two sides – the adaptation of processes, which*

represents the organisational position and acceptance and approval which represents the position of an individual. Human risk also includes wrongful adjustment of data for the purposes of personal gain.”

Similar to the laws of Kenya, the ELRA require the maintenance of an electronic land register to record the relevant information in respect of land, including its location, area, particulars of the owners and any encumbrances upon such land (please see Sections 8 to 16 of the ELRA).

In respect of the process for registration³⁹ of land title, Section 19(2) of the ELRA states that a “*registration application shall be notarially certified or digitally signed. The notarially certified registration application shall be submitted together with the documents necessary for registration to the land registry department through the intermediary of the notary who certified the registration application over the electronic information system of notaries. For good reason the registration application and the documents required for registration may be submitted through another notary. The notary shall explain to a person what documents shall be appended to the registration application and what requirements apply to them*”.

Section 34 of the ELRA states that “*any person whose rights are affected by an entry or for whose benefit the entry is made has the right to submit a registration application*”. The registration application must include the consent of the transferor and transferee. As noted above, applications for registrations are filed digitally and the registry maintains a digital record of each application. An acknowledgment of the registration application is sent on the same day and the application is marked with a seal and the seal is visible upon accessing the land register.

Section 34(6) of the ELRA states that the “*registration application shall set out a desire to make an entry, the number of the register, part of the registered immovable in which the making of entry is applied for and content of the real right applied for. In the case of application for entry in the register part to be opened, the cadastral code of the registered immovable shall be indicated instead of the number of the register part in the registration application*.”

Upon review of a registration application, a person with registration competence ascertains if: the required documents have been submitted; registration is not precluded due to the rights entered in the land register or secured by notations or due to any restriction under law.

After reviewing the registration application, the person with registration competence makes a ruling on entry within three months after the date of receipt of the application. An application for the transfer or encumbrance of a registered immovable property is to be reviewed not later than within one month from the date of receipt of such application (Section 46 of the ELRA).

Once the registration is complete, the printouts of the “register entry” are sent to the transferor and transferee (Section 77(10) of the ELRA). The law also allows correction of any registered entry due to an omission or error or because of an “incorrect ruling on entry” (Section 63 of the ELRA).

³⁹ Section 33 defines “Registration” as the making of an entry in a land register, including amendment or deletion of an entry, on the basis of a ruling of a person with registration competence.

Section 79(5) of the ELRA holds the government / state “*liable for damage relating to transfer to an electronic land register which arises from errors in maintenance of the land register, in automated data processing or in the data processing equipment.*”

Further to the above, in an excerpt titled “*Estonian Land Registration and Experiences in Electronic Conveyancing*”⁴⁰ by Heidi Ratstep, the process of transferring the register parts from paper into the electronic system involved typing all the information from paper into the electronic system. Subsequently, every single electronic register part is compared with the respective data typed on the paper register part.

We think that though the above is a time-consuming process, the benefit is of avoiding any possible mistakes at the time of such transfers and ensuring the correctness of the data that is entered into.

SINGAPORE

The Singapore Land Titles Act, 1993 (“**SLTA**”) allows for instruments to be lodged / registered in an electronic form (Section 51A). The SLTA defines an instrument to include a transfer, lease, mortgage, transmission application, charge and any other application, or any other document in writing relating to any disposition, devolution or acquisition of land or any claim to or vesting of interest in land.

Section 51A(2) states that a person must not lodge an instrument in electronic form unless the person is authorized by the Registrar to do so.

Rule 4 of the Land Titles (Electronic Lodgment) Rules, 2013 (“**SLTR**”) states that any person intending to lodge an electronic record with the Registrar under the SLTR shall, before lodging the electronic record, ensure that he has:

- (a) become the subscriber of a certificate⁴¹ issued by an approved certification authority; and
- (b) arranged for the payment of the appropriate fees as specified in the Schedule to the Land Titles Rules (R 1) to be made by inter-bank GIRO or such other means as the Registrar may require.

The SLTR do not specify the process for becoming the subscriber to a certificate.

⁴⁰ //efaidnbmnnnibpcajpcglclefindmkaj/http://ipra-cinder.info/wp-content/uploads/file/Ponencia_Heidi_R__tsep.pdf

⁴¹ The SLTR define “certificate” as a record that at a minimum —

- (a) identifies the approved certification authority issuing it;
- (b) names or identifies its subscriber;
- (c) contains the subscriber’s public key; and
- (d) is digitally signed by the approved certification authority issuing it.

Rule 5(1) of the SLTR states that an electronic record to be lodged with the registrar under the SLTR by the subscriber of a certificate shall be signed with a digital signature or an electronic signature as the registrar may direct. The SLTR define a digital signature as:

“an electronic signature consisting of a transformation of an electronic record using an asymmetric cryptosystem and a hash function such that a person having the initial untransformed electronic record and the signer’s public key can accurately determine:

- (a) whether the transformation was created using the private key that corresponds to the signer’s public key; and*
- (b) whether the initial electronic record has been altered since the transformation was made.”*

Rule 5(2) states that such digital signature shall be capable of being verified by reference to the public key listed in the subscriber’s certificate.

Rule 6 of the SLTR states that except for the instruments set out in the Third Schedule (which does not include a sale deed or a mortgage deed) and such other instruments as the Registrar may determine, all instruments in the paper form shall be lodged for registration in person on the same day after the same instruments in the electronic form has been electronically lodged. The electronic land title registration system in Singapore, therefore, is not completely paper free and the electronic submission of documents has to be supplemented by physical submission of documents.

AUSTRALIA

Sections 5(1) and (2) of the Electronic Transaction National Act (“**ETNA**”) as adopted by the various provinces in Australia states that:

“(1) The object of this Law is to promote efficiency throughout Australia in property conveyancing by providing a common legal framework that...enables documents in electronic form to be lodged and processed under the land titles legislation of each participating jurisdiction.

(2) In order to achieve this object, this Law, among other things, authorizes the Registrar in each participating jurisdiction to operate or authorize the operation of an Electronic Lodgment Network, and provides for the making of rules relating to the operation of the Electronic Lodgment Network.”

The ETNA sets out the enabling provisions allowing digital transfer of land title and supplements various other laws regulating transfer of land, such as the Conveyancing Act of 1919 (“**ACA**”).

Section 7 of the ETNA states that:

- (1) A document may be lodged electronically for the purposes of the land titles legislation if the document is lodged--
 - (a) in a form approved by the Registrar, and
 - (b) by means of an Electronic Lodgment Network (“**ELN**”).

Section 9 states that an instrument lodged electronically shall have the same effect as if the instrument was in paper form. Section 9(2) states that a registry instrument that is digitally signed by a subscriber in accordance with the participation rules applicable to that instrument has the same effect as if a paper document having the equivalent effect.

The ETNA provides for the establishment of an ELN that allows the digital submission of instruments for registration (Section 13 of the ETNA).

Section 23 states that the Registrar shall formulate the rules for subscription and usage by subscribers and eligibility criteria of subscribers for usage of the ELN. Generally, persons seeking to lodge their instruments electronically have to enter into a participation agreement.

The “Model Participation Rules” (“MPR”), provide further details regarding the electronic registration process.

Rule 4.2 allows the subscriber to be a person, company or partnership. The subscriber must be a person of good character and must not have been, *inter alia*, subject to: an insolvency event, conviction of fraud or indictable offence, disqualification from managing a company. The MPR allows the subscriber to lodge documents for its own benefit or on behalf of another person.

Rule 6.2 states that the subscriber must:

“...retain the evidence supporting an electronic Registry Instrument or other electronic Document for at least seven years from the date of Lodgment of the electronic Registry Instrument or other electronic Document that is registered or recorded including:

- (a) any evidence required by the Duty Authority; and*
- (b) any Client Authorisation and any evidence supporting that Client Authorisation; and*
- (c) any evidence supporting a Party’s right to enter into the Conveyancing Transaction; and*
- (d) any evidence supporting verification of identity; and*
- (e) any other evidence demonstrating compliance with Prescribed Requirement.”*

Rule 7.5.1 states that electronic registry instruments and other electronic documents to be lodged through an ELN must be digitally signed, where the electronic registry instrument or other electronic document requires a digital signature, using a private key⁴² to create the subscriber’s digital signature.

Schedule 7 sets out the suspension events, which entitle the Registrar to suspend the subscribers right to use the digital system and include events such as material breach of subscriber’s obligations under the MPR, non-payment of fee and if the subscriber poses a threat to the ELN.

⁴² “Private Key” “means the Key in an asymmetric Key Pair that must be kept secret to ensure confidentiality, integrity, authenticity and non-repudiation”.

NEW ZEALAND

The Land Transfer Act, 2017 (“**NLTA**”) and the Land Transfer Regulations, 2018 (“**NLTR**”) regulate the electronic transfer and registration of land title and electronic recording of mortgages. The overall structure of the laws is similar to those discussed above, in that it contains enabling provisions allowing individuals and companies to file their transfer instruments electronically and empowers the registrar to approve and register transfer of title electronically. The law specifies the: criteria that must be met for filing documents on the electronic registration system; the documents to be submitted for seeking registration; and the process followed by the relevant authority for approving the electronic registration.

The law establishes “electronic workspace facilities”. Section 32 of the NLTA states that an electronic instrument must be prepared in and lodged through an electronic workspace facility. As per the “Landonline – Terms and Conditions” published by the Government of New Zealand:

*“Landonline is an online service provided by Land Information New Zealand (**LINZ**, **we**, **our**, **us**), a department of the New Zealand Government. During the Landonline operating hours, the electronic workspace provided by Landonline allows registered customers to securely search, lodge and update title dealings and survey data, digitally, in real time. It is the 'electronic workspace facility' approved by the Registrar-General of Land under section 25 of the Land Transfer Act 2017 for use in the preparation of electronic instruments for lodgement under that Act.”*

To become a Landonline account holder an application needs to be submitted. The “core” information that needs to be submitted with the application for registration, includes:

“(a) the type of instrument...;

...

(c) the land registration district for the land:

(d) the unique identifier of each record of title for the land affected...

(e) the unique identifier, and type, of each instrument or other document affected by the instrument, if applicable...

(g) for each party to the instrument,—

(i) the type of party (for example, transferor or applicant); and

(ii) the full name of the party:

(h) if the instrument incorporates any provisions of a memorandum, the unique identifier of the memorandum:

(i) for an electronic instrument that requires certification under regulation 7, those certifications and the digital signatures of the certifiers.”

The account holder is responsible for accuracy of all information provided. Landonline, therefore, is the online portal through which applications / instruments for registration are submitted. Electronic instruments are required to be certified by: (i) practitioners; or (ii) a person of a class authorized

to certify electronic instruments⁴³. On registration, an electronic instrument that has been certified is to be treated as having been made in writing and executed by every party specified for the purpose and having effect according to its terms⁴⁴.

GEORGIA

Georgia is currently using blockchain technology for land registrations and has enacted the Electronic Documents and Electronic Trust Services Law, 2017 (“EDTS”) which, *inter alia*, sets forth the legal grounds for using electronic documents, electronic signatures and electronic trust services. However, the law does not restrict transferors from using physical documents or handwritten signatures for their transactions.

The EDTS does not specifically state that blockchain technology will be used for the purposes of land registration. However, as with the laws of other jurisdictions discussed above, the EDTS enables electronic transfer of land titles and expressly confers validity upon electronic documents and signatures. The law requires electronic documents to have “qualified time stamps”, which set out the accuracy of the time and the date of the electronic document.

In order to effectuate the electronic transaction of land, a qualified trust service, i.e., an electronic service the purpose of which is the creation, verification and identification of the authenticity and/or storage of electronic signatures, is set up⁴⁵. The qualified trust service is obligated to develop internal regulations and ensure that public access for all services is provided in accordance with Georgian law⁴⁶. The internal regulations are required to, *inter alia*, contain the following information: (i) description of the safe systems, devices and procedures used by the qualified trust service provider; (ii) grounds and scope of the insurance of the liability of the qualified service provider; (iii) terms and procedures for storing all necessary information; (iv) procedures for the termination of the activities of a qualified trust service provider and transferring the activities to another entity, if any; and (v) the amount of the fee established for the services provided, the procedures for payment of the fee and the possible fee charges⁴⁷.

We have not been able to locate a copy of the internal regulations. However, based on the information available on Georgia’s National Agency of Public Registry (“NAPR”) website, the process for initial digital recording of land involves a survey of the land and digital recording of the owner’s particulars, title documents and all other necessary data regarding the land, which is simultaneously shared with the registrar who reviews and checks the owner’s title documents based on data available on the Government’s record. Owners can access their uploaded data through an application and confirm that the same is correct by signing an online form, which concludes the registration process.

⁴³ Section 27 of the NLTA.

⁴⁴ Section 31 of the NLTA.

⁴⁵ Article 5(1) of the Georgian Law.

⁴⁶ Article 5(2) of the Georgian Law.

⁴⁷ Article 5(2) of the Georgian Law.

For the use of blockchain technology, the Republic of NAPR partnered up with Bitfury, a security and infrastructure provider for the Bitcoin Blockchain, to create the software allowing for land transactions to take place electronically through the use of Blockchain technology⁴⁸. From what we understand, a separate service allowing for timestamping was added to the process for the digital signing of documents and by incorporating the same, the NAPR was able to provide digital certificates to users of their assets supported with cryptographic proof⁴⁹.

CENTRAL DEPOSITORY SYSTEM FOR SHARES IN PAKISTAN

In addition to the laws of other jurisdictions, we have also examined the central depository system (“**CDS**”) established by the Central Depository Company Limited (“**CDC**”) under Section 4 of the Central Depositories Act, 1997 (“**CDA**”). CDC has been able to successfully implement and operate a sophisticated and state-of-the-art electronic system in Pakistan that allows the conversion of physical securities into electronic form and enables users to transact with such securities electronically.

The key players in the CDS are:

(a) **Account Holders / Participants**

As per the guidelines published by CDC “Account Holders are divided into two categories; Account Holders and Participants. Both, Account Holders and Participants have direct access to CDS. Account Holders are only allowed to keep their beneficially owned securities whereas Participants, in addition to maintaining their beneficially owned securities, are entitled to open Sub-Accounts in CDS in order to further provide custody services to their clients”.

Typically, Account Holders are “[m]embers of Stock Exchanges...Commercial Banks, Modarabas and Developmental Financial Institutions...Whereas, all entities (Private and Public) can be admitted as Account Holder”.

(b) **Issuer of Eligible Securities**

Issuers are companies whose securities (both equity and debt) are inducted in CDS (directly in book entry form or by the way of physical deposit of securities).

⁴⁸ Please see <https://exonum.com/story-georgia>

⁴⁹ A cryptographic proof is a two-party protocol between a prover and a verifier, where the goal of the prover is to convince the verifier that some statement is true. Please see <https://www.cs.utexas.edu/~dwu4/proofs-project.html>

(c) **Eligible Pledgees:**

An “Eligible Pledgee” is “[a]ny Company, Corporation or Institution such as Banks / Financial Institutions / Development Financial Institutions that are authorized to provide financing against securities... Further, Stock Exchanges / Clearing Companies can also join CDC in the capacity of Eligible Pledgees for risk management purpose.”

Conversion of physical shares into book-entry / electronic form generally involves the following steps:

- (a) filing of a duly filled transfer deed (TD) form together with original share transfer deeds, CNIC copies of the transferor and witnesses of the transfer deeds and physical share certificates with the CDC participant or CDC Investor Account Services Department (IAS). The transfer deeds must be verified by the share registrar of the company (whose shares are being converted) (“**Share Registrar**”) before submission to the CDC participant or CDC IAS.
- (b) filing of CDC’s Securities Deposit Form (SDF) with the CDC Participant (stock broker/CDC IAS).
- (c) CDC Participant (stock broker/CDC IAS) then initiates the deposit request in the CDS and sends the above documents along with the original physical share certificates and verified transfer deed(s) to the Share Registrar.
- (d) The Share Registrar verifies the lodged shares/documents and gives approval of deposit request in the CDS.
- (e) After approval by the Share Registrar, the deposited/converted shares are reflected in the CDS Account of the shareholder maintained with respective CDC Participant (stock broker/CDC IAS).

The CDC laws also allow an Account Holder/Participant, acting either on his behalf or on behalf of its client, to place securities under pledge in favor of an Eligible Pledgee. As per the guidelines issued by CDC, prior written authorization (on the prescribed format) from sub-Account Holders/clients is required in case of pledge through sub-accounts. Participants are also required to ensure that a copy of such authorization is submitted with the Eligible Pledgee. Placing securities under the pledge results in the securities being flagged as no longer available for handling till such time these are released from the pledge.

Upon default of the Pledgor, securities which have been pledged can be called by the Eligible Pledgee and transferred to any of its other accounts in CDS for handling.

Any disputes between the Account Holders, Participants, Issuers or Eligible Pledgees can be referred to the CDC Chief Compliance Officer who has the authority to listen to the parties, inquire into the matter and resolve the dispute. Complaints against CDC can also be filed with the Chief Compliance Officer.

Section 8 of the CDC Act seeks to limit CDC's liability and states that to the extent that it is not acting negligently and is acting upon the instructions of the Account Holder / Participant, it cannot be held liable for any loss, damages, compensation, costs and expenses in tort or under any law or contract for any breach of trust or duty. Section 8(2) of the CDC Act states that a "*central depository, if acting in good faith and without negligence, shall be fully discharged of its obligations to an account-holder and participant, upon the transfer or delivery of book-entry securities under the instructions of the account holder or participant, as the case may be*". Section 8(3) states that CDC is not required to enquire whether an Account-Holder or a Participant, has a right to handle any book-entry securities entered in his account or in any sub-account under his account, as the case may be or verify the document title of any security deposited with an issuer for the purpose of registration of the transfer of the security in the name of CDC.

Section 11 of the CDC Act states that if:

"...

(a) an account-holder or a sub-account holder did not consent to a transfer of any book-entry securities from, or to, his account or sub-account, as the case may be; or

(b) the name of any account-holder or sub-account holder is fraudulently or without sufficient cause entered in, or omitted from, the central depository register, the aggrieved party may apply to the court for relief and the court may award damages to the aggrieved party but shall not order rectification of the central depository register."

CDC, therefore, has been able to successfully create and implement a comprehensive electronic universe through which users can convert their physical shares into electronic form and transact with such shares electronically.

The main takeaway from Section 11 of the CDC Act is that it *prima facie* provides a conclusive title to the account-holders which, once entered into the system, cannot be disputed and/or rectified and the *only* remedial recourse available is applying to the Courts for damages. Specifically for the purposes of the Project, a similar provision in the Proposed Legislation will be beneficial when it comes to keeping fraudulent entries and disputes at bay. This is so that since the SPHF or a new regulatory body will be in charge of the new digitalized system, the chances of multiple and/or fraudulent entries are minimalized.

The process of entering the records and data in the new system will be required to be carried out meticulously though albeit it may be time-consuming, carefully recorded entries (along with accurate GPS co-ordinates, if available) will be conclusive insofar as title to the land is concerned.

CONCLUSION

Based on our review of the laws and regulations of various jurisdictions, we note the following features, which are necessary for implementing a digital land transfer and title registration regime:

- (a) the first step is establishing an electronic land registry, in which all the particulars of land (such as the area of land), particulars of owner(s) and the cadastral map are recorded.
- (b) the laws enabling digitalization identify the individuals responsible for maintaining the registry, which in most cases is the registrar and specify their powers.
- (c) the laws provide for the establishment of an online portal / electronic system that allows people to create an online account for lodging their documents electronically.
- (d) the laws specify the criteria a person must meet for using the electronic system / online portal and the fee for using the system.
- (e) the laws specify the forms and supporting documents that must be filed for each type of transfer of interest in land, such as a sale, lease or creation of mortgage and also enable signing, witnessing and filing of documents through electronic signatures.
- (f) the laws prescribe the criteria that the registrar must apply for accepting or rejecting an application for registration, including the documents that the registrar must review before approving the registration.
- (g) the laws provide grounds for appeal, in the event the registrar refuses to register an instrument.
- (h) The form of the registration certificate / title document issued upon successful registration is specified (this could be replaced with electronically verifiable title).
- (i) the laws specify the process for correcting any error/ omission in the electronic record.
- (j) the laws empower the registrar to cancel registration upon the occurrence of certain specific events, such as the parties providing wrong information or making any misrepresentation.
- (k) the laws, specifically the CDC Act, state that the account-holder's title shall be conclusive and not be subject to any rectification on the basis of any fraudulent entry or transfer.

RISKS ASSOCIATED WITH THE DIGITALISATION PROCESS

While the advantages of digitalization are many, based on our review of the laws of various jurisdictions, SPHF / GoS should also be mindful of some of the issues that may arise during the implementation of the Project. We set out below some of the key risks that will need to be accounted for while implementing the Project.

- Digitalization of land records would require setting up an entirely new infrastructure and hiring and training of individuals to implement the digital transfer of land.
- Internal organization controls and checks will have to be implemented to eliminate the risk of any abuse of power by any of the officials of SPHF / new regulatory authority in the transfer, registration and recording of particulars of land.
- Extreme care will have to be exercised while recording the particulars of land / coordinates to ensure that there is no error in them as any error in the records could result in serious land disputes.
- A robust and state of the art software / technology will have to be established to ensure that the digital transfer process takes place with minimum human intervention and zero risk of hacking / tampering with the record.
- One challenge that would be faced is that most of the Beneficiaries will be situated in remote areas with little or no access to computers or internet and the assumption should be that majority of these individuals will not be computer literate. Educating and training these individuals on how to best protect their account details and the process that needs to be followed for transfer of title or lease of land or creation of mortgage will be a challenge and would require deployment of considerable resources.
- Another important issue that requires consideration is whether SPHF / new regulatory authority will establish offices closer to the remote areas so that Beneficiaries do not have to travel long distances if they require any assistance with the registration process.

CHAPTER 6 – STRUCTURE OF THE PROPOSED LEGISLATION

6.1 PROPOSED NEW REGULATORY FRAMEWORK

The new regulatory framework would involve enactment of the new GoS Policy and the proposed new [Sindh Flood Affectees Rehabilitation] Act (“**Proposed Legislation**”), which will, among other things, regulate the electronic transfer of title to the Beneficiaries. Please note that while we will help identify and draft the enabling legislation, the software and technology to be used at the back end for the safe, transparent and uninterrupted operation of the DLTRS will have to be developed and structured by SPHF’s technical experts. The Proposed Legislation will, *inter alia*:

ESTABLISH A NEW REGULATORY AUTHORITY

The Proposed Legislation will either empower SPHF or establish a new regulatory authority for implementing and regulating the Project.

The Proposed Legislation will set out the composition (including qualification and disqualification criteria and tenure of members), roles, responsibilities, functions and powers of the authority. The Proposed Legislation will also identify the manner in which the new authority will be funded, frequency of the meetings of its members, and the powers of its Chief Executive Officer / Managing Director.

The new authority should, *inter alia*, have the power to:

- manage, operate, upgrade and monitor the DLTRS, which will allow the digital transfer of land to Beneficiaries and record their particulars and will also allow and record any future transfer of land by a Beneficiary to a third party or the creation of mortgage over such land in favor of a third party;
- be the sole authority for retaining the digital record of all land that has been transferred to it by the GoS or private parties;
- determine whether an individual qualifies as a “Beneficiary”;
- digitally record the transfer of legal title in favor of Beneficiaries;
- issue evidence of registration of land title to Beneficiaries;
- record transfer of land by Beneficiaries to third parties and any subsequent transfer of such land;

- record the creation of any mortgage or other security interest over land by a Beneficiary in favor of a third party;
- rectify any errors in the registration of land title, creation of mortgage or particulars of a Beneficiary;
- create a grievance redressal forum to address any grievances or complaints of Beneficiaries in respect of the DLTRS;
- prescribe rules and regulations;
- have the powers to prescribe the fees for performing its services; and
- perform such other functions as are necessary for the implementation of the Project.

ESTABLISH THE DLTRS

- The Proposed Legislation will provide for the establishment of the DLTRS system through which land will be transferred and registered in favor of the Beneficiaries and will also enable future transfer of land by Beneficiaries and creation of mortgage in favor of third parties.
- The Proposed Legislation will specify the powers and functions of the officers of SPHF / the new regulatory authority who will operate the DLTRS and oversee the registration process.
- The Proposed Legislation will set out the manner in which Beneficiaries will be able to digitally access their land information and carry out transactions through the digital platform.
- The Proposed Legislation will expressly recognize the legitimacy of electronic signatures and electronically signed and witnessed documents.
- The Proposed Legislation will specify the forms together with the supporting documents that need to be filed for any Beneficiary seeking to transfer land.
- The Proposed Legislation will specify the criteria that the registrar will take into account before approving an application for transfer / registration of land title or creation of a mortgage.
- The Proposed Legislation will contain a provision attributing to the conclusive title in the land of the Beneficiaries once their respective information and land details have been entered into the DLTRS.

For the purposes of drafting the Proposed Legislation, we shall carefully examine the precedents of other jurisdictions (please see Chapter 5 of this Report, in which we have highlighted some of the key features which will need to be made part of the DLTRS based on our review of relevant legislation of other jurisdictions). Our current view, for this Report, is limited to identifying key features of such legislations and macro policy issues that require consideration and may be applicable to this Project.

MECHANISM FOR TRANSFER OF GoS OWNED AND PRIVATELY OWNED LAND

The Proposed Legislation will set out the process for transfer of both:

- (i) GoS owned land and privately owned land to SPHF; and
- (ii) land transferred by SPHF to Beneficiaries.

(i) (a) *Transfer of GoS owned land to SPHF / New Regulatory Authority*

In respect of the transfer of GoS owned land to SPHF / new regulatory authority, one proposal is that the law will set out the coordinates⁵⁰ of each parcel of GoS owned land over which a Beneficiary is situated and from the effective date of the Proposed Legislation, the land shall stand automatically transferred to SPHF / new regulatory authority. This in our view would be the cleanest and most expeditious way of ensuring that all GoS owned land is transferred to the SPHF / new regulatory authority. Accordingly, once the GoS owned land is transferred in favor of SPHF / new regulatory authority, the legal title of the same shall stand absolutely vested in SPHF / new regulatory authority without having the need to carry out any physical registration.

However, we would need to discuss this proposal with SPHF and the World Bank's experts to understand the technical / logistical issues in respect of the said proposal. For instance, one issue which needs to be discussed is the treatment of the existing physical record of land and whether the same will become redundant after the enactment of the Proposed Legislation or whether it should continue to exist in some form. We would recommend that following the enactment of the Proposed Legislation, the physical record in respect of GoS owned and privately owned land should become redundant and the particulars of land recorded in SPHF / new regulatory authority's register should be the sole and conclusive record in respect of such land.

Importantly, SPHF's technical and land experts will also have to confirm whether they have the requisite data to provide accurate coordinates. As any inaccuracy in the land coordinates could compromise the entire proposed scheme and could open flood gates for boundary disputes.

⁵⁰ This proposal is based on the assumption that SPHF / GoS will be in a position to provide the accurate coordinates of each parcel to be transferred to the Beneficiaries.

If the transfer of GoS owned land to SPHF / new regulatory authority through coordinates is not possible then the alternative would be to have the land registered in favor of SPHF / new regulatory authority under the existing laws of Sindh and the digitalization of land transfer and registration could take place as step two, i.e., at the time of transfer of land to the Beneficiaries. From both a legal and operational point of view, these are extremely important issues which need to be discussed with SPHF / World Bank's experts, so that the new law provides a workable transfer process.

The Proposed Legislation, in respect of state owned land, would also expressly override and disapply the applicability of the Registration Act and the Stamp Act to land regulated by the Proposed Legislation and no registration fee will apply at the time of transfer of land from the GoS to SPHF / new regulatory authority. Likewise, no registration fee and stamp duty will apply at the time of transfer of land to the Beneficiaries.

(b) Transfer of privately owned land to SPHF / New Regulatory Authority

In respect of the transfer of privately owned land to SPHF / new regulatory authority, we have identified in Chapter 4 of this Report the various constitutional and legal considerations that need to be taken account by SPHF. The manner in which SPHF will acquire privately owned land will depend upon the option SPHF decides to adopt based on our recommendations in Chapter 4. Once the GoS / SPHF takes a decision on the option it intends to pursue for acquiring privately owned land, the Proposed Legislation will be drafted to reflect the same. For instance, if SPHF decides that privately owned land will be acquired after payment of compensation. Then we would propose an acquisition process in the Proposed Legislation, which would be simpler than the one provided in the Land Acquisition Act. However, as noted above, the structure to be adopted will first have to be finalized with SPHF.

While these are ultimately policy considerations, we, on balance, would recommend that only those privately held land be bought under the provisions of the Proposed Legislation where the transferors are willing to donate/gift the property to SPHF (or other regulatory body) out of their own free will. This will avoid compulsory acquisition complications with respect to purchases and the determination of fair market value. And importantly, where compulsory acquisition is allowed (which will have to be against compensation), it will disincentivize transferors to donate. However, the Proposed Legislation will grant sufficient flexibility to SPHF / regulator to acquire private property through any other (legally permissible) manner it deems fit.

(ii) Transfer of Legal Title of Land from SPHF / New Regulatory Authority to the Beneficiaries

The Proposed Legislation will set out an objective criteria and mechanism through which SPHF / new regulatory authority will identify the Beneficiaries and digitally transfer legal title of land to them.

The Proposed Legislation will set out the procedural requirements for the said transfer together with timelines within which registration will take place.

The Proposed Legislation could also specify any transfer restrictions that the GoS would like to impose on the land transferred to the Beneficiaries. For instance, under the Goth-Abad Act, a deserving person who receives land from the GoS cannot sell the same for a period of ten (10) years. If SPHF / new regulatory authority intends to impose such restrictions, then we will incorporate the same in the Proposed Legislation.

Irrespective of whether GoS owned or privately owned land is to be transferred to the Beneficiaries, the Proposed Legislation will contain appropriate provisions to ensure that in addition to the title of land, the Beneficiaries are granted all necessary easement rights / rights of way, so that they can fully enjoy their freehold title. Further, the successful implementation of the Project will greatly depend upon SPHF's ability to provide accurate land coordinates, which will then be incorporated in the Proposed Legislation.

Please see Chapter 3 of this Report for further discussion on this issue.

Transfer of Legal Title of Land from Beneficiaries to Third Parties or Creation of Mortgage Over Transferred Land

The Proposed Legislation will allow Beneficiaries to digitally transfer land to a third party or mortgage the same electronically. The Proposed Legislation will set out the detailed procedure for both sale of land by the Beneficiary or mortgage such land in favor of a third party. The Proposed Legislation will also enable the Beneficiary to register lease of land electronically.

The Proposed Legislation will specify the electronic forms, supporting documents and entire process for transfer of freehold / leasehold rights over the land to a third party or for mortgaging the same to obtain a loan.

Rectification of Land Registry

The Proposed Legislation will provide for rectification of any errors in the land registry, either on the SPHF / new regulatory authority's own initiative or upon receive of any objection from the Beneficiary or a third party.

Dispute Resolution Mechanism

The Proposed Legislation will propose a dispute resolution mechanism to resolve any disputes that may arise regarding the transfer of digital land title to Beneficiaries. The Proposed Legislation will also set out appropriate grievance redressal mechanisms together with a well thought out appeal process.

Training

The Proposed Legislation should impose an obligation on SPHF / new regulatory authority to not just train its own staff in respect of the digital registration of land title / mortgages but to also provide free of cost facilitation and training to the Beneficiaries in respect of the use of the DLTRS. Ensuring that the Beneficiaries have the ability and resources to access and use the DLTRS will be extremely important for the success of the Project. Especially, given that the Beneficiaries will be situated in remote areas and quite a number of them may not be computer literate.

Limitation of Liability

The Proposed Legislation will provide for a limitation / exclusion of liability of SPHF / new regulatory authority (and its officers) in respect of any errors / omission of DLTRS or in respect of any dispute arising out of the digital entries in the land registry or the transfer of title to the Beneficiaries or the subsequent sale of such land.

Accounts and Audit

The Proposed Legislation will provide the maintenance of audited accounts by SPHF and also allow audit of SPHF.

Overriding Effect of the Proposed Legislation

The Proposed Legislation will expressly state that nothing contained in the Registration Act, the Land Revenue Act or the Stamp Act shall apply to the registration, transfer, lease and creation of mortgage over land regulated by the Proposed Legislation and in the event of any conflict with any other law, the provisions of the Proposed Legislation will prevail.

CHAPTER 7 – POLICY CONSIDERATIONS

7.1 POLICY MATTERS FOR CONSIDERATION

We have provided our preliminary views and recommendations on certain policy matters. These are subject to further discussions with the World Bank Group, SPHF and ourselves.

A. Regulator

So as to mitigate legacy issues we would suggest that SPHF be the sole regulator of title and related matters as they apply to Beneficiaries and their transferees (including buyers and lenders in whose favour title may be mortgaged). A counter argument is that it would create a parallel system for title registrations matters. However, given the weakness of the current system and the challenges to fix it, we are in favour of a new framework to serve as a model for future reforms and this will allow any glitches /shortcomings to be addressed in a more controlled environment.

It needs to be decided whether the regulator should be SPHF or a new authority that is set up under the Proposed Legislation.

B. Composition, Powers, Resources, Funding and Operations of the Regulator

Proposed functions and powers of the regulator are highlighted in Chapter 6. For operationalising the regulator, among other matters, the following decisions/actions are required:

- (i) What will be the composition of SPHF / regulator, including powers of CEO/MD etc. (will there be private sector representation?)?
- (ii) How will SPHF / regulator be funded?
- (iii) Who will develop the DLTRS for SPHF / regulator?
- (iv) Who will train officers / employees of the SPHF / regulator to operate the DLTRS and carry out the digital land title transfer process?
- (v) Will SPHF / regulator be a centralized authority seated in one city or will it have offices across the affected areas so that Beneficiaries can easily approach it for redressal of any grievances or any issues they face in respect of the transfer process.
- (vi) Will SPHF / regulator train the Beneficiaries so that the Beneficiaries have the ability and resources to access and use the DLTRS? Training of the Beneficiaries will be extremely vital given that the Beneficiaries will be situated in remote areas and quite a number of them may not be computer literate.

C. Size of Land/Plot

Whilst it is SPHF's policy decision, we recommend that the size of the land granted to the Beneficiaries under the Project should ideally be small. Under the Goth-Abad Act the size limit is two (2) ghuntas.

Further, placing a limitation on the size of the land/plot will also not run contrary to the decision of the Shariat Appellate Bench of the Supreme Court of Pakistan in Qazalbash Waqf and others vs. Chief Land Commissioner Punjab, Lahore and other⁵¹ wherein it was *inter alia* observed that though imposing a permanent restriction on the ownership of land in terms of size by the Government is not permissible as the same is repugnant to the injunctions of Islam. Notwithstanding this, an exemption was allowed whereby the Government of Pakistan could place certain restrictions on the size of the land/plot, provided the same was in the public interest.

D. Reasonable Classification of Beneficiaries

As discussed in detail in Chapter 4, apart from defining a 'Beneficiary' for eligibility purposes, it also required to mitigate against claims of discrimination (which mitigation is possible if there is), a reasonable classification for differentiating between Beneficiaries and non-Beneficiaries.

It is proposed that the criteria for determining a Beneficiary may, take into account:

- (a) limiting the applicability of the Proposed Legislation to the transfer of small parcels of land, say two (2) to three (3) ghuntas. As an important purpose of the Proposed Legislation is to serve a pilot project, we would strongly recommend that efforts should be made to keep this definition narrow so that vested interest groups at this stage may not feel threatened. (We do appreciate that practical application of criteria set forth in points (b), (c), (d), (e) and (f) may not be easy and requires further deliberations).
- (b) the extent to which the Beneficiaries' houses were destroyed due to the floods;
- (c) areas which were the most affected due to the floods;
- (d) the current financial status of the Beneficiaries;
- (e) loss of income/livelihood of the Beneficiaries; and

⁵¹ Reported as: PLD 1990 Supreme Court 99

- (f) whether the house of an individual has been indirectly impacted by the floods, for instance, by virtue of being in the vicinity of the flood affectees or affected area.

E. Title Certainty

In Chapter 4 of the Report, we have, on balance, suggested that once title is inducted into the electronic system, it will not be subject to challenge but an aggrieved party may claim monetary damages in line with the current legislation involving scripless shares under the CDC Act. An alternative would be to provide such title certainty after the lapse of say three (3) years so that the aggrieved party may during this period file a suit for specific performance.

We have also examined the possibility of granting a provisional title to the Beneficiaries. i.e., issuing a qualified title prior to a “final title” – similar to the procedure followed in Malaysia in certain cases. We do not think that granting a provisional title for the purposes of the Project is a suitable option since the benefit of such a system will be outweighed by the multiplicity of litigation that we anticipate.

Subject to policy considerations, we would suggest as follows:

- (a) with regard to transfer of GoS land to SPHF or another regulator, title should attain finality upon such transfer, subject to an aggrieved party’s right to money damages extinguishing on the third (3rd) anniversary of such transfer.
- (b) with regard to gift/donation of land by a private party to SPHF or a regulator, title should attain finality on the expiry of eighteen (18) months from the date of the gift/donation, subject to an aggrieved party’s right to money extinguishing on the third (3rd) anniversary of such gift/donation.
- (c) after induction of title in SPHF or regulator, all subsequent transfers should attain finality upon transfers, subject to an aggrieved party’s right to money damages extinguishing on the third (3rd) anniversary of transfer (provided no transferee shall get any rights superior to that vested with SPHF or regulator).

F. Restraint on Transfer

We have considered whether there should be a time limit during which a Beneficiary is restricted from selling/transferring/mortgaging or otherwise parting with possession of the piece of land allotted to them under the Project.

The obvious advantage of this would be to discourage the Beneficiaries from trying to liquidate their houses soon after they take possession with the risk that they may be rendered homeless again. The disadvantage that in the absence of such liquidity, the value of the property may be negatively affected until such time the restriction is in place. The Goth-Abad Act places a ten (10) year restriction on alienation. Policy decision is required on whether there should be a time frame during which a Beneficiary may not alienate the land transferred to him/her.

Should there be any restrictions (such as a time restriction) on a Beneficiary from transferring/selling land granted to it by SPHF/new regulator? If so, for what period? Assuming a restriction is deemed necessary should the restriction apply to a Beneficiary mortgaging land to a financial institution?

G. Transfer of land by GoS

We would like to reiterate that for the purposes of the Proposed Legislation, it is assumed that when the government gives title, it has good title. The transfer document as per general practice would include a representation and warranty of the GoS with respect to their title being free and clear from any claims, encumbrances, third party disputes and title disputes. This is subject to confirmation by the GoS.

H. Supreme Court Confirmation

Given the lack of clarity regarding the requirement of obtaining permission from the Supreme Court for transferring GoS owned land to SPHF or regulator, it is our opinion that the GoS may need to seek permission from the Supreme Court of Pakistan. Additionally, we believe that seeking an opinion from the Ministry of Law and Justice, Government of Pakistan, could provide further guidance in this matter.

I. Gift/Donation v. Compulsory Acquisition of Private Land

In respect of voluntary transfers of private land to SPHF as dealt with in Chapter 4 of this Report, we have suggested that it would be preferable to effect the same through a gift by the private party as opposed to its consent. If, however, the private party is unwilling to voluntarily transfer, then it needs to be decided whether or not the relevant legislation should provide a mechanism for compulsory acquisition of the land (we have already opined that based on existing case-law of our Superior Courts in Pakistan, such acquisition can only be against compensation based on fair market value(s)).

We have on balance formed the view that that the legislative framework should not provide or enable any compulsory acquisition which would mean that where a private party is unwilling to transfer, no transfer would be possible under the proposed legislative framework being formulated. GoS will however be free to affect a compulsory acquisition in accordance with the Land Acquisition Act read with the Goth-Abad Act. The Proposed Legislation will grant sufficient flexibility to SPHF / regulator to acquire private property through any other (legally permissible) manner it deems fit.

Our reason for the same is that if private landowners have the option to donate or get compensation through compulsory acquisition, they will be disincentivized to donate. Moreover, we would expect controversies on the adequacy of compensation. Finally, we understand that approximately 70% of the flood-affected properties are on public land and further understand that given the small size of land many private landowners will be willing to donate, and only a small percentage of the land that may be required will be subject to any compulsory acquisition. Also, in respect of unwilling landlords, the GoS may provide such persons with alternate pieces of land.

From a policy perspective, GoS needs to decide whether transfers by private persons may only be effected by gift donation.

J. First Induction

We have recommended that, while the mode of induction of title to SPHF, will be prescribed under the statutory framework it will nevertheless broadly be in compliance with provisions of existing laws. The DLTRS will apply to all transfers from SPHF or regulator to the Beneficiaries and from the Beneficiaries to third parties. GoS to confirm the foregoing from a policy perspective. (Title certainty matters are covered in para E above).

K. Title to Females

We have also considered whether the titles in the land should be provided to females or males. Whilst there is no specific mandate under Pakistani laws as to which gender receives and retains title in land, we think that given the magnitude of the Project and similar initiatives adopted in Indonesia subsequent to the earthquake in 2004 and in Bangladesh where over twenty million women are associated with microfinance activities sponsored by non-governmental organizations, title(s) being given to females can have a positive impact on female empowerment in Pakistan.

We do not see any glaring impediment in providing the land titles to females. Nevertheless, we should point out that upon the death of such females who hold the titles, the Principles of Muhammadan Law, i.e., succession laws, will come into effect and can potentially lead to title disputes at a later stage where more likely than not, the title can stand transferred to her husband/sons.

From a policy perspective, GoS needs to decide whether SPHF or regulator may only transfer title to females? If so, should a female transferee be permitted to sell or gift to a male person or other artificial persons.

L. Grievance Redressal Mechanism and Appeal Process

The Proposed Legislation will need to set out an appropriate grievance redressal mechanism for entertaining complaints from the Beneficiaries or third parties. We require SPHF's input on whether the Proposed Legislation should set out an appeal process so that any person aggrieved by a decision of an officer of SPHF / regulator could approach SPHF's / regulator's appellate tribunal. SPHF will have to take a decision on whether it will have the necessary resources / expertise to establish an appellate tribunal and entertain appeals from aggrieved parties. SPHF / regulator will also have to guide us in respect of the composition of the appellate tribunal. Until such time that the appellate tribunal has been notified and is fully functional, appeals from any decision of an officer of SPHF / regulator could lie with the civil court. Once the tribunal is operational, appeals from the decisions of the appellate tribunal could lie with a higher forum such as the High Court. The Proposed Legislation will expressly disapply, override and supersede any other legislation that requires a land title dispute to be resolved in a manner other than the one set out in the Proposed Legislation.

The process set out above is an initial outline of what the grievance redressal mechanism could look like. We would be pleased to evolve / amend the process based on input received from SPHF and the World Bank's team, while preparing the draft of the Proposed Legislation.

Once we receive SPHF's feedback on the Report and the Project implementation structure is finalized, we will commence drafting the GoS policy and the Proposed Legislation.