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Capacity Building for  
Resettlement Risk Management

**Compensation and Valuation  
in Resettlement:  
Cambodia, People's Republic  
of China, and India**

November 2007

Asian Development Bank





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Rural Development Institute

Asian Development Bank

## CAPACITY BUILDING FOR RESETTLEMENT RISK MANAGEMENT SERIES

This publication was prepared in conjunction with an Asian Development Bank (ADB) regional technical assistance (RETA) project on Capacity Building for Resettlement Risk Management, covering three developing member countries in the region, namely, Cambodia, People's Republic of China (PRC), and India.

The RETA aimed to generate specific knowledge based on country studies to identify risks and improve the capabilities of ADB and developing member countries to address impoverishment risks associated with involuntary resettlement.

The series comprises the following outputs of the RETA:

1. Capacity Building for Resettlement Risk Management: Final Report by Sam Pillai
2. Capacity Building for Resettlement Risk Management: Cambodia Country Report by Chea Sarin
3. Capacity Building for Resettlement Risk Management: India Country Report by Parthopriya Ghosh
4. Capacity Building for Resettlement Risk Management: People's Republic of China Country Report by the China Land Surveying and Planning Institute
5. Capacity Building for Resettlement Risk Management: People's Republic of China Thematic Reports by the China Land Surveying and Planning Institute
  - Thematic Report No. 1: The Scope of Land Expropriation Rights
  - Thematic Report No. 2: Asset Valuation in Land Acquisition and Compensation
  - Thematic Report No. 3: Improving Resettlement Policies and Practices to Manage Impoverishment Risks
  - Thematic Report No. 4: Reforming the Legal and Policy Framework for Land Acquisition to Manage Impoverishment Risks
6. Handbook on Resettlement for Transport Projects in Cambodia by Chea Sarin
7. Handbook on Resettlement for Highway Projects in India by Parthopriya Ghosh
8. Risk Analysis and the Risks and Reconstruction Model in Population Resettlement: Training Course by Professor Michael Cernea
9. Compensation and Valuation in Resettlement: Cambodia, People's Republic of China, and India by Rural Development Institute
10. The Impoverishment Risks and Reconstruction Model: Resettlement and Benefit-Sharing by Professor Michael Cernea

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# Abbreviations

|                |  |
|----------------|--|
| ADB            | Asian Development Bank                                     |
| AP             | affected person/people                                     |
| cm             | centimeter   |
| CNY            | yuan   |
| CPR            | community/common property resource                         |
| CRIP           | Cambodia Resettlement Implementation Plan                  |
| CVM            | contingent valuation method                                |
| DFDR           | development-caused forced displacement and resettlement    |
| DMC            | developing member country                                  |
| GOI            | Government of India  |
| IRC            | Inter-ministerial Resettlement Committee (Cambodia)        |
| ISA            | initial social assessment                                  |
| kg             | kilogram   |
| LAA            | Land Acquisition Act (India)                               |
| LML            | Land Management Law  |
| m <sup>2</sup> | square meter   |
| MEF            | Ministry of Economy and Finance (Cambodia)                 |
| NGO            | nongovernment organization                                 |
| NHAI           | National Highways Authority of India                       |
| NPRR           | National Policy on Resettlement and Rehabilitation (India) |
| PPTA           | Project Preparatory Technical Assistance                   |
| RDI            | Rural Development Institute                                |
| RLCL           | Rural Land Contracting Law (the PRC)                       |
| ROW            | right of way   |
| RRAP           | Resettlement and Rehabilitation Action Plan (Cambodia)     |
| Rs             | rupee  |
| R&R            | resettlement and rehabilitation                            |
| WTA            | willing to accept  |
| WTP            | willing to pay   |

## Note:

In this publication, “\$” refers to US dollars.

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# Executive Summary

**D**evelopment-caused forced displacement and resettlement (DFDR) is frequently characterized by the resulting impoverishment of those displaced. The lack of appropriate valuation of and compensation for lost assets is one major underlying factor. This paper addresses the valuation and compensation issues within the context of three Asian countries (Cambodia, People’s Republic of China [PRC], and India) and offers recommendations related to the Asian Development Bank’s (ADB) relevant guidelines and methods and to the country-specific policy and legal regimes.

Specifically, Section I contains a discussion of the general international experiences in valuation and compensation issues. Section II discusses the topic within each of the three focal countries and offers specific recommendations for both policy reform and project-specific approaches in each country. Section III summarizes common problems and offers general recommendations for policies and practice that may be applicable for ADB across the region.

ADB adopted an involuntary resettlement policy in 1995 that includes general language on compensation and valuation. That policy calls for compensation of lost assets at “replacement cost.” It appears that the policy and legal frameworks governing DFDR compensation in all three countries fall short of relevant ADB policy standards in several respects. Meeting those standards for ADB-funded projects in these three countries will require conducting legislative and policy reforms, designing and implementing extra-legal, project-specific guidelines, and faithfully implementing the laws and rules on the ground.

The gaps between ADB policies and the country legal frameworks are country-specific. Nonetheless, several themes appear in more than one country, including: the difference between replacement value (ADB standard) and “market value”; the difficulties of applying any compensation standard in settings where land markets are inactive; the failure of legal

regimes to recognize claims of those without formal titles; and the inadequacy of procedural mechanisms in terms of providing affected people (AP) with access to information, participation, and redress.

Most notably, a five-component formula—consisting of market value, premium, transaction costs, interests, and direct damages—should be used to determine the “replacement value” under the ADB policy. Among other things, we further recommend the following:

- Where land market is active, apply comparable sales approach to assess the value of expropriated land and non-expropriated equivalent land in vicinity and take the higher of two values as the market value of the land at issue.
- Apply income capitalization approach to assess the value of expropriated land based on the best permissible use of the land.
- Experiment with contingent valuation methods to substitute the other valuation methods eventually.
- Improve procedural safeguards by instituting a six-step mechanism.

Main recommendations offered to each focus country include:

#### For the **PRC**:

- Introduce a replacement value approach along with minimum compensation standards for valuation of rural land under expropriation.
- Designate a fair ratio of allocation of compensation between collective landowners and affected farmers, with greater share going to affected farmers.
- Improve resettlement subsidy to satisfy the needs for mitigation of non-asset impoverishment risks.

- Reduce the scope of land expropriation by clearly defining “public interests.”

For **India**:

- Conduct valuation of land through different combinations of key informant interviews, comparable sales approach, and income capitalization approach for the expropriated land depending on development level of land market in the locality.
- Adopt the highest value for the expropriated land in the locality derived from different valuation techniques.
- Consider establishing expert tribunals to help set compensation in all projects involving land expropriation.

- Require “land-for-land” as an option in making compensation and provide larger house plots upon the selection of this option.

For **Cambodia**:

- Conduct legal and policy reforms on compensation and resettlement regimes to protect poor people from being further marginalized.
- Define clearly the “fair and just compensation” requirement.
- Do not let the lack of formal title be a bar to rehabilitation assistance.
- Establish an independent adjudication body to address AP’s grievances.



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# Introduction

**D**evelopment projects ultimately aim to improve people's well-being. Yet, such projects frequently result in direct negative impacts on some portion of the population. Perhaps, chief among those negatively impacted are those whose assets are taken by the authorities as part of the project. This typically occurs because the project requires land. As such, those people living on, working on, or otherwise benefiting from the land and its related resources become "losers." Frequently, such people become involuntarily displaced and have to resettle elsewhere.<sup>1</sup> For those affected, involuntary displacement means a drastic disruption fraught with risks of impoverishment.<sup>2</sup>

Any development project is essentially an endeavor to bring overall economic benefits to all people in the country, including those who have to be displaced by the project. These affected people (AP)—whether they are titled holders or informal dwellers of the property to be expropriated—are an integral part of beneficiaries, rather than sufferers, of such development projects. On the other hand, the success of a development project depends on voluntary cooperation and heartfelt

welcome by these APs. Any impoverishment to APs by such project will be inevitably translated into not only a failure to achieve the project's goal of increasing overall well-being for all citizens, but also an impediment to the smooth execution of the project.

Unfortunately, the history of development projects that result in displacement is characterized by the impoverishment of those displaced, resulting in "one of the most perverse pathologies of induced development."<sup>3</sup> This need not be so. The risks of impoverishment through displacement can be mitigated. The approaches to appropriately addressing the impoverishment risks of involuntary displacement are multifaceted, but all involve both (i) compensation for expropriated assets and (ii) rehabilitation measures to help improve or, at least, restore incomes and standards of living.

This paper addresses the compensation aspect of mitigating impoverishment risks resulting from involuntary displacement, and even more specifically, the appropriate valuation of lost assets. Proper valuation of and compensation for lost assets are crucially important counteractions to mitigate impoverishment risks for displaced persons and to achieve successful resettlement results.<sup>4</sup> Unfortunately, the history of development-caused forced displacement is littered with examples of undervaluation and under-compensation resulting in cost externalization on the shoulders of displaced persons and their impoverishment.

Several threshold points are crucial to understanding the context of the paper. First, compensation for lost assets, by itself, is not sufficient to address the losses faced by those involuntarily displaced. In addition to losing assets, involuntarily displaced people face substantial economic and social disruption and related

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<sup>1</sup> Experts estimate that roughly 10 million people around the globe are displaced each year due to dam construction, urban development, and transportation and infrastructure programs. (World Bank Environment Department. 1994. Resettlement and Development: The Bankwide Review of the Projects Involving Involuntary Resettlement 1986–1993. *Environment Working Papers* No. 32.). While development-induced displacement occurs throughout the world, two countries in particular—the People's Republic of China (PRC) and India—are responsible for a large portion of the displacements. The National Research Center for Resettlement in the PRC has calculated that over 45 million people were displaced by development projects in the country between 1950 and 2000. (Fuggle, R., et al. 2000. Experience with Dams in Water and Energy Resource Development in the People's Republic of China. Country review paper prepared for the World Commission on Dams, Cape Town, South Africa. Available: [www.dams.org/kbase/studies/cn/](http://www.dams.org/kbase/studies/cn/)). Estimates on displacement in India from dam projects alone range from 21 million–40 million. (Bartolome, L.J., et al. 2000. Displacement, Resettlement, Rehabilitation, Reparation, and Development. Paper prepared for the World Commission on Dams. November.).

<sup>2</sup> Cernea has developed a widely accepted model of impoverishment risks in displacement and of counteractions to match these basic risks. The model deconstructs the process into nine recurrent risks: (1) landlessness, (2) joblessness, (3) homelessness, (4) marginalization, (5) increased morbidity and mortality, (6) educational losses, (7) food insecurity, (8) loss of common property, and (9) social disarticulation. (Cernea, M.M. 2000. Risks, Safeguards, and Reconstruction: a model for population displacement and resettlement. In *Risks and Reconstruction Experience of Resettlers and Refugees*, edited by M.M. Cernea and C. McDowell. World Bank.)

<sup>3</sup> Cernea, Michael M. 2003. For a new economics of resettlement: a sociological critique of the compensation principle. *International Social Science Journal*. 175(37). March.

<sup>4</sup> Of the nine recurrent risks identified by Cernea, proper valuation of and compensation for lost assets most directly addresses the risks of landlessness, homelessness, marginalization, loss of common property, and (often) joblessness.

costs and losses that rehabilitation and generalized safety net measures must address. Those rehabilitation and safety net measures are not within the scope of this paper.

Second, the legal, policy, and administrative frameworks concerning expropriation and compensation for lost assets (especially in developing country settings) are not typically designed to address situations that result in involuntary displacement. Rather, these laws and policies are typically designed for circumstances where the expropriation of assets does not result in involuntary displacement and resettlement. Such laws and policies are inherently insufficient for expropriatory interventions that cause displacement because they do not recognize and address the multiple other losses and impoverishment risks inherent in resettlement.

Third, the compensation portion of the broader entitlement package typically falls short of fully compensating for the lost asset(s) due to a variety of factors. Valuation is one of those reasons, and the one on which this paper will focus, but it will also touch upon non-valuation factors that lead to under-compensation for lost assets.

This paper examines the issue of compensation for and valuation of lost assets in the context of development-caused forced displacement. It is prepared for the Asian Development Bank (ADB) as part of a regional technical assistance on capacity building for resettlement risk management (RETA 6091) aimed at developing and disseminating knowledge products that address the management of poverty risk due to involuntary resettlement.

The paper consists of six major sections. The first section discusses approaches to valuation in the ADB policy and broader international context and how such approaches address (or not) impoverishment risks in resettlement. The second through the fourth sections explore the laws and practices of expropriation in three Asian countries (Cambodia, People’s Republic of China [PRC], and India) covered under the regional technical assistance: RETA 6091, and provide related country-specific recommendations. The fifth section provides a series of general recommendations for “best practices” in expropriation laws and policies. The sixth and final section is a brief conclusion of the paper.

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# I. Expropriation, Compensation, and Valuation: ADB Policy and International Experience

**D**riven by the demand for economic development and improvement of the well-being of citizens, governments in every country maintain and exercise the power to expropriate (compulsorily take) private properties for public purposes. While every sovereign state maintains an “eminent domain” power to advance the interest of the public, the government’s action negatively impacts the livelihoods of those whose assets are taken.

Most countries have developed land expropriation or acquisition<sup>5</sup> laws to restrict their government’s exercise of its eminent domain power and have accumulated instructive experience in implementing those laws. Such laws typically: (i) define the cases in which the government can exercise its power; (ii) describe the rights and participation of those persons whose assets are being taken; (iii) define the lost assets for which compensation is payable; and (iv) define the level of compensation that is payable for those assets. Our analysis will focus on the fourth of these topics, but we will also touch upon the first three.

Few countries have developed broader resettlement legislation that applies to land expropriation cases resulting in involuntary displacement and provides for rehabilitation measures as well as compensation. Thus, it is typically the land expropriation laws that often stipulate a government’s legal obligations in situations of involuntary displacement and resettlement. Even when applied to cases that do not involve involuntary resettlement, such laws are often flawed. They are universally flawed—to varying degrees—when applied

to cases resulting in involuntary resettlement, as discussed further below.

Until relatively recently, development-caused forced displacement of a population was considered a “sacrifice” some people had to make for the larger good. The conventional “remedy” employed in projects to respond to resettlers’ dispossession and economic and social disruption was compensation for lost assets. Resettlement programs in general were limited to statutory monetary compensation for land and other assets acquired as specified in the relevant expropriation law. Perceptions are changing, however, in large part because of a growing awareness of the actual and potential adverse social, economic, and environmental consequences of population displacement. Policy makers, planners, and practitioners are increasingly accepting that displaced persons should not bear any of the externality costs and that rather than trying to reduce some of the burden imposed on the displaced, the approach should focus on fully restoring, if not improving, the well-being of project-affected persons (APs).

## A. ADB’s Involuntary Resettlement Policy

As part of this sea of change, ADB has adopted a policy for involuntary resettlement resulting from development projects. ADB’s policy cover a range of issues including, but not limited to, compensation for loss of assets; resettlement of APs; government budgetary planning for resettlement and compensation; institutional framework for involuntary resettlement; and interactions with civil society concerning resettlement.

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<sup>5</sup> “Expropriation” and “acquisition” are used interchangeably in this paper and they refer to the government’s involuntary taking of land and other assets.

The guidelines on compensation for loss of land assets upon expropriation set the bar higher than those set by the statutory frameworks of all developing member countries (DMCs). The guidelines on compensation for loss of assets to land expropriation are outlined below.<sup>6</sup>

**1. Compensation for loss of assets should be determined in such a way that the APs' economic and social future will generally be at least as favorable with the government takings as without them.**

This guideline establishes ADB's bottom-line principle on compensation for loss of assets because of government expropriation: whenever resettlement is unavoidable, APs' livelihood should not be worse off due to involuntary resettlement. Flowing from the bottom-line principle of preventing APs' livelihood from worsening, determination of compensation for lost assets should be based on "replacement value." Replacement rates, according to ADB policy, are "equal to market costs plus transaction costs providing that the markets reflect reliable information about prices and availability of alternatives to the assets lost." Replacement value can mean either replacing the asset with a like asset of similar quality and quantity or with monetary compensation. Thus, the "market cost" in ADB's definition of "replacement value" refers to the "market cost" of the replacement land, not necessarily the land that is lost.

**2. The absence of formal legal title to land by APs should not be a bar to compensation.**

In many Asian countries, rights to land (especially rural land) are poorly documented. Possessors without formalized rights are common, including tenant farmers, customary users, and so-called "encroachers" and "squatters." It is common that long-term possessors with customary rights accepted by the local community do not have formalized rights officially recognized by the government. Many such people who do not have formal legal title to the land to be expropriated nonetheless will be negatively affected by expropriation.

ADB's policy states that all "persons affected" are eligible for compensation irrespective of legal or ownership titles. "APs" are broadly defined as "those who stand to lose, as a consequence of the project, all or part of their physical and nonphysical assets, including homes, communities, and productive lands, resources such as forest, range lands, fishing areas, or important cultural sites, commercial properties, tenancy, income-earning opportunities, social and cultural networks, and activities."

**3. APs should be fully consulted about the compensation and should have basic access to mechanisms for enforcing their entitlement to just compensation.**

APs' access to information, full participation in the expropriation process, and ability to enforce their rights are not only a component of democratic development, but also an effective institutional check on the government's expropriatory power.<sup>8</sup> ADB's policy is to neutralize the power imbalance that exists in the government's favor in land expropriation by empowering the stakeholders to defend effectively their entitlement to fair and just compensation under the rule of law.

Notably important is that in all the three country cases reviewed here, the laws and their implementation fall well short of meeting ADB's standards. Specifically, the legal framework of each country does not provide compensation to all APs at replacement cost. Thus, achieving ADB's standards in the context of all ADB-funded projects involving resettlement in these countries will require supplementing the compensation provided under the local legal regime with other allowances so that the total is equal to the replacement cost of affected assets.

## **B. Fair Market Value vs. Replacement Value**

Most countries around the world have constitutional and/or statutory standards that call for "market value" or "fair market value" compensation for lost assets that the state expropriates. The distinction between compensation at "fair market value" and compensation

<sup>6</sup> Asian Development Bank's (ADB) policies on compensation for loss of assets are drawn from the ADB *Handbook on Resettlement: A Guide to Good Practice*. 1988. Appendix 1.

<sup>7</sup> Available: [www.adb.org/Resettlement/faq\\_03.asp](http://www.adb.org/Resettlement/faq_03.asp)

<sup>8</sup> Economists have noted the dangers of the in-built asymmetry of information and asymmetry of power embedded in the application by the state of the eminent domain principle. (See Stiglitz, Joseph. 1997. *Principles of Microeconomics*. 2nd edition, 430.) This information and power asymmetry can be at least partially countered with effective notice, consultative, and redress procedures.

at “replacement cost” is often a source of operational confusion. Where (i) markets provide reliable information about prices and (ii) comparable assets or acceptable substitutes are available for purchase, replacement cost is equivalent to “fair market value” of the replacement land<sup>9</sup> plus any transaction costs (such as preparation, transfer, and registration fees and taxes).<sup>10</sup>

In many DMC settings, one or both of the two conditions noted above are not present. In some such settings, particularly remote, rural settings, markets are not sufficiently active to provide reliable information about prices. Even when markets do provide reliable information about the value of the expropriated land, it may not be possible to identify comparable land for purchase.

Even in the presence of both conditions, valuation using the fair market value standard often results in less than market price due to a variety of other factors. In many countries, legal compensation criteria are based on a registered “market value” that underestimates actual market value, so landowners are unable to replace their assets. In many settings, legal compensatory practices do not recognize customary claims that are not formalized (as defined by the state). In other settings, the legal framework recognizes the claims, but compensates them at a discounted value. In some settings, the state places sharp restrictions on the rights of formalized land users—such as the right to sell—which then results in a sharply discounted market value, making it impossible for landowners to replace their asset. In most settings, “market value” compensation refers to the market value of the expropriated land, which for a variety of reasons might not be the same as the market value of land of equal productive potential or use that could serve as a replacement.

## C. International Practice on Compensation for Expropriation

### 1. Fair Market Value

Most countries have constitutional requirements for paying compensation when the government expropriates private assets for public purposes. In the United States (US), the US Constitution requires “just compensation” for all takings of private property.<sup>11</sup> The Philippine Constitution similarly requires that “payment of just compensation must be made.”<sup>12</sup> Brazil’s Constitution also contains a “just compensation” clause.<sup>13</sup> In Cambodia, the Constitution mandates that the state make “fair and just compensation” for taking possession of land from any person.<sup>14</sup>

Some countries have what appears to be a milder constitutional requirement. In the PRC, not until 2004 was the Constitution amended to require the state to make “reasonable compensation” for land expropriation.<sup>15</sup> Before the amendment, the Constitution merely required the state to provide “compensation” for land takings.

Based on constitutional requirements, many countries have developed standards for determining “just compensation.” Most high- and middle-income countries with well-functioning legal systems have adopted “fair market value” of the expropriated asset as the standard for determining compensation for state expropriations. The fair market value is commonly defined as “the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer.”<sup>16</sup> The underlying reason for adopting the fair market value standard is that the market is an objective gauge for assessing the value of the land.

Under the fair market value standard, land expropriation laws in many of these countries provide further practical rules to guide adherence to the

<sup>9</sup> Not the expropriated land.

<sup>10</sup> The fair market value standard used in most developed country settings (including the United States [US]) does not include consequential damages associated with condemnation, such as moving expenses, attorney’s fees, and lost business good will associated the location of the property. (Dana, D., and T. Merrill. 2002. *Property Takings*. New York: Foundation Press).

<sup>11</sup> US Constitution, Amendment V.

<sup>12</sup> Philippine Constitution, Art. III, § 9.

<sup>13</sup> Brazil Constitution, Art. 153, para. 22 (amendment 1).

<sup>14</sup> Cambodian Constitution, Art. 44.

<sup>15</sup> The People’s Republic of China Constitution amendment, art. 10 (2004).

<sup>16</sup> Knetsch, Jack L., and Thomas E. Borchering. 1979. Expropriation of Private Property and the Basis for Compensation. *University of Toronto Law Journal*, 29(237).

standard.<sup>17</sup> Some countries provide a premium above the “fair market value” because of the involuntary nature of the taking. In a compulsory land taking, the government is a willing buyer, but the affected landowners are often not willing sellers. Some governments have developed a variety of mechanisms to compensate landowners in excess of market value because of the involuntary nature of the taking.

Great Britain provides for special compensation when expropriation of agricultural land disturbs a farmer's operations.<sup>18</sup> Likewise, in Germany, when an expropriation divides or transverses agricultural land, the government must pay additional compensation based on the following: (i) increased time required for the farmer's road travel and preparation of machinery; (ii) damage due to detours; (iii) damage due to increased boundaries on the land; and (iv) damage caused by worsened alignment of the land.<sup>19</sup>

Italian law provides for a high level of compensation and strong incentives for agricultural landowners and users to accept the compensation offered by the state. When agricultural land is expropriated and rezoned for urban uses, the municipality offers compensation of 1.5 to 3 times the government-established average value of similar agricultural land in the locality. This higher-than-market value offer of compensation has

encouraged landowners to accept compensation offers without appeal to the courts.<sup>20</sup>

Although the prevailing practice throughout the world in compensating property owners for their loss is to provide cash compensation, some countries present an asset-for-asset alternative that international development agencies promote. In the US, for example, when the government evicts tenants of substandard housing for development of better housing, the government may provide the tenants with new residences that meet city standards in lieu of cash compensation.<sup>21</sup>

## 2. Valuation Methodology

As discussed above, most countries have adopted “fair market value” as the compensation standard when the government expropriates land. But how is “fair market value” determined? This subsection discusses typical valuation methods used internationally to determine the fair market value of the asset types typically impacted by government expropriations: land, structures on land, crops, and common property resources (CPRs).

### a. Valuation of land

Land valuation is typically achieved through one or both of two basic approaches: comparable sales approach, and/or capitalization or income approach.<sup>22</sup>

#### (i) Comparable sales approach

The comparable sales approach is the most common method of land valuation. It relies on market information to value the land. The underlying concept is that a recent sale from a willing seller to a willing buyer of a property (the comparable property) can best reflect the value of a similar property (the subject property) in the vicinity. This method models the behavior of the market by comparing the subject property under valuation with similar property or properties that have recently sold or for which offers to purchase have been made. It assumes that a rational and prudent buyer

<sup>17</sup> In the US, the government must fully compensate the landowners, putting the owners in a similar position to where they would be if the property had not been expropriated. The determination of market value cannot reflect any changes in the value arising from the expropriation itself. If the announcement of the expropriation causes the land suddenly to become more or less valuable, this change in value is not considered, and the state must pay the market value that existed immediately prior to the announcement. (Ackerman, Alan T., ed. 1994. *Current Condemnation Law: Takings, Compensation, and Benefits*. 55). In Great Britain, the expropriating authority first negotiates with all interested parties to reach an agreement on compensation. If the parties cannot agree, a Lands Tribunal determines the appropriate compensation according to the following principles: (i) no allowance is made since expropriation is compulsory; (ii) the value of the land is deemed to be the amount for which a willing seller would have sold the land in the open market; (iii) the suitability of the land for a special use is not considered if the owner would require statutory approval for that use; (iv) no consideration is given to any item of value related to the use of property that is illegal, detrimental to the health of the occupants, or detrimental to public health; and (v) if it is impossible to determine the market value for a particular piece of land due to the lack of a market for the purpose of the land, the compensation can be based on the reasonable cost of providing the occupier with a comparable piece of land. Some countries, mostly in South America, use land valuation for tax purposes as the basis for determining “just compensation.”

<sup>18</sup> In addition to compensation for the land, if anyone is displaced from an agricultural unit, that person is entitled to a “farm-loss payment,” provided that one: (i) has an interest in agricultural land with at least 3 years remaining; (ii) one loses interest in the land because of the state's expropriation; and (iii) within 3 years, one begins to farm another agricultural unit within Great Britain. Land Compensation Act. 1973. § 34 (Eng.).

<sup>19</sup> Grimm, Dr. Christian. 1998. Rural Land Law in Germany. May. (Unpublished manuscript on file with the Rural Development Institute [RDI]).

<sup>20</sup> Agostini, Danilo. 1998. Rural Land Law in Italy. May. (Unpublished manuscript on file with RDI). Each landowner and user has 30 days to decide whether to accept or reject the offer. The level of compensation for urban land differs from rural land and is based on the following formula: the market value of the land (Vm) plus 10 times the cadastre income (RD) divided by two:  $(Vm + 10RD)/2$ . In practice, this typically leads to compensation that is approximately 40% lower than the market value of urban land.

<sup>21</sup> 26 Am.Jur. 2d, Eminent Domain § 180.

<sup>22</sup> Some observers describe a third approach typically described as “expert opinion,” but expert opinions are typically based on one or both of the other two approaches.



will not pay more for the comparable property, while a seller in the same situation will not accept less for the same property. The sales price finally reached reflects the equilibrium of supply and demand for land in a given market. Therefore, if the subject property under valuation were offered for sale in the same market about the same time, the transaction would be completed at approximately the same price.

The comparable approach requires the following steps: data collection; analysis of market data to develop a group of properties for comparison; selection of attributes for adjustment; application of the approach to adjust the sales prices of comparable properties to the subject property; and analysis of the adjusted sales prices to estimate the value of the subject property.

Data collection involves market research to collect information on the actual transactions, demand, and supply with respect to the comparable properties and the subject property. To do this, the assessor needs to collect the information on recent sales of land plots in the relevant market and verify the transaction information. The information about land covers both quantitative and qualitative aspects, including the area of the land plots sold; sales price and date; land quality and fertility; long-term investments in the land; crops grown on the land; categories of land use (rice paddies, dry land, or wasteland); and restrictions on land use or alienability.

The collected data normally should be verified. The information about the transaction is typically considered authentic when it is obtained from at least one of the transacting parties, an agent, or from a government office where such information is registered. One must always consider the likely quality of the information collected. Such information, particularly from a government office, can be inaccurate when either the buyer or seller or both have significant incentives to overstate or understate the transaction price.

Once credible information on land sales is obtained, the next step is to select the comparable properties. This involves two basic issues: the number of properties to be selected for comparison and the attributes of properties for comparison. While selecting a large number of sold properties for comparison tends to increase the confidence of the comparison result, it will add workload and complexity for valuation work. Therefore, a proper balance must be achieved between the number of comparable properties and the efficiency of the valuation work. Based on international practice, three to five comparable properties is typically sufficient.

The key for selection of attributes for comparison is comparability between comparable properties and the subject property. Comparability measures similarities between them. A rule of thumb is that comparable properties and the subject property should be similar with respect to date of transaction, economic conditions, physical attributes, and competitiveness in the same market. Of all these attributes, competitiveness is most important because if the comparable properties and the subject property do not compete in the same market, the value derived from such comparison for the subject property may be distorted.

The attributes for comparison and adjustment typically include transaction financing, sale terms and conditions, sale time, location, and physical characteristics.

Transaction financing can affect the land price. Sellers will normally accept a lower price when the payment is made in a lump sum than when it is made in a series of payments over time. The terms of financing can also affect price. If the sales of the comparable properties are financed through a bank, the information on amount of downpayment, interest rates, type of loan, loan maturity, and the ratio between the loan and the mortgaged property value must be collected and analyzed for each transaction to disclose the difference between the comparable property and the subject property.

Sale terms and conditions also impact price, but making adjustments based on them is difficult. For instance, where a seller is under pressure to sell the property urgently, or transactions are between relatives or close friends, the land may be sold at a price that is lower than the market prices. On the other hand, the sale may be transacted at a price higher than the market price where the property purchased has some additional personal or family value for the buyer.

The general rule is that any sales of a non-arms-length nature should be excluded from the pool of the comparable properties because the sales price it represents is distorted. A comparable sale is a sale that is completed in an open market through an arms-length negotiation. Where the sale terms of a comparable property cannot be replicated on the subject property, it should not be used for valuation unless these sales terms and conditions can be confidently adjusted. Such non-arms-length sales include: sales involving courts and government entities; sales in which a financial institution is the buyer (such as foreclosure sales); sales between relatives or close friends; sales under

pressure or for convenience (such as sales for reducing the amount of landholding to meet the government's landholding ceilings in some countries), etc.

Sale time is one of the principal elements for comparison. The standard for selecting the comparable properties with respect to sale time is that the shorter the time is between the sale date and the date of comparison, the better the comparable property fits for comparison. This is because inflation and the rise of price index with time elapsed tend to devalue the purchasing power of money at the time of valuation. Moreover, sales prices fluctuate from time to time even when there is no or little inflation. To make the comparable property most comparable to the subject property, the assessor must have knowledge of price changes in recent years.

The fourth element for comparison is the respective location of the comparable properties and the subject property. Farmland values can vary significantly within an area due to proximity to road or residential area, proximity to water sources, geographical access to agricultural extension services, availability of agricultural labors, agricultural production restrictions,<sup>23</sup> etc. It is ideal when both comparable properties and the subject property are in areas with a similarity of these attributes. When this ideal situation does not exist, the value of the comparable properties needs to be adjusted.

The fifth element for comparison is the physical features, including size, shape, plot slope, soil quality, irrigation characteristics, and long-term investments in land. Finding a comparable property that is identical with the subject property is unrealistic. It is enough that the differences in physical features between the comparable property and the subject property are not many or adjustable.

After attributes for comparison are selected, adjustments should be made based on the various attributes to derive more comparable value for the comparable properties. The rule of thumb is that when any of the attributes increases the sale price of a comparable property more than how the market views this attribute, a negative adjustment is made through reduction of the sale price for that comparable property. Conversely, if one of the attributes tends to decrease the sales price of a comparable property more than the average, a positive adjustment should be made accordingly.

Once the attributes have been selected and the adjustment coefficients determined, the assessor could apply the sales comparison. A common approach for conducting comparison is the pair sales approach. It requires that the comparable properties be identical in all attributes, except the attribute being adjusted or that adjustments have already been made for other attributes. Pair sales may be vertical or horizontal. In vertical pair sales, the assessor compares two consecutive sales of the same property—excluding improvements on the property done by the second seller—to get changes in price between two sales. Horizontal pair sales involves two comparable properties, and requires making adjustments for other attributes in the second comparable property to make the two “identical,” except for time. By comparing the two comparable properties in a horizontal pair, the assessor can find the difference in price caused by the time elapsed, and make proper adjustments accordingly.

While the comparable sales approach is preferable in land valuation, it has at least two inherent limitations. First, the approach depends on some amount of land sale market activity. If the land sales market is underdeveloped in the area where the subject property is located, it will be difficult, if not impossible, to find appropriate comparable properties. Second, the comparable sales approach requires the availability of accurate market information. If information about land sales and prices is not routinely recorded or registered, or if any of the concerned parties have significant incentive to understate or overstate the sales price or otherwise distort the information, it may be difficult to use the comparable sales approach.

#### (ii) *Income or capitalization approach*

The comparable sale approach is not applicable if markets are inactive. Typically, the “thinner” the market, the less accurate the approach will be for determining value. An alternative to the comparative sales approach, typically used in situations where markets are relatively inactive, is called the income (or capitalization of income) approach. It is most applicable to agricultural land and investment properties.

The income approach is based on the principle that the value of an investment property reflects the quality and quantity of the income it is expected to generate over the life of the property at issue. In other words, the value of the land derived from this approach is the estimated present value of future benefits, including streams of incomes during the

<sup>23</sup> In the PRC, for example, growing perennial crops or digging a fishpond is not permitted in arable land located within the zone of a “basic farmland.”

lifetime of the property and proceeds from the sale of the property.<sup>24</sup> The income approach assumes that the owner or potential owner intends to generate income from the land. This valuation approach derives land value by annual net income from the land divided by an estimated capitalization rate.

Under the income approach, valuation of land is accomplished through capitalization. Capitalization is the division of a present income by an appropriate capitalization rate to derive the value of the income stream. This method can be expressed in the following formula:

$$\text{Land Value} = \text{Net Income} / \text{Capitalization Rate} \\ \text{or } V = I / R$$

Using the income approach involves three steps. First, one must collect accurate and detailed information on the annual gross income that the farmer has received from the land and on the total costs incurred by the farmer to generate such income. Second, one must subtract total annual costs from gross annual income to derive the net annual income. The third step—as well as the most important and complicated step—is to identify an appropriate capitalization rate and divide the net income by such a rate to get the value of the land under valuation.

In the first step, the assessor needs to collect all information concerning the landowner's gross income from the land and related costs in the most recent year. Ideally, one will also obtain data for the most recent 2–5 years, especially for agricultural land in areas prone to yield and price fluctuations. In general, a farmer is likely to have an accurate knowledge of crop yields per unit of land and the local market price for such crops, at least for the most recent year. Local market prices vary considerably, so it is important to determine the price the farmer actually received if he sold any of the crops. One must also apply a value to the portion of the crop consumed by the household.

More difficulties typically arise when questioning farmers about the costs incurred for generating the gross income. Farmers often do not keep accurate accounts of the operating costs. Moreover, farmers usually do not account for their labor costs because they are inclined not to perceive their labor spent on the farm as a “cost.” By asking the farmer the local daily rate for hiring an agricultural labor, the assessor

may be able to calculate the labor cost by multiplying this labor rate by the days he worked on the farm for producing that annual income. Farmers may not be able to correctly allocate indirect costs or amortize the cost for long-term investments (such as irrigation wells or land leveling and enduring farm tools or machinery), so the assessor must provide technical assistance. To ask appropriate questions, the assessor must know the specifics of agricultural production and be able to compare the income and cost data obtained from individual farmers with the productivity levels, production costs of neighbor farmers, the averages for the respective region, and the market information.

For the second step, farming costs should include at least the following direct expenses: agricultural inputs such as fertilizer and pesticides, seeds or seedlings if purchased from commercial seedling companies, extension service charges, irrigation charges, labor cost, tax, and farm insurance. Indirect costs should include—but are not limited to—management costs, overhead, if any, and amortized usage for long-term investments and enduring agricultural machinery.

In urban settings, items of information collection may be somewhat different. If the subject property is used as a parking lot, the gross income will be the rental income and any associated incomes as incomes from vending machines and other non-parking services. In such situations, all costs on materials and labor for maintenance and interest, if the property is on a mortgage, should be the direct cost. Management cost and administrative overhead are usually indirect costs and should be amortized.

The third step is determining an appropriate capitalization rate or multiplier.<sup>25</sup> The capitalization rate normally includes both a discount rate and a recapture rate. The discount rate represents the present worth of all future incomes produced by the subject property. The recapture rate represents the annual amount needed to provide a return on the investment over the period the investment is held. If income from a land investment is forecast to be level in perpetuity or level income is forecast and little change is expected in the capital value of the income-producing land, then the recapture portion may not be necessary. In such cases, the capitalization rate is the same as the discount rate.

There are basically two methods to derive a discount rate: direct capitalization and yield capitaliza-

<sup>24</sup> Eckert, Joseph, ed. 1990. *Property Appraisal and Assessment Administration*, 231.

<sup>25</sup> Where the capitalization rate =  $x$ , the multiplier =  $1/x$ .

tion. In direct capitalization, the assessor analyzes the relationship between current year income and sale price of comparable property to come up with an overall capitalization rate. For example, if net income in a given year is \$12,000, and the sale price of the comparable property is \$100,000, then dividing the sale price by the net income gives a discount rate of 12%. The advantages of direct capitalization are simplicity and straightforwardness. However, it is applicable only in settings with active land markets.

In yield capitalization, however, many factors (such as degree of risk and the nature of the income stream) are to be considered by the assessor to develop an appropriate discount rate. The general formula for yield capitalization is:

$$V = \frac{I_1}{1+Y} + \frac{I_2}{(1+Y)^2} + \frac{I_3}{(1+Y)^3} + \dots + \frac{I_n}{(1+Y)^n}$$

Where V is present land value, I is income (or cash flow), Y is the appropriate discount (or yield) rate, and n is number of periods.

The income to be capitalized under yield capitalization and the rate applied should be consistent. When net income is capitalized, the rate should be applicable to the property as a whole.

Compounding interest is often used in deriving the present value of future incomes from an income generating property. Compound interest functions are based on the concept of the time value of money: an amount of money receivable or anticipated as income in the future is always worth less than an equal amount actually in the hand now. Conceptually, it is the same process as valuation of land under the income approach. Therefore, when using the yield capitalization method, the current lending interest rate is often applied as the discount rate for estimating the present worth of all future income streams to be generated by the land.

The advantage of the income approach is its applicability in settings where land markets are not sufficiently active to use the comparable sales method. Even in settings where land markets are sufficiently active to use the comparable sales method, the income approach can provide a check against or confirmation for that preferred approach.

The income approach does have limitations. First, the income approach is not good at reflecting many of the non-income factors that determine land values or prices. Land provides value to its owners for reasons

other than its ability to produce income. Land can and often does have value as a source of status, increased access to credit, increased access to government services, political power, and as a hedge against inflation. Second, if primary data must be collected, data collection can prove difficult and time-consuming. This is particularly true if one must collect primary data from multiple years. And if one only collects data from the most recent year, an atypically good or bad year can substantially skew the land value.<sup>26</sup>

#### b. Valuation of structures

Government expropriations often involve the loss of structures on land in addition to the land itself. If the structures are primarily for investment or income-producing purposes, the income approach is sometimes used. However, for a variety of reasons, the preferred valuation method for structures is usually the replacement cost method.

The replacement cost approach for structures in a typical developed country setting of active markets is based on the theory that the market value of an improved parcel can be estimated as the sum of the land value and the depreciated value of the improvements. In other words, subtracting the land value from the overall value of the house and land will get the value of the house. Its underlying principle is that an informed buyer will pay no more for an improved property than the price of acquiring a vacant site and constructing a substitute building of equal utility.<sup>27</sup>

The replacement cost approach requires estimates of land value, accrued depreciation, and the current cost of constructing improvements such as a house. Depreciation is subtracted from current construction costs to obtain an estimate of improvement value. A land value that reflects the value of the site, as if vacant and available for development to its highest and best use, is added to the value of the improvement.

Applying this method involves several steps. The first is data collection. The replacement cost approach requires descriptive data on the improvements being valued.

<sup>26</sup> Many agricultural settings are characterized by frequent weather and crop-price fluctuations that result in substantially varying net annual incomes from year to year. One coauthor recalls a field interview with a developing country farmer wherein we were trying to obtain "typical" crop yields. The author remarked that the area had experienced a flood during the most recent year and a drought the previous year. When asked when the most recent "typical" year was, the farmer replied, "Six years ago."

<sup>27</sup> Eckert, *supra* note 24(205).

The second step is to determine an accurate cost estimate. Costs consist of all expenditures necessary to complete construction of a house or other building. They are either direct or indirect costs. Direct costs include materials and labor, while indirect costs include labor and the monetary cost of obtaining a building permit,<sup>28</sup> registering the house with relevant government agency, and designing fees if hiring an architect to design the house.

Because the structure subject to valuation may have been built many years ago, it is often difficult to determine the costs incurred when the structure was built. Thus, estimation of costs is often based on “reproduction cost” or “replacement cost.” “Reproduction cost” is the cost of constructing an identical structure by using the same materials and design at the time of appraisal. “Replacement cost,” in this context, is the cost of constructing a substitute structure of equal utility using current materials, design, and standards. A common practice in developed countries is to use the replacement cost method, except for buildings with special significance to the owner, because this method requires less detail and fewer adjustments.

In the US, the unit-in-place cost segregated method is usually adopted when estimating replacement cost for a single property.<sup>29</sup> This method expresses all direct costs of structural component as units. The costs for building horizontal components, such as floors, roofing, and electrical system, are expressed as cost per square foot. The costs for building vertical components, such as wall and interior partitions, are expressed as cost per liner foot. Different materials used in building one component have their own material unit cost and labor unit cost. Unit cost is standard, available in published cost manuals.

For mass appraisal, the comparative unit method is widely used. This method, constructed based on the unit-in-place method, simplifies the estimation process by grouping all itemized direct costs and indirect costs into a composite unit cost expressed in square foot of ground area or floor area or cubic feet of space. The unit cost further breaks down based on quality of the structure and the number of stories. Percentage or lump-sum adjustments for features not included in comparative unit cost may be made with the unit-in-place method.

<sup>28</sup> In the PRC, for example, a farmer must go through a lengthy process to obtain government approval to build a house on his land and must pay the local government for such permission.

<sup>29</sup> Eckert, *supra* note 24(208).

Cost estimations for both single-property appraisals and for mass appraisals attempt to answer the question, “How much does it cost to build the same structure today?”

The third step for valuing structures in most developed country settings is to estimate accrued depreciation. Accrued depreciation is the loss in value from “replacement cost new,” which is defined as the replacement cost as if the similar structure were built as of the date of appraisal. The underlying reason for accrued depreciation is that cost and value are most similar when the structure is new; with time, the structure will suffer physical deterioration until the day it is completely out of use. In a setting with active markets, accrued depreciation will affect the market price of a structure, and compensation reflecting the accrued depreciation will enable the asset owner to purchase a “similar” structure in the vicinity.<sup>30</sup>

Accrued depreciation, expressed in percentage points, is estimated based on interaction of the structure’s economic life, effective age, and remaining economic life.<sup>31</sup> In general, accrued depreciation rate is derived by dividing effective age by economic life, and the value of the structure is calculated by deduction of accrued depreciation from replacement cost new, or multiplying replacement cost new discounted by the accrued depreciation rate. So:

$$\begin{aligned} \text{Depression rate} &= \text{effective age} / \text{economic life} \\ \text{The value of the structure} &= \text{replacement cost} \\ &\quad \text{new} - \text{accrued depreciation} \end{aligned}$$

### c. Valuation of common property resources

The compensation practices in most developing country settings do not provide for compensation for environmental impacts or for customary rights to CPRs

<sup>30</sup> If markets are less active, and similar structures are not available for purchase in the vicinity, the asset owner may be faced with rebuilding a similar structure in the vicinity. In such cases, the “replacement cost” will be more than the depreciated value of the expropriated structure.

<sup>31</sup> Structures typically have a total economic life, which is the period of anticipated economic use of a building, determined at the time of construction. It is often shorter than physical life because many buildings outlive their economic life. Total economic life is divided between effective age and remaining economic life. Effective age is the typical age of a structure as determined by the assessor based on its condition, and serves as the basis for estimating accrued depreciation. Remaining economic life is the number of years remaining in the economic life of a structure. Effective age may be shorter or longer than actual age (the chronological age) of a structure, depending on maintenance, remodeling, and renovation. In other words, if the building is well-maintained or has been renovated, its effective age will be reduced accordingly, thus extending its remaining economic life.

such as forests, grazing land, ground and surface water, fisheries, and changed access to productive resources.<sup>32</sup> In such settings, CPRs typically do not play an important economic role in the livelihoods of APs. Such is not the case for the rural poor in developing country settings where CPRs often play a major role in livelihoods. Not compensating for the loss of such assets would fall short of ADB's bottom-line standard of preventing AP's livelihood from worsening.

The contingent valuation method (CVM), which is infrequently—although increasingly used in developing country settings—may be applicable and appropriate for valuation of CPR losses. CVM is increasingly used to estimate economic values for all kinds of ecosystem and environmental services, although it remains a controversial valuation method. It can be used to estimate both use and non-use<sup>33</sup> values, although our focus here is on the use values.

CVM involves directly asking people, in a survey, how much they would be willing to pay (WTP) for a specific good or service (in this case, access to CPRs) or how much they would be willing to accept (WTA) for the loss of an existing good or service. The method is called “contingent” valuation because people are asked to state their willingness to pay (for obtaining) or accept (for losing), contingent on a specific hypothetical scenario.

CVM is referred to as a “stated preference” method because it asks people to directly state their values, rather than inferring values from actual choices as the “revealed preference” methods do. The fact that CVM is based on what people say they would do—as opposed to what people are observed to do—is the source of its greatest strengths and its greatest weaknesses.

The fact that CVM is based on asking people questions, as opposed to observing their actual behavior, is the source of enormous controversy. The conceptual, empirical, and practical problems associated with developing estimates of economic value based on how people respond to hypothetical questions about

hypothetical market situations are debated upon constantly in the economics literature.

Applying CVM to settings of impending or possible future expropriation presents another important methodological problem: the problem of “incentive incompatibility,” which suggests that basing compensation on losses claimed by the AP gives them an incentive to exaggerate. CVM researchers are attempting to address these problems and are increasingly applying CVM in developing country settings, but they are far from finished.<sup>34</sup>

Despite the problems with using CVM for valuing CPRs, the method does have potential and deserves further experimentation in involuntary resettlement settings, particularly with nonmarketed goods such as CPRs. Recent use of the method in an involuntary resettlement setting in India (Sardar Sarovar Project in the Narmada Valley) demonstrates its usefulness for both CPRs and other lost assets without yielding to the ‘incentive incompatibility’ problem.<sup>35</sup>

#### d. Valuation of crops

Valuation of crops is considerably less complicated than land, structures, or CPRs. Typically, compensation for crops is decided according to the gross market value of the lost crops. Gross market value makes full provisions for owner or user input already expended (labor, seed, fertilizer, etc.) in the event that there is a crop in-ground at the time of acquisition or expropriation.

There are two determinants of gross or full-market value: market rate for the crop and the average annual yield of the crop. The price used to calculate the compensation is the highest market price of the locality of the year, which will give the benefit to farmers who are normally assumed to transport the harvest to get the most attractive prices.

The average annual yield of a crop involves some degree of data collecting and analysis. Local governments typically collect data on average yield

<sup>32</sup> An interesting departure from this practice is Germany's Nature Protection Law, which requires that environmental impacts be offset through the creation of equivalent environmental assets elsewhere. (Pearce, David W. 1999. Methodological Issues in the Economic Analysis for Involuntary Resettlement Operations. In *The Economics of Involuntary Resettlement, Questions and Challenges*, edited by M.M. Cernea. 50. Washington, DC: World Bank.) Similarly, Chinese law requires the creation of equivalent arable land elsewhere for the land that has been lost to nonagricultural uses. See China's Land Management Law (LML), Art. 31.

<sup>33</sup> Non-use or “passive use” values include everything from the basic life-support functions associated with ecosystem health or biodiversity, to the enjoyment of a scenic vista or a wilderness experience, to appreciating the option to fish or bird watch in the future, or the right to bequest those options to your grandchildren. It also includes the value people place on simply knowing that giant pandas or whales exist.

<sup>34</sup> See United Nations Food and Agriculture Organization (UN FAO). 2000. Applications of the Contingent Valuation Method in Developing Countries. *FAO Economic and Social Development Paper* No. 146.

<sup>35</sup> Garikipati, Supriya. 2005. Consulting the Development-Displaced Regarding their Resettlement: Is there a Way? *Journal of Refugee Studies*, 18(3). One of the other findings from this study was that the majority of affected persons (APs), irrespective of their dependence on common property resources (CPRs), were quite willing to accept cash as compensation for the loss of CPRs. This result contradicts previous studies of the same area that identified provision of replacement CPRs as an extremely important precondition for resettlement of persons affected by the Sardar Sarovar Project in the Narmada Valley.

per hectare for each type of crop, and establish a schedule or table on average yield for each locality. In most cases, the irrigated nature of the land and the frequency of harvests per year are considered. However, the government-established figure is typically rebuttable by actual production of a particular parcel of land. For instance, if the landowner or user can provide satisfactory evidence that the average of actual yield for the past 5 years is higher than the government-determined figure, the actual average yield is used as the basis of calculating gross market value.

### 3. Procedural Mechanisms

Most countries with reasonably developed legal systems have adopted procedural guidelines for expropriation of assets that place some significant constraints on state power, help better balance the information asymmetry, and at least partially protect the rights of AP against excessive expropriation and unjust compensation. Effective procedures include the right to receive adequate notice and information, the right to participate and influence decision making, and the right to appeal decisions to independent bodies such as courts.

#### a. Right to receive adequate notice and information

Expropriation statutes in most countries require that the state notify AP regarding the state's plans to expropriate land and to compensate or resettle APs. The specific timing and form of notices varies greatly by jurisdiction.

In the US, property owners are generally entitled to notice and a fair hearing concerning all contested issues of fact and of law before property may be taken.<sup>36</sup> Accordingly, each state enacts statutes containing detailed procedures governing land takings.<sup>37</sup> These

statutes, like the statutory requirements in most developed countries, require the state to notify directly each person who will be directly affected by the expropriation as well as to publish a general notice.

In other countries, the law requires the state to post notice at the land that is proposed for expropriation. For example, in Italy, after the municipality has drafted an urban development plan, it must post for 15 days a copy of the plan that indicates which parcels of land will be expropriated. The municipality does not provide each affected landowner with individual notice, but all landowners can inspect the posted plan to discover the new zone designation of their land.<sup>38</sup>

Often, however, public notice is not enough to convey adequate information about land acquisition and public works projects to landowners and communities. In an attempt to provide more information about projects and property holders' rights, Slovakia passed the Environmental Impact Assessment Act in 1994. This law established Consultation-Information Centers (CICs) "to allow for greater information flow and communication with the negatively affected communities."<sup>39</sup> Consultation-Information Centers were an attempt to remedy various problems of ignorance and misunderstanding that seemed prevalent among landowners, particularly in rural areas, but they have been subject to criticism as they are typically taken over by project proponents to push for their agendas.

#### b. Right to participate and influence decision making

The most neglected part of expropriation procedures is the participation by APs. Overall, the governments should adopt participatory development as a core principle, moving away from compulsory taking or forced relocation to a voluntary, participatory, and negotiated process. Participation by APs in land expropriations plays a crucial role in safeguarding their legitimate interests from being infringed upon by government actions and in helping government to prevent discretionary or arbitrary land expropriations. Given the relatively low levels of education and unfamiliarity with governmental or legal procedures of APs—indigenous or tribal people in particular—the right to participate before the key decisions are made is the key to prevent unjust or even disastrous outcomes.

<sup>36</sup> Dana, David, and Thomas Merrill. 2002. *Property: Takings*, 205. Citing *State of Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 US 116, 121. 1928.

<sup>37</sup> *Id.* In Washington State, for example, state law requires that anytime an authorized agent of the state intends to acquire land through the process of compulsory acquisition, the office of the state attorney general must present a petition for appropriation to the superior court in the county where the land is located. This petition must describe the property to be acquired, list all owners or other interested parties, describe the purposes for which the property will be acquired, and request a determination of compensation to be paid to all affected owners. At least 10 days prior to the presentation of such a petition to acquire property, the state is required to provide a notice to every person listed as an owner or otherwise interested party. This notice must include a description of the property to be acquired and the time and place where the petition will be presented to the county superior court. Revised Code of Washington (RCW), secs. 8.04.010–020.

<sup>38</sup> Agostini, *supra* note 20.

<sup>39</sup> Burrows, Paul. 1991. *Compensation for Compulsory Acquisition* 21.

Cernea argues that “...participation through consultation with potentially AP is indispensable” and dysfunctional or inadequate communication between decision makers and affected groups is one of the root causes for compensation and resettlement plan failure.<sup>40</sup> Because of this close relationship between stakeholders’ right to due process and their right to just compensation and resettlement, virtually all developed countries have and implement specific legal rules concerning AP’s participation in the process. These typically provide APs with a right to object to decisions and present their arguments either at a public hearing or before an appointed person or both. The statutory rules in some countries require the state to demonstrate that it has negotiated with the APs or that the state cannot obtain the land through methods other than expropriation.

Participation by APs is meaningless unless it can influence decision-making processes. Therefore, many governments have established various forums and channels of different degrees of formality for APs to voice their opinions and to impact on decisions. Some countries require the state to demonstrate that it has actively negotiated with landowners. For example, in Poland, after the expropriating agency notifies landowners of its intention to expropriate their land, the agency must negotiate with the land right holders for not less than 3 months to attempt in good faith to acquire the property through voluntary agreement.

Public hearings are the most utilized strategy to give people access to the decision-making process. In Canada, public hearings are an integral part of the expropriation process. Within 30 days of the publication of the acquisition notice, any person, including those who have no stake in the land to be expropriated, can object to the acquisition.<sup>41</sup> Once an objection is raised, the minister of the acquiring agency must hold a public hearing on the matter.

### c. Right to appeal decisions to independent bodies such as courts

The right of appeal provides APs with an important check against arbitrary or illegal administrative decisions on land expropriations. The right to appeal

varies substantially by jurisdiction in terms of formality and the extent of reviewable issues. Regardless, the reasonableness and adequacy of compensation or resettlement packages is reviewable in virtually all countries and regions.

In the US, the courts of general jurisdiction typically hear cases involving state acquisitions or expropriations. Some countries use specialized land courts or land tribunals for resolving land disputes. Australia, Great Britain, Scotland, South Africa, New Zealand, and Hong Kong, China have all established specialized judicial bodies to handle land disputes. The governments have instituted land courts to deal with recurring problems. Presiding judges have special expertise in land cases that ensures judicial proficiency on land issues and promotes consistency in decisions that, in turn, allows for predictability for future claimants.

#### Box 1: Land Tribunal in Hong Kong, China

The Hong Kong Land Tribunal has jurisdiction over disputes covering both agricultural and nonagricultural land. It has both original and appellate jurisdiction over any claim to determine the amount of compensation owed by the government due to a compulsory expropriation or acquisition. The Tribunal may grant both legal and equitable remedies like a court of general jurisdiction.

The Tribunal may appoint any expert who has specialized knowledge or experience in a particular subject to assist the member in the proceedings before it. The Tribunal must advise the parties of the nature of the advice given by experts in any hearing, and must give parties the opportunity to contest the advice before the Tribunal renders its decision.

Decisions of the Tribunal are typically final. A party has two limited options for further review. First, a party may appeal to the general Court of Appeals, which is not a specialized land court, on the ground of law—that is, issues such as whether a law is correctly interpreted or applied, but not any factual disputes. Second, the Tribunal may decide to review its decision (within one month of its decision) on any grounds it deems sufficient. The Tribunal may initiate this internal review upon application of one of the parties or on its own motion.

Source: Rural Land Tribunal Project Proposal, Rural Development Institute (RDI) memorandum on file with RDI, 2001.

<sup>40</sup> Cernea, Michael. 2000. Risks, Safeguards, and Reconstruction. In *Risks and Reconstruction: Experiences of Restlers and Refugees*, edited by M.M. Cernea and C. McDowell. 51. Washington, DC: World Bank.

<sup>41</sup> Expropriation Act. 1985. § 10.



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## II. Expropriation Laws and Practices: The People's Republic of China (PRC)<sup>42</sup>

### A. Legal Framework for Land Ownership and other Tenure Forms

Unlike developed countries where private land ownership is the main form of land ownership, the PRC adopts public ownership of land in the form of state ownership and collective ownership. Generally, urban land is owned by the state, and rural land, except for what is legally defined as state owned, is owned by collectives.<sup>43</sup> However, such public ownership of land has undergone a series of reforms since the late 1970s when the PRC started to move toward a market economy, resulting in a separation of land use rights from land ownership where land is still publicly owned while use rights to such land are allocated to private individuals.<sup>44</sup>

State ownership is exercised by the State Council<sup>45</sup> through land administrative agencies established at county, province, and state levels, with the land agency at each level responsible for management of state-owned land in its jurisdiction. In contrast, collective land ownership has never been clearly defined under Chinese laws. In the rural PRC, there are two levels of collectives: administrative-village collectives and villager-group collectives. An administrative village consists of more than two villager groups. Typically, the administrative-village collective owns the land within its geographical area that is not owned by villager groups, and the villager-group collective owns the land within the geographical boundaries of the individual group. A villager committee represents the administrative-village collective responsible for, among other things, “managing land and other assets that belong to [the]

administrative village collective,”<sup>46</sup> while the villager-group collective is usually represented by the head of the villager group.

Although the state maintains ownership of urban land, use rights to urban land may be granted to any entities and private individuals for value.<sup>47</sup> Granted use rights have specific terms ranging from 40–70 years depending on the intended use.<sup>48</sup> Upon expiration, land use rights together with structures and other fixtures on the land are acquired by the state without compensation.<sup>49</sup> However, the holder of granted rights may renew his use rights upon approval.<sup>50</sup> Once granted rights are acquired, the grantee enjoys a broad spectrum of land rights, including assignment, lease, or mortgage of such use rights for the remaining term.<sup>51</sup>

Rural land reform in the PRC takes a similar route. With the PRC’s decollectivization under a so-called household responsibility system in the late 1970s and early 1980s, the monolithic collective ownership of land has been replaced by a land system where a collective retains ownership of land while use rights to rural land are allocated in an egalitarian way to rural households for individual farming.

There are several fundamental characteristics from the perspective of interaction between collective landowners and farmer households in controlling rural land. First, virtually all rural households have access to some arable land. Rural landlessness is virtually non-existent. Second, landholdings are distributed among households in a substantially egalitarian fashion. Third, the existing legal ambiguities with respect to

<sup>42</sup> This is the first of three consecutive sections discussing expropriation laws and practices in each of the three countries covered by Regional Technical Assistance (RETA) 6091: Cambodia, PRC, and India.

<sup>43</sup> The People’s Republic of China Constitution, Art. 10.

<sup>44</sup> Id.

<sup>45</sup> The 1998 LML, Art. 2.

<sup>46</sup> The Organization Law of Villager Committee, Art. 5.

<sup>47</sup> The Interim Regulations on Allocation and Granting of Urban State-owned Land Use Rights, 1990. [Hereinafter, the Granting Regulations] Art. 8.

<sup>48</sup> Id., Art. 12.

<sup>49</sup> The Granting Regulations, Art. 40. This provision has been heavily criticized by legal scholars because it effectively gives the government the power to take the lawful private property, such as a house, from private individuals without compensation. See Weiguo, Wang, 1997. *A Study on China’s Land Rights* [zhongguo tudi quanli yanjiu], 66.

<sup>50</sup> The 1994 Urban Real Estate Management Law (UML), Art. 21.

<sup>51</sup> The Granting Regulations, Art. 4.

the nature and scope of collective ownership enables collective landowners to abuse their ownership power against individual households, through administrative readjustment of farmers' landholdings or other means.<sup>52</sup>

The landmark Rural Land Contracting Law (RLCL) of 2002 reinforces such individual rights to land by granting to the farmers use rights to arable land for a term of 30 years, grassland for a term of 30–50 years, and forestland for a term of 30–70 years.<sup>53</sup> The forthcoming Property Law further defines such use rights as usufruct property rights, independent from collective landowner's control during the statutory term.

## B. Expropriation Laws and Practice

### 1. Expropriation of Urban Assets

Because urban land is state owned, compulsory acquisition of land only involves “withdrawal” of land use rights.<sup>54</sup> However, Chinese laws on withdrawal of urban land use rights are quite limited. The 1998 Land Management Law (LML) provides five situations under which the government may withdraw urban land use rights from the right holders: (i) public interests, (ii) renovation of old towns, (iii) expiration of land use terms without renewal or denial of the renewal application, (iv) dissolution or relocation of the holder of administratively allocated land rights, and (v) termination of use of public infrastructure.<sup>55</sup> However, the right holder is entitled to a vaguely phrased “appropriate compensation” only in the first two situations.<sup>56</sup> In case of land use rights initially acquired through contract grant, the right holder is entitled to a compensation corresponding to the number of remaining years on the grant contract and the extent to which land has been developed.<sup>57</sup>

Although Chinese laws require compensation to the holder of urban land use rights when such rights are withdrawn in certain situations, the requirement has never been honored in practice. There have been no reported examples of compensating the holders for the loss of their urban land use rights.<sup>58</sup>

Compensation for expropriation of private properties in urban areas in the Chinese context, therefore, only involves structures, including residential houses and structures for business purposes. Compensation may be paid in cash or in kind, and the owner of the property to be demolished may select between monetary compensation and a replacement structure.<sup>59</sup> The amount of cash compensation is determined by a market appraisal of the condemned structure based on location, use, and floor space of the structure.<sup>60</sup> The method of appraisal should be the comparable sales approach, except in areas where housing markets are not developed.<sup>61</sup> As to in-kind compensation, the property owner is entitled to a replacement structure plus or minus any difference between the value of the replacement structure and the assessed market value of the condemned structure.<sup>62</sup>

In addition, the property owner is entitled to moving expenses and transitional resettlement subsidy.<sup>63</sup> Resettlement subsidy can be in the form of either cash subsidy or provision of a transitional home.<sup>64</sup> In the case of nonresidential structures, an “appropriate compensation” should be made for losses sustained by the property owner if such condemnation causes termination of production or business.<sup>65</sup> However, if the structure was initially used as a residential unit but later changed into a business structure, the owner is not entitled to compensation for termination of business, unless that person can produce evidence that such change of use was approved by and registered with relevant government agencies.

One of the distinctive features of Chinese urban condemnation laws is that the government itself is not

<sup>52</sup> Not all land readjustments are of the same magnitude. “Big” or comprehensive readjustments involve an overall change in the landholdings of all farm households in the village. In a big readjustment, all farmlands in the village are returned to the collective entity and reallocated among village households so that each household receives entirely new land. A “small” or partial readjustment consists of adding to or taking from a household's existing landholdings when that household's size changes. Under small readjustments, households that neither add nor lose members will continue to farm the same landholding.

<sup>53</sup> The 2002 Rural Land Contracting Law (RLCL), Art. 20.

<sup>54</sup> Chinese laws use different terms with respect to compulsory acquisition of urban land and rural land. Government taking of urban land is “withdrawal” of urban use rights, while rural taking is phrased as “expropriation” and involves transfer of land ownership together with farmers' land use rights.

<sup>55</sup> LML, Art. 58.

<sup>56</sup> Id.

<sup>57</sup> The UML, Art. 19.

<sup>58</sup> Further, in its reply to the Ministry of Construction on whether to compensate land use rights in condemnation of urban private houses, the State Council's Legislative Office implicitly ruled out compensation for land use rights. See China Rule of Law Publishing House. 2004. *New Compilation of Laws on Demolition, Compensation and Resettlement for Houses* [Xinbian Fangwu Chaiqian Buchang Anzhi Falu Shouce], 129–130.

<sup>59</sup> 2001 Urban Structure Demolition Regulations, Art. 23.

<sup>60</sup> Id., Art. 24. It should be noted that a market appraisal of the house taking into account the factor of location might reflect at least part of the value of the land on which the structure is erected.

<sup>61</sup> The Ministry of Construction Guiding Comments on Urban Structure Demolition, Art. 16.

<sup>62</sup> 2001 Urban Structure Demolition Regulations, Art. 25.

<sup>63</sup> Id., Art. 31.

<sup>64</sup> Id.

<sup>65</sup> Id., Art. 32.

allowed to conduct condemnation and compensate for the condemned property.<sup>66</sup> Instead, the end user of the land, either a private developer or a public entity, on which the condemned property stands is authorized to demolish the property, negotiate and give compensation to the property owners upon receipt of use rights to the land and approval of condemnation.<sup>67</sup> Under this legal framework, the government delegates its eminent domain power and shifts its duty of compensating property owners to developers or contractors of public facility construction once such developers or contractors obtain land use rights.

As a result, urban condemnation is essentially an act conducted by one private entity on another private entity. The law requires that both parties enter into an agreement on all relevant arrangements, including amount of cash compensation, size, and location of resettlement home, moving date, and transitional arrangements.<sup>68</sup>

As to procedural safeguards for property owners, the law prescribes a three-step process. First, if the negotiation on compensation between developers and property owners fails to reach an agreement, any party can apply to the government's urban condemnation administration for an administrative review.<sup>69</sup> If not satisfied with the review decision, the appellant may file a lawsuit with the local court within 3 months of receiving the decision.<sup>70</sup> Third, if the property owner refuses to move out of the property before the demolition date, the end user may bring the case to the arbitration board or directly file a lawsuit with the local court for enforcement.<sup>71</sup> However, in either case, the pending lawsuit does not enjoin the developer from conducting condemnation.<sup>72</sup>

## 2. Expropriation of Rural Assets

Expropriation of rural assets is governed by a different set of laws, which can be outlined as follows:

- (i) **Purpose for land expropriation.** The PRC's Constitution mandates that any expropriation or requisition of land must be "for the needs of public interests."<sup>73</sup> The 1998 LML echoes the Constitution without providing any further

detail on what specific purposes serve the public interest: "The State may, in the public interest, lawfully requisition land owned by collectives."<sup>74</sup> Moreover, the PRC's existing legal framework governing land expropriation further requires that all nonagricultural use of land must use state-owned land.<sup>75</sup> Where the land is owned by a rural collective, it must first undergo a process through which the state expropriates the land and becomes the owner.<sup>76</sup> In such cases, the intended land user must apply to the state for approval of the use and conversion of agricultural land for nonagricultural purposes.<sup>77</sup> Upon approval, the state will exercise its eminent domain power through the county-level government.<sup>78</sup> Under such a land-taking framework, the state may take farmers' land not only for "public interests," but also for all other purposes nonpublic in nature.

- (ii) **Compensation for expropriation of land.** The PRC adopts an approach of compensating farmers based on the original use of the land to be taken and determining such compensation based on statutory standards. The current legal requirement for compensation consists three components: (a) a compensation for loss of land set at 6 to 10 times the average annual output value of the land for the 3 years prior to the requisition; (b) a resettlement subsidy set at 4 to 6 times the average annual output value; and (c) compensation for structures and standing crops to be determined by provincial governments.<sup>79</sup> The compensation law further caps the sum of compensation for loss of land and resettlement subsidy at 30 times the average annual output value for the preceding 3 years if the statutory standards are insufficient to maintain farmers' original living standards.<sup>80</sup>
- (iii) **Distribution of compensation.** Because of the existence of collective landowners, the

<sup>66</sup> 2001 Urban Structure Demolition Regulations, Art.10.

<sup>67</sup> *Id.*, Art. 13.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, Art. 16.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*, Art. 15.

<sup>72</sup> *Id.*, Arts. 15 and 16.

<sup>73</sup> The People's Republic of China Constitution, 2004. Amendment 10.

<sup>74</sup> LML, Art. 2.

<sup>75</sup> LML, Art. 43. The exceptions to this rule include uses of collectively owned land for rural enterprises, rural public facilities, and farmers' residential houses. *Id.*

<sup>76</sup> *Id.*, Art. 43. A narrow exception to this rule is for rural public facilities, farmers' residential houses, and township and village enterprises, which may use collectively-owned land. *Id.*

<sup>77</sup> *Id.*, Art. 44.

<sup>78</sup> *Id.*, Art. 46.

<sup>79</sup> *Id.*, Art. 47.

<sup>80</sup> *Id.*

LML allocates three types of compensation between collective landowners and the affected farmers. Under the law, compensation for loss of land is allocated to the collective landowner. Compensation for young crops and fixtures is paid to the households whose land has been affected by the takings. Resettlement subsidies are paid to the collective or to another entity responsible for the resettlement, or to those to be resettled directly if no resettlement arrangements are necessary.<sup>81</sup>

- (iv) **Compensation for rural non-land assets.** Compensation for rural non-land assets—including standing crops, housing structures, and businesses—is governed by provincial regulations. While a variety of approaches are adopted in the 31 provincial jurisdictions, some common features can be summarized as follows:

*Crops.* For annual crops, compensation standards range from the land's crop season yield<sup>82</sup> to average annual yield of the preceding 3 years,<sup>83</sup> with most provinces adopting the crop season yield standard. For perennial crops, compensation is determined based on the crops' annual output,<sup>84</sup> or actual value.<sup>85</sup> In Guangdong, the compensation for perennial crops is based on the time of planting and the term of maturity.<sup>86</sup>

*Housing structures.* Most provinces do not have specific rules on compensation for expropriation of housing structures. The most common practice is issuance of ad hoc standards that are highly discretionary. In many provinces, these ad hoc standards made before the 1998 LML are still applied in current expropriations. However, in recent years, improvements have been made in developed areas such as Beijing and Shanghai. In Beijing, for example, compensation may be made in cash or with a replacement

home.<sup>87</sup> In the case of cash, compensation should be the sum of compensation for foundation plot location and replacement cost new minus accrued depreciation,<sup>88</sup> in which compensation for foundation plot<sup>89</sup> location is the average commodity house price in the relevant locality multiplied by the total area of foundation plot. Affected farmers are entitled to moving expenses. In Shanghai, compensation may also be made in cash, or with a replacement home, or with a replacement foundation plot plus subsidies. Cash compensation is calculated based on the formula of (unit replacement cost new minus accrued depreciation + unit price of land use rights of multi-story commodity residential buildings in the locality + price subsidy) X total floor space of the house to be demolished.<sup>90</sup> In addition, the municipality requires payment for moving expenses and transitional subsidy.<sup>91</sup>

*Businesses.* Most provinces have not promulgated any rules on compensating for structures for business use. Again, Beijing and Shanghai are exceptions. In these two municipalities, the government is required to pay an "appropriate compensation" for the termination of business or production on the condition that the owner has a business license.<sup>92</sup>

- (v) **Procedures for land takings.** The 1998 LML sets out procedures governing the taking of agricultural land by the state. Although the law requires notification of collective landowners and farmers in the event of state expropriation, such notification is only required to be conducted after the expropriation is approved.<sup>93</sup> Farmers may complain to the agency that approves the expropriation with respect to the compensation and resettlement

<sup>81</sup> Id., Art. 47, and LML Regulations, Art. 26.

<sup>82</sup> The Compensation and Resettlement Measures for Land Expropriation of Beijing Municipality. 2004. Art. 16.

<sup>83</sup> The Ningxia Autonomous Region Land Management Regulations, Art. 29.

<sup>84</sup> The Compensation and Resettlement Measures for Land Expropriation of Beijing Municipality. 2004. Art. 16; and Anhui Provincial Regulations for Implementing LML. 2002. Art. 37.

<sup>85</sup> Jiangxi Provincial Regulations for Implementing LML. 2000. Art. 29.

<sup>86</sup> Guangdong Provincial Regulations for Implementing LML. 2000. Art. 30.

<sup>87</sup> Beijing Municipality Measures on Management of Demolition of Houses on Collectively Owned Land. 2003. Art. 14. However, the municipal government also sets a standard for replacement cost new minus accrued depreciation at a level of yuan (CNY)400–700 per square meter (m<sup>2</sup>). Id., Art. 4.

<sup>88</sup> Beijing Municipality Rules on Demolition of Houses on [collectively Owned] Foundation Plot. 2003. Art. 3.

<sup>89</sup> Id., Art. 4.

<sup>90</sup> Shanghai Municipality Measures on Compensation and Resettlement for Demolition of Houses on Collectively Owned Land Subject to Expropriation. 2002. Art. 6.

<sup>91</sup> Shanghai House and Land Administration's Notice on Subsidies for Demolition of Residential Houses on Collectively Owned Land. 2002.

<sup>92</sup> Beijing Municipality Measures on Management of Demolition of Houses on Collectively Owned Land. 2003. Art. 22; and Shanghai Municipality Measures on Compensation and Resettlement for Demolition of Houses on Collectively Owned Land Subject to Expropriation. 2002. Art. 10.

<sup>93</sup> LML, Art. 46.

plan, but any disputes concerning compensation and resettlement shall not affect the implementation of the expropriation.<sup>94</sup>

Realizing the serious defects of its expropriation legislation, the Chinese government has taken some legal and policy measures to improve the regulatory framework, notably the State Council's Document No. 28 of 2004, the Ministry of Land and Resources' Regulations on Public Hearings, and legal measures adopted by some provincial governments in response to the central government's policy guidelines. These new developments include:

(i) **Compensation for land expropriation.**

Document No. 28 reemphasizes that compensation be determined based on the principle of preventing farmers' living standard from being lowered because of land expropriation. It specifically requires that local governments allocate part of their revenue from granting state-owned land use rights to farmers if the maximum sum of land compensation and resettlement subsidies (30 times the average annual output value of the land to be expropriated) is still insufficient to restore affected farmers' livelihoods. It also allows farmers to have an option of "stock-for-land" through which farmers can elect to contribute directly their land rights to a project with stable incomes in exchange for shares of stock in the project.

The Beijing municipal government recently reversed the maximum standard approach by adopting a "minimum protection standard" and requiring the expropriating agency to negotiate with the collective based on "no less than the minimum protection standard."<sup>95</sup> In Guangdong Province, the new rules on compensation for land expropriation for commercial purposes go even a step further. The rules are completely silent on the agricultural yield method and multiplier standard as provided under the 1998 LML. Instead, the rules require that conversion for nonagricultural and nonpublic purposes be

conducted in open market at the price reached through negotiation between collective and the end user or through auction, bidding, and public listing.<sup>96</sup> It appears at least in Guangdong, the standard of fair market value begins to emerge.<sup>97</sup>

(ii) **Allocation of compensation.** Document No. 28 clearly states that compensation for loss of land—the biggest component of compensation and resettlement package under existing expropriation law—must be primarily used for the farmer households who have lost their contracted land through requisition. Based on the spirit of this guideline, the Shanxi provincial government promulgated in October 2005 its regulations on allocation of land compensation between collective landowner and affected farmers. The regulations unambiguously require that 80% of land compensation go directly to affected farmers whose contracted land is expropriated, while 20% be retained with collective landowner.<sup>98</sup>

(iii) **Procedures for land expropriation.** The Ministry of Land and Resources promulgated the new Regulations on Land and Resources Hearings in 2004, which requires the land expropriating agency to inform affected farmers of their right to a hearing on compensation standards and the resettlement package, and such a hearing must be held, if requested, within 5 days after the parties are informed. Document No. 28 takes this further and states that before the expropriation is submitted for approval, its purposes, location, compensation standard, and resettlement and rehabilitation measures should be made known to farmers whose land is to be taken. Moreover, the rural collective and the farmer households should confirm the results of the survey on the existing situation of the land proposed to be taken.

<sup>94</sup> The LML Implementing Regulations, Art. 25.

<sup>95</sup> Beijing Municipality Regulations on Compensation and Resettlement for Land Expropriations. 2004. Arts. 9 and 10.

<sup>96</sup> The Guangdong Provincial Measures on Management of Transactions of Use Rights to Collectively Owned Construction Land. 2005. Art. 15.

<sup>97</sup> However, the Guangdong rules apply to commercial nonagricultural use of farmland only. Government expropriation of land for authentic public interests is expected to be governed by the 1998 LML.

<sup>98</sup> Shanxi Provincial Measures on Allocation of Land Compensation for Expropriation of Collectively Owned Land. 2005. Art. 13.

### C. Resettlement in the PRC: A Quick Snapshot

Land expropriations immediately trigger loss of land and subsequently affect the livelihood of those who depend on land for survival. According to the research conducted under ADB RETA 6091 project, more than 36 million farmers had lost all or part of their land between 1993 and 2003, and an additional number of 26.5 million farmers are projected to lose their land between 2001 and 2010.<sup>99</sup> However, the PRC does not have a national law addressing the whole range of resettlement issues except for prescribing monetary resettlement subsidies based on the land's agricultural yields<sup>100</sup> and generally calling for encouraging APs to engage in the development of business and nonagricultural production.<sup>101</sup> The 1998 LML does authorize the State Council to promulgate specialized regulations governing compensation and resettlement for construction of medium- or large-scale water facilities and hydropower projects.<sup>102</sup>

For example, the State Council has established rules for reservoir-related resettlement to “gradually assist resettlers to reach or exceed their original living standard”<sup>103</sup> through “developmental resettlement.”<sup>104</sup> Such developmental resettlement adopts an approach of deciding compensation and subsidy amounts before the construction starts and providing production support after the construction is completed.<sup>105</sup> Preconstruction compensation and resettlement subsidies are determined based on the land's agricultural yields, but with a much lower multiplier than what is stipulated in the 1998 LML.<sup>106</sup> For example, compensation for loss of arable land is three to four times the average annual yield of the preceding 3 years and resettlement subsidy is only two to three times the average annual yield.<sup>107</sup> If the sum of compensation and resettlement subsidies is “difficult” to resettle APs, the total amount can be increased but it cannot exceed 20 times.<sup>108</sup>

Post-construction support comes from revenues generated by the project. For example, the Regulations on Resettlement for the Three-Gorge Project establish a “post-construction support fund” from power generating revenues, which will be allocated to the provinces with resettlers because of the Three-Gorge Project.<sup>109</sup> According to research, as of 2000, yuan (CNY)1.76 billion had been raised annually as post-construction support fund for resettlers affected by hydropower projects throughout the country, which could be translated into CNY110 per resettler per year.<sup>110</sup>

In the absence of a national law regulating involuntary resettlement arisen from non-reservoir related expropriations, a variety of approaches have been developed by local governments to address post-expropriation livelihoods of APs.

- (i) The most common approach is monetary resettlement in which resettlement subsidies as required by the 1998 LML (plus part or all compensation for loss of land in some cases) are given to APs who, in turn, will be responsible for their survival. More than 90% of affected farmers were dealt with under this approach.<sup>111</sup>
- (ii) Another approach is the so-called “resettlement through joint stock share arrangement” method, where APs convert their share of land compensation and resettlement subsidy into joint stock shares of the company that is formed with collective investments of such compensation and resettlement subsidy.<sup>112</sup>
- (iii) A new resettlement practice—called “resettlement through establishment of social security mechanism”—was created and has been adopted in recent years in some developed provinces. Under this approach, all resettlement subsidies and part or all of the compen-

<sup>99</sup> *China's Capacity Building of Risk Management of Land Acquisition Resettlement*. 2005. *National Report*, 49. (Hereinafter, referred to as China Country Report).

<sup>100</sup> LML, Art. 47.

<sup>101</sup> LML, Art. 50.

<sup>102</sup> LML, art. 51.

<sup>103</sup> Regulations on Compensation and Resettlement for Medium and Large Water Facilities and Hydropower Construction. 1991. Art. 4.

<sup>104</sup> *Id.*, Art. 3.

<sup>105</sup> *Id.*

<sup>106</sup> It should be noted though that the compensation and resettlement standards for reservoir-related projects were promulgated long before the 1998 LML and may not be practically effective. However, such apparently out-of-date regulations have never been repealed, and therefore, are still in force.

<sup>107</sup> *Id.*, Art. 5.

<sup>108</sup> *Id.*

<sup>109</sup> The Regulations on Resettlement for the Three-Gorge Project. Art. 45.

<sup>110</sup> Tang, Chuanli. Undated. *Policies and Practice in Resettlement for Reservoir Construction in China*. Available: [www.cws.net.cn/Journal/slx/20009z/14.html](http://www.cws.net.cn/Journal/slx/20009z/14.html)

<sup>111</sup> *China Country Report*, *supra* note 99, 60.

<sup>112</sup> One such example is a toll highway project in Shanghai. Affected farmers waived their right to land compensation and resettlement subsidy in exchange for an annual dividend adjusted for inflation for 28–30 years, depending on the expiration date of their 30-year land rights. The annual dividend is calculated based on the net income from land plus standard labor costs. In 2002, this dividend was CNY1,350 per mu (1/15 of hectare). See The Housing and Land Administration of Qingpu District of Shanghai, Summary of Experiment on Building Infrastructures in Cooperation with Collective Land Use Rights. In Lu Xinshe, ed. *Yanjiu Zhengdi wenti Tansuo Gaige Zhilu*. 2003. *Study on Land Expropriation Issues and Explore Ways for Reform*. Part II, 198–203. It should be noted that determination of such “dividend” is not based on the toll road's profits and does not take into account transitional cost, interference with farmers' farming on remaining land, etc.

sation for loss of land are used to finance a social security safety net including pension, unemployment insurance, and medical insurance.<sup>113</sup>

One of the bright spots of local legislation on resettlement comes from Beijing where the Measures on Compensation and Resettlement for Land Expropriations have been adopted. Under the measures, the affected village may choose between monetary compensation for loss of land and land rezoned for nonagricultural purposes in accordance with the municipality's overall land use planning so that farmers may use the land for income generating nonagricultural endeavors.<sup>114</sup> Moreover, the developer of the expropriated land is required to employ first the APs when it has such openings.<sup>115</sup> If no employment is provided, the end user of the land must make a lump-sum employment subsidy to APs equivalent to 48–60 months of the city's minimum wage.<sup>116</sup>

## D. Present Problems

### 1. Urban Expropriations

In general, the PRC's urban expropriation laws contain the following flaws:

- (i) **Noncompliance by government with respect to compensation for urban land use rights.**<sup>117</sup> Although existing urban land laws require compensation to land users for the urban land use rights withdrawn for urban development, governments at all levels have failed to abide by such legal mandate in urban expropriation practice.

This is particularly dangerous to the PRC's objective of establishing the rule of law in the country. Non-compensation for land rights also introduces an incentive structure where the value of land is not an issue in urban expropriation, resulting in apparently irrational as well as unsustainable urban redevelopment.<sup>118</sup>

Compensating house alone in urban expropriations is equivalent to depriving house owners of their legitimate rights to land. In an urban setting, land use rights may be much higher in value than structures erected on the land. As of 2002, the total market value of the PRC's urban land use rights was estimated at the level of more than \$3.1 trillion.<sup>119</sup> Even 10% of this value came from the uncompensated land, which would be equivalent of more than \$300 billion of loss digested by urban property owners.

- (ii) **Delegation of eminent domain power to the commercial condemner.** In the PRC, the compulsory power is often delegated to developers who are expected to maximize profit margins by depressing property values and lowering compensation. Partly because of this institutional arrangement, the number of complaints over unfair compensation has increased dramatically in recent years. In 2003, the central government received more than 10,000 complaints over compensation for urban condemnation, and most of these complaints were related to unfair compensation and coercive practices by condemners.<sup>120</sup>
- (iii) **Denial of the right to compensation for undocumented properties.** Chinese urban condemnation laws decline to compensate for the condemned properties that are unlawful because they were not built with a building permit and therefore are not documented. In most urban areas, the sole evidence of

<sup>113</sup> For example, in Jiaying of Zhejiang Province, all resettlement subsidies—determined based on the need rather than the quantity of land expropriated and part of compensation for loss of land—are contributed to the city's social security fund, which in turn pays to APs in the following ways: (i) APs at the retirement age receive a city standard pension of CNY398 per person per month as of 2002; (ii) those 15 years younger than the retirement age are entitled to pension upon retirement and a living allowance of CNY160 per person per month prior to retirement; and (iii) those regarded as labor are entitled to a lump sum of employment subsidy plus a government contribution to social security fund determined based on their farmwork years. The total cost per person was CNY43,000 in 2002. The Land Administration of Jiaying of Zhejiang, 2003. *Actively Pushing land takings Reform*. In *Id.*, 169–177.

<sup>114</sup> The Beijing Municipality Measures on Compensation and Resettlement for Land Expropriations. 2004. Art. 15.

<sup>115</sup> *Id.*, Art. 24.

<sup>116</sup> *Id.*, Arts. 26 and 27.

<sup>117</sup> As discussed above, urban land use rights may be obtained either through allocation at no cost or through granting by paying to the state a land use fee. However, the PRC's urban land expropriation laws require paying an appropriate compensation to land users regardless of how land use rights are obtained. See LML, Art. 58.

<sup>118</sup> According to the statistics compiled by the Ministry of Construction, the amount of urban condemnation measure in the floor space of structures being demolished was nearly doubled between 1996 and 2000 as compared with that between 1991 and 1995. The scale of such urban condemnation dramatically increased in the new century. In many provinces, especially those in coastal provinces, the amount of urban condemnation for the first 6 months of 2003 exceeded the total amount in 2002.

<sup>119</sup> Available: [www.southcn.com/finance/financenews/guoneicaijing/20020624794.htm](http://www.southcn.com/finance/financenews/guoneicaijing/20020624794.htm)

<sup>120</sup> Policy Research Center of the Construction Ministry. 2004. *The Latest Guide to Urban Structure Demolition*.

property ownership adopted by the developer-condemner is the house certificate registered with the urban real estate registration office. Because a certificate will not be issued to the owner of the property without a building permit, these property owners are not entitled to any compensation no matter how long they have built and possessed the property or how dependent they are on the property for their livelihood.

- (iv) **No effective participation by APs in determining compensation.** Although the law requires negotiation on compensation, such negotiations are seldom arm-length negotiations in practice because of the substantial power imbalance between the condemner and the condemnee. Property owners—especially those living in blighted areas under condemnation—are usually powerless, with inadequate sources of information, and without access to unbiased appraisal organization. Most often, upon approval of the condemnation, the developer hires the appraisal company to assess the value of the structure under condemnation and to come up with a written agreement for the condemnee to sign. When the condemnee has objections or disagreement, the condemner often threatens the condemnee for obstructing urban development for “public interests.”<sup>121</sup>

## 2. Rural Expropriations

With rapid economic development and urbanization taking place in the PRC in recent years, farmlands have been lost at an unprecedented pace. Over 3.15 million ha of farmlands, more than 2% of the PRC's total arable landmass, was taken for various kinds of nonagricultural uses between 1990 and 2002,<sup>122</sup> about 36.4 million farmers have been rendered landless between 1993 and 2003.<sup>123</sup> According to the questionnaire survey conducted by Chinese consultants under the RETA project, more than 50% of affected farmers reported that their living standard had been reduced or substantially reduced because of land

expropriations.<sup>124</sup> This is a clear indication that the PRC's land expropriation practices might have failed to meet the minimum standard as adopted by the PRC Government and ADB—that is, AP's livelihood should not be lowered because of land expropriation for necessary economic development projects. This subsection will highlight institutional deficiencies related to compensation for loss of assets as reported in the RETA Country Report (the PRC) and discovered by RDI's own research.

- (i) **Ambiguous definition of “public interest.”** Although the PRC's expropriation laws require the state to expropriate farmland for public interests, such public interests are not defined in either statutory or case law, giving the government virtually unlimited power in taking farmland for any purpose. Allowing government exercise of eminent domain power for commercial interests gravely distorts the land market, resulting in government intervention in land transactions that could be otherwise achieved through private negotiation. According to the RETA Country Report (the PRC), about 22% of land expropriations in 16 provinces during 2000–2001 were for commercial interests, such as real estate developments.<sup>125</sup>
- (ii) **Inadequate compensation standard for loss of land use rights.** In the PRC, compensation for loss of land and subsidies to affected farmers for resettlement are provided as a package. Such practice tends to blur the distinction between replacement value of land and the needed financial and nonfinancial support to APs for restoring their livelihoods. With respect to compensation for loss of land, several institutional problems exist. First, compensation for expropriating farmland for either public interests or any commercial purpose is subject to the statutory limits which are usually well below the fair market value—let alone replacement cost—of the land to be taken.

<sup>121</sup> Id., 113–115.

<sup>122</sup> Yu Jianrong, 2005. Get into the Dispossessed Farmers. *Nanfang Weekend*. 14 July.

<sup>123</sup> *China Country Report*, supra note 99(49).

<sup>124</sup> *China's Capacity Building of Risk Management of Land Acquisition Resettlement: National Report*. 2005. Appendix II “China Research on Valuation method of Land Acquisition Compensation,” 10.

<sup>125</sup> *China Country Report*, supra note 99(25). Moreover, in two rounds of fieldwork conducted during 2002–2003, RDI researchers found that more than half of land expropriation incidents had been for commercial uses ranging from real estate projects to gas stations. Prosterman, Roy, Li Ping, and Brian Schwarzwalder. 2004. Reform on the Land Takings System: Fieldwork Findings and Recommendations for Further Reform. *China Rural Survey*. 6.



In its own investigation, Chinese consultants under the RETA 6091 project found that the sum of land compensation and resettlement subsidy was, in general, less than 20% of the price at which government sold the use rights to the same land to developers.

### Box 2: How Much Do Affected Farmers Get in Land Expropriations?

RDI Fieldwork Findings

**Case 1.** A field research was conducted in four suburban villages of Fuyang of Anhui Province in late 2002. In a total of 14 land expropriation incidents we found during the field research, the highest amount of land compensation received by the affected farmers was CNY23,000 per mu of arable land. In contrast, according to the published figure, the government in the same locality sold such land use rights to developers in 2003 for CNY160,000–CNY300,000 per mu.

**Case 2.** In a field research conducted on a golf course project in 1998 in Shuangliu of Sichuan Province, farmer interviewees reported that compensation for loss of land for the golf course was CNY13,000 per mu. However, the interviewed government officials in charge of negotiation with the golf course owner reported that the sale price of the same land was CNY35,000 per mu. Moreover, the officials claimed that government had the right to retain 50% of the proceeds for any land use rights sold to developers.

CNY = yuan, mu = 1/15 of a hectare, RDI = Rural Development Institute.

Source: Li Ping. Unpublished Fieldwork Notes on Crop Compensation Standards. The government sales price was taken from "Introduction of Granting Use Rights to State-owned Land in Anhui Province." 2003. *Zhongguo Guotu Ziyuan Bao*. *China Land and Resources News*. 12 August.

Second, no Chinese laws or government policies provide any guidance on valuation of land to be expropriated. Determination of compensation is thus based on average agricultural yield of the preceding 3 years regardless of farmers' investment in land, location of the land, potential best use of the land, local demand for such land, market price for agricultural product that the land is producing, and other factors that typically consist of the value of farmland. Chinese consultants of the RETA project report that among the four valuation methods (agricultural yield, comparable sales, income capitalization, and expected nonagricultural market price minus infrastructure cost) tested for research purposes, the land's value was

in most cases the lowest when applying the agricultural yield method.<sup>126</sup>

Third, Chinese land compensation laws explicitly cap the compensation for loss of land at a maximum of 10 times of the annual agricultural yield, leaving virtually no legal basis for farmers to demand a higher compensation, or a compensation that affected farmers are willing to accept. In the meantime, the government is authorized to sell use rights to such expropriated land to commercial interests at a market price that is in most cases several times higher even than the maximum compensation paid to affected farmers. Although the recent central policies allow compensation to exceed the maximum legal standards, such policies have not yet been fully implemented and its results remain to be seen.

- (iii) **Unfair calculation of resettlement subsidy.** Under the 1998 LML, resettlement subsidy, the only remedy available for damages resulting from resettlement is in fact tied to the amount of land expropriated, rather than the number of people who need to be resettled. This linkage unfairly affects farmers with small landholdings. The PRC's arable land per capita is already at the lowest end in the world; with the PRC's rapid economic development, the farmers' already small landholdings are expected to get even smaller. Thus, even a small-scale land expropriation will create a large number of landless farmers. Linking resettlement subsidy to the amount of land under expropriation is, in effect, a reduction of the government's budgetary expenditure on resettlement, which will eventually shift the government's responsibility of restoring affected farmers' livelihood to affected farmers themselves, and will inevitably bring about a result that fails well short of ADB standards.
- (iv) **Excessive interception of compensation by collectives or local governments.** While the compensation may be low, the affected farmers do not even receive the full amount of this already low compensation in many cases. Chinese law requires that the compensation for loss of land—the biggest component of the

<sup>126</sup> *China Country Report*, *supra* note 99(34–35).

three categories of compensation/resettlement package—be paid to the collective landowner for the development of the collective economy.<sup>127</sup> The decision as to whether this compensation is shared between the collective landowner and the affected farmers, and if so, at what ratio, is entirely subject to the collective landowner's discretion.

- (v) **Land-for-land practice in the form of illegal “big land readjustment.”**<sup>128</sup> Because land is the primary means of subsistence for most APs, cash compensation itself may not be able to provide a sustainable source of income and living support for affected farmers, especially those living under marginal conditions. ADB has thus adopted a policy that equivalent land will be provided as the first alternative to compensating affected farmers' loss of land to expropriation.<sup>129</sup> This land-for-land approach is certainly preferable to the cash compensation approach in an area where economically meaningful land can be obtained lawfully to fairly compensate the affected farmers. However, in the PRC, land-for-land compensation is usually conducted through village-wide land readjustment, especially where a portion of the village's land is expropriated. RDI has done more than 1,000 individual farmer interviews in more than 20 provinces since 1987, and found no case in which a small readjustment was conducted in response to land expropriation in the village. Relying on big readjustment to compensate affected farmers appears incompatible to the ADB policy, and clearly violates existing Chinese laws governing farmers' land rights. ADB's land-for-land policy requires provision of replacement land, which is equivalent in quality and quantity. However, based on RDI's empirical experience in the PRC, any big readjustment will universally result in a reduced land share, and often in less quality, for APs. Second, any administratively orchestrated land readjustment is tantamount to “collective taking” of unaffected farmers' land to compensate affected farmers' in the

### Box 3: Anhui and Jiangxi – A Tale of Two Provinces

In Anhui, interviews were conducted with a total of 32 farmers in four counties. The vast majority of Anhui farmers, 21 of 25 that expressed their opinion, were highly confident that their land rights would remain free from the process of readjustment for the entire 30-year term. Because of this confidence, 10 farmers reported that they had made long-term investments on their land to increase productivity or diversify into higher value-added crops. The specific investments included planting fruit trees, shifting from chemical to organic fertilizer, building greenhouses for mushroom or vegetable cultivation, and digging irrigation ponds. On the average, farmers who had made such investments reported that their net income per mu of land had increased fivefold in the first year following the investment. To make these investments, farmers invested both labor and cash, ranging in amounts from several hundred to as much as CNY20,000. Farmers uniformly told us that without secure land rights, they would not have invested on their land.

Jiangxi presents a starkly contrasting picture. Only two of 26 farmers interviewed during a 2003 field research expressed high confidence that their land rights would remain secure and free from land readjustment during the 30-year term. In fact, 16 of the 26 villages had already conducted a land readjustment since purportedly giving farmers 30-year rights under the 1998 LML. As a result, only four farmers reported making any long-term investments on their land. Among these four farmers, two believed that none of their land would be subject to readjustment (the two “high confidence” farmers noted above), while one had invested only on his dry land because the village announced that dry land would no longer be subject to land readjustments, while readjustments would continue on paddy land. Only one of the farmers we interviewed (the only one reflecting such behavior in either of the two provinces) risked making a long-term investment on land he still considered subject to possible readjustments; and he made sure that the greenhouses he built were movable, just in case.

CNY = yuan, LML = Land Management Law, mu = 1/15 of a hectare.

Source: Prosterman, Roy, and Brian Schwarzwalder. 2004. From Death to Life: Giving Value to China's Rural Land. *China Economic Quarterly*, Vol. 8, No. 1.

community, which appears to be at odds with the ADB policy of avoiding land takings and subsequent involuntary resettlement where feasible.<sup>130</sup>

Big land readjustment also violates Chinese laws on farmers' land rights. As indicated above, RLCL provides that no land readjustment is permitted within the 30-year period except for readjustment conducted between isolated households in the event of special circumstances, such as natural disasters that

<sup>127</sup> The Implementing Regulations of the 1998 LML, Art. 26.

<sup>128</sup> For definition of big readjustment, see supra note 52 and accompanying text.

<sup>129</sup> ADB. *Handbook on Resettlement: A Guide to Good Practice*, 35.

<sup>130</sup> *Id.*, 101.

have seriously damaged farmers' contracted land.<sup>131</sup> Clearly, a village-wide big readjustment is illegal regardless of what circumstance under which it is instituted. Further, land readjustment—especially village-wide big readjustment—has proved to be detrimental to the farmers' tenure security and thus their enthusiasm to make long-term investment in land and engage in intensification or diversification in the process of increasing their living standard through farming.

(vi) **Erratic and inconsistent compensation for non-land assets.** For example, in most provinces, compensation for perennial crops, such as fruit trees, is only a 1-year output value of the crop regardless of its age. As to structures such as residential houses, all but two provincial jurisdictions (Beijing and Shanghai) have yet to develop specific and coherent legal standards. Such a legal vacuum makes it possible for local expropriating agencies to depress the value of standing crops and structures arbitrarily. RDI obtained a detailed list of compensation standards during its fieldwork conducted in 1998 on an expropriation project involving a golf course, as shown in Table 1.

(vii) **Inadequate protection of married/divorced women's entitlement to compensation.**<sup>132</sup> Under RLCL, collective entity cannot reassign the land that it allocated to a woman if she later moves out of the village, unless and until the collective in her marital village has allocated land to her.<sup>133</sup> While these new rules create greater overall land tenure security, they also have the potential to deprive some women of access to land. Specifically, if a woman moves from a village that conducted a small readjustment upon her departure to a village that does not readjust land upon her arrival, she no longer has a land share and in a sense becomes "landless." Second, even if the woman's original village does not readjust her land share out upon her marriage

or divorce, the land share allocated to her is regarded as a joint property of her maiden family or ex-husband's family, and it is difficult for her to partition that land share. When a land expropriation occurs in the village she moved out of because of marriage or divorce, and compensation is made based on either amount of landholdings or number of exiting family members, she may not be able to claim her legitimate share of compensation. Third, in many rural villages, "married-out" women are regarded as nonmembers of the community and the collective decision on distribution of compensation often excludes them from the list of beneficiaries even though their contracted land is still within the village. Fourth, for those women who married into suburban villages where land expropriations are more frequent, collective landowners often use the villagers' discrimination

**Table 1: Standards of Compensation for Standing Crops and Structures**

| Standing crops                  |   |
|---------------------------------|---|
| Annual crops                    | CNY400/mu regardless of variety of the crop |
| Perennial crops                 |   |
| Timber trees                    | (in CNY)                                    |
| • Less than 3 cm in diameter    | 1.5/tree                                    |
| • 3–5 cm                        | 3/tree                                      |
| • 6–10 cm                       | 5/tree                                      |
| • 11–15 cm                      | 8/tree                                      |
| • 16–20 cm                      | 10/tree                                     |
| • 21 cm or above                | 15/tree                                     |
| Fruit trees                     |   |
| • Mature tree with fruits       | 50/tree                                     |
| • Trees that just bear fruits   | 30/tree                                     |
| • Trees that do not bear fruits | 10/tree                                     |
| • Young trees                   | 1/tree                                      |
| Bamboo                          | 0.6/kg                                      |
| Structures                      |   |
| Brick house                     | 88/m <sup>2</sup>                           |
| Clay brick house                | 45/m <sup>2</sup>                           |
| Grain storage                   | 40/piece                                    |
| Pigsty                          | 40/piece                                    |
| Drying ground                   | 40/piece                                    |

cm = centimeter, CNY = yuan, kg = kilogram, m<sup>2</sup> = square meter, mu = 1/15 of a hectare.

Source: Li Ping, 1998. Fieldwork Note (on file with RDI).

<sup>131</sup> RLCL, Art. 27.

<sup>132</sup> This problem is deeply rooted in the PRC's patrilineal tradition prevailing in rural areas, in which a woman usually moves to her husband's village upon marriage or moves back to her maiden village upon divorce, leaving her land share behind in the village she moves out of.

<sup>133</sup> RLCL, Art. 27.

against “married-in” women and refuse their household registration as a villager.<sup>134</sup>

- (viii) **Absence of procedural safeguards.** Farmers’ right to notice, participation, and appeal in land expropriations is seriously lacking in both the legal regime and in practice. Although the law requires notifying the farmers of the planned expropriation, this notification is, in effect, a simple ultimatum demanding that farmers get ready for the taking within a predetermined timeframe. Moreover, the PRC’s expropriation laws authorize the state to enforce the expropriation plan and to take actual possession of the land even if disputes concerning compensation and resettlement are not resolved.<sup>135</sup> During 2002 and 2003 field research on land takings in 17 villages of three provinces, RDI researchers did not find a single farmer who had been consulted before and after the expropriation plans were made. None of the affected farmers in these 17 villages was allowed to participate in the expropriation process or appeal the land expropriation decisions.

## E. Recommended Reforms

Like every DMC, land expropriations in the PRC, while benefiting economic development of the country as a whole, negatively affect the livelihoods of people living in the project areas, resulting in loss of their movable and immovable assets, loss of their income generating sources, and disruption of their daily living. To prevent their livelihoods from being worse off because of land expropriations, the threshold requirement for a sound and rational land expropriation regime is to replace what they have lost. Clearly, to meet such a minimum requirement, APs must be provided with a comprehensive replacement package. It should include full compensation for lost assets at the assets’ replacement value and resettlement measures that address negative impacts on non-assets aspects of AP’s livelihoods. For the purpose of this paper, the recommendations below will focus on issues related to the replacement of AP’s lost assets.

### 1. Adopt Socially Sensible Solutions to Address Urban Woes

- (i) **Allow compensation for urban land use rights.** With rapid urban development, urban land use rights are becoming increasingly valuable. Conversely, failure to compensate for land use rights will certainly depress the value of the condemned structure, and thus fails to offer full replacement value of the AP’s losses. Specific operational rules should be made requiring the condemner to pay compensation for land use rights in addition to structures. Such rules should include, but not be limited to, adoption of fair market value standard, application of the comparable sales approach in valuation of urban land use rights since there is already an active land market in urban areas, and mechanism to enforce such compensation.
- (ii) **Gradually take back the expropriating power.** The PRC may be the only country in the world that delegates to private entities the government’s eminent domain power in determining, negotiating, and paying the compensation to owners of condemned properties. Such delegation was initially intended to create a forum for condemned property owners to negotiate with the condemner-developer at arms length for a compensation that best reflects the market value of the property because of the absence of government’s involvement. However, because of their goal of maximizing profit, these condemners-developers tend to minimize the compensation costs of property development in negotiations. Moreover, these condemners-developers have full access to market information and financial resources for determination of the property value while individual property owners do not. Such power imbalance is used to distort the valuation process to their favor. Lastly, these condemners-developers usually possess closer ties with the government agency in charge than average property owners do.<sup>136</sup>

<sup>134</sup> *China Country Report*, *supra* note 99 (72–73).

<sup>135</sup> The Implementing Regulations of the 1998 LML, Art. 25.

<sup>136</sup> Policy Research Center of the Construction Ministry. 2004. *The Latest Guide to Urban Structure Demolition*, 46.

They tend to label their condemnation as a government-sanctioned action and force individual property owners to accept the deal on the table. To adopt a socially sensible system for urban condemnation, such delegation must be restored to the government.

- (iii) **Allow compensation for undocumented or unregistered property.** Categorically declining compensation for undocumented property will disproportionately affect poor and low-income urban dwellers who were forced to self-build and inhabit these undocumented houses because of the government's inability to provide affordable housing. Moreover, many of these undocumented houses have existed openly without the government's objections for many years. Since the PRC does not have an adverse possession law, the government should, for public policy considerations, take into account the fact that condemnation of these properties without reasonable compensation will inevitably lead to tremendous hardships and social instability. Third, this socially insensible policy is clearly inconsistent with the prevailing international development policy that the lack of title should not be a bar to compensation. Urban condemnation laws should be improved to allow compensation for undocumented properties.

## 2. Introduce a Replacement Value Approach along with Minimum Compensation Standards

The principle for determining compensation for state expropriation for public purposes is that the costs of such expropriation benefiting the public as a whole should not be borne by private individuals, especially those who are socially or economically disadvantaged. Where land expropriation is unavoidable, compensation should be sufficient to replace the assets affected farmers have lost.

Designing a compensation standard for the PRC that is both socially sensible as well as politically acceptable is perhaps more challenging than for most developing countries. The reasons are: (i) there is virtually no rural land market and it is difficult, if not entirely impossible, to get relatively accurate market value of land through valuation; (ii) even if a fair market value can be derived, the shortage of farmland

per capita and increasing population pressure will certainly drive up the cost of replacement land, making it virtually impossible for affected farmers to purchase similar replacement land rights with the compensation equivalent to the fair market value of the lost land rights; and (iii) even if these replacement land rights are successfully purchased with the compensation, they will be for another 20 years or so from now.<sup>137</sup> If the land transaction were a cross-village transaction, the affected farmers–purchasers would almost certainly lose such purchased rights eventually.

However, the new central leadership's increasing awareness of the tremendous negative consequences of "urban-biased development at all cost" and refocusing on the improvement of farmers' livelihood appear to present a prospect—no matter how slim it is at this juncture—for developing a compensation standard that is leaning toward replacement of not only monetary value, but functional and utility values as well, of the land lost to expropriations. That is, replacement of most—if not all—possible benefits that the lost land conveys to affected farmers.

The threshold requirement under such replacement value approach is full and informed participation by affected farmers. While land expropriation is compulsory, the determination of the land's value should not be compulsory at all under the replacement value approach. Under this mechanism, determining compensation for loss of assets is essentially a four-step work. First, an independent assessment should be conducted to assess what benefits affected farmers would have to give up directly from the loss of land. Second, an independent survey on what affected farmers are willing to accept with respect to compensation. Third, based on the information from the assessment and survey, the government expropriating agency will initially determine the land's value and propose it to affected farmers and their collective landowners. Fourth, at this stage, a negotiation process begins where a willing buyer (the state) makes an offer to the collective landowner and the affected farmers who may or may not be willing to accept the government offer. The outcome of such non-compulsory interactions should be an agreement on compensation for land expropriation at or close to the replacement value of the land to be taken.

<sup>137</sup> The second round of rural land allocation for 30 years started in 1998 for most rural villages, and farmers' 30-year land rights are supposed to expire around 2028.

Existing Chinese expropriation laws adopt an approach of setting a numerical ceiling on multipliers of annual agricultural yields in determining compensation level, which is clearly at odds with the willing-to-accept concept. The first step for reforming the PRC's compensation standards is to abolish this ceiling approach as the Beijing municipal government does in replacing the ceiling approach with a "minimum protection price" approach. As the RETA Country (the PRC) Report suggests, on the other hand, using a multiplier of annual yield to determine compensation for the land to be taken has been widely implemented for many years, and it would be difficult—if not impossible—to completely take it out from the valuation process. To tailor the WTA concept to fit peculiar Chinese context, an alternative is to substantially increase the level of statutory multiplier standards based on initial social assessment (ISA) and valuation surveys and use these standards as minimum benchmarks rather than a maximum ceiling. This benchmark standard should be equal or similar to the replacement cost, subject to modification based on rebuttal evidence.

It is important to note that no matter what specific approach is to be taken, the overarching principle is the affected farmers' willingness to accept the deal. Government should take every action possible to ensure the farmers' awareness of the government's offer and the farmers' right to accept, decline, or make a counteroffer on the government's offer.

### 3. Apply "Land-for-Land" in Compliance with Existing Laws and Strictly Prohibit "Land Readjustments" as Compensation

Unlike most DMCs, the PRC's arable land per capita is quite small. After more than 20 years of household responsibility system, virtually all farmlands in the PRC have been allocated to farmers for 30 years, and there is little land available for compensating affected farmers that has not already been allocated to other farmers. To motivate farmers to make long-term investments in their land of limited amount and make their land more profitable through intensive farming and crop diversifications, the PRC has promulgated a series of laws and policies strictly restricting administrative land readjustments conducted by collective landowners and local officials.

Land readjustment, especially village-wide "big" readjustment, seriously undermines farmers' tenure security, which dampens the farmers' motivation to make long-term investments in land, depresses

the development of a rural land rights market, and obstructs the creation of land value. Because of these negative impacts, Chinese laws on land readjustment contain the following provisions:

- (i) A general principle of no readjustment during the farmers' 30-year contract period;
- (ii) Strict prohibition of village-wide ("big") land readjustments;
- (iii) Land readjustments between isolated households are permissible when (a) natural disasters that seriously damage farmers' land or other special circumstances occur, and (b) two thirds of villagers and township and county governments approve it; and
- (iv) Lawful land readjustment may be conducted on village-reserved flexible land, reclaimed land, and the land that has been voluntarily surrendered.<sup>138</sup>

Clearly, any "land-for-land" approach, if it involves a village-wide land readjustment to "compensate" affected farmers for loss of their landholdings, is illegal regardless of whether such readjustment meets procedural requirements. During numerous rounds of fieldwork in rural PRC, RDI researchers have never found a land readjustment after an expropriation that was a legally permissible small readjustment.<sup>139</sup> Therefore, extra caution should be taken to ensure that the source land is not made available through nonvoluntary land readjustments.

Alternatively, allocating to affected households pre-reserved land, escheat land, wasteland, reclaimed land because of land expropriation<sup>140</sup> and land voluntarily returned to collective landowners could be a lawful practice, and should be seriously considered when such land is available. For example, in Beijing and Guangdong, if collective landowners and affected farmers elect nonmonetary compensation, the developer of the expropriated land is required to set aside a portion of such land and allocate it to affected households for nonagricultural use (e.g., opening a shop, restaurant, or a rental premise), which is expected to generate higher income than agricultural use of the land.

Any "land-for-land" program should be scrutinized for its legality and the farmers' willingness to accept.

<sup>138</sup> RLCL, Arts. 27 and 28.

<sup>139</sup> Prosterman, et al., *supra* note 125.

<sup>140</sup> Chinese laws require the land expropriator to reclaim the same amount of nonarable land into arable land of the same quality. LML, Art. 31.

The primary legal standard for a lawful land-for-land program is such that the program does not lead to a land readjustment of existing landholdings of all villagers and thus result in weakened security of tenure for all farmers. Second, any “land-for-land” program—no matter how desirable as perceived by expropriating agency—should be provided to affected farmers along with an offer of monetary compensation reflecting the full replacement value.

#### 4. Designate a Fair Ratio of Allocation of Compensation between Collective Owners and Farmers

Existing laws require that the compensation for loss of land, the biggest component of compensation/resettlement package for land expropriation, be retained with collective landowner, and resettlement subsidy be paid to whoever is responsible for the affected farmers' resettlement.<sup>141</sup> Such a scheme is susceptible to abuses and misuses, as evidenced by a growing number of grievances and protests by farmers who have eventually received grossly inadequate compensation in cases of expropriations.

Under the RLCL, all farmers are entitled to 30-year land use rights that are free from land readjustments. The forthcoming Property Law further defines farmers' 30-year rights as property rights and not contract rights.<sup>142</sup> Depending on the discount rate used for future income streams, the initial economic value of farmers' 30-year land rights represents somewhere between 75% and 95% of the value of full, private ownership. Therefore, farm households who lose their 30-year land use rights as the result of a state expropriation should be entitled to somewhere in the range of 75–95% of the total compensation paid.

At present, once the compensation amount is determined, the government delivers the money to the collective entity (usually the villager committee). No government agency meaningfully monitors or supervises the distribution of the funds to the affected households. Some rules are needed to ensure that compensation is actually disbursed to affected households. The most desirable way of distributing compensation is to require the government agency in charge of land expropriation to make direct payments to the affected households based on the above ratio. Another possible way involves

the use of an escrow agent, in lieu of directly providing the compensation to the collective landowner. Thus, a state bank might be designated as the intermediary responsible for receiving the compensation from the state and for receiving all documentation from the collective landowner and affected land users. Upon completion of the transaction, the escrow agent would then distribute the compensation directly to affected households according to controlling agreements or laws.

#### 5. Adopt the Replacement Value Standard for Non-land Assets

Compensation standards for non-land assets are typically governed by provincial regulations. Based on our research, such provincial standards vary from jurisdiction to jurisdiction, but few of them apply the replacement value standard in determining the value of non-land assets. Hence the following recommendations:

- (i) **Structures.** It is important to note that adopting a uniform standard province-wide may not reflect the true replacement value of structure within the province. For example, location has much greater impact on the value of houses in suburban areas than those in non-suburban areas. Fortunately, recent measures on valuation of structures in Beijing and Shanghai offer a useful guidance for further reforms. In the valuation of structures, a two-layer compensation scheme should be adopted subject to affected farmers' election.
  - Replacement home or cash compensation subject to farmers' election; and
  - In case of cash compensation, full replacement cost along with moving expenses and transitional costs should be included. For structures used for business purposes, compensation should also include loss of reasonable and foreseeable profits as supported by appropriate evidence.
- (ii) **Crops.** For annual crops, the current standard (the value of the crop's season yield) adopted in most provinces is acceptable. However, none of the provincial standards for perennial crops reflects replacement value of the

<sup>141</sup> The Implementing Regulations of the LML, Art. 25.

<sup>142</sup> The Draft Property Law (for public comment), Chapter 11

crop. It is recommended that valuation of perennial crops should be based on the crop's income generating capacity for its remaining economic life.

## 6. Improve Resettlement Subsidy to Satisfy the Needs for Alleviation of Non-asset Impoverishment Risks

No matter how fair and just compensation is paid for loss of assets during land expropriations, such compensation alone is far from sufficiently restoring farmers' livelihoods. This paper is not supposed to provide a set of detailed recommendations to address non-asset impoverishment risks. However, some general advice may be offered for further reforms in this regard.

The Beijing Municipality has made the first move by offering affected farming labors a resettlement subsidy equivalent of 48–60 months of the city's minimum wage.<sup>143</sup> This is essentially a subsidy for involuntary unemployment, and this could be adopted as a benchmark standard for all provinces nationwide.

Further, experiments on provision of food subsidies, pension, medical insurance, and job training currently conducted in many provinces should be encouraged and may be expanded.

Finally, it must be kept in mind that it is the government's statutory duty not to lower AP's living standard in land expropriations, and therefore, the government should bear the costs for elimination or at least alleviation of impoverishment risks, rather than shifting such costs to collective landowners and affected farmers. Therefore, administrative land readjustments to achieve a temporary social peace in the community should not be considered as an option.

## 7. Protecting Women's Rights to Compensation

Women, especially those who married into or divorced from the village where land expropriation occurs, are often deprived of their entitlement to compensation. Such unequal treatment can be traced to both legal loopholes and traditional thinking. First, although the RLCL guarantees that a woman has a land share

wherever she resides, the Chinese law is silent on whether the farmers' land rights are partitionable, and therefore, entitlement to land compensation can be individualized. This legal vacuum puts women in a dilemma: forfeiting her claim or fighting for her right against her maiden family, with little legal guidance. Second, because local culture is often discriminatory of outsiders, it would be easy for collective landowners to summon villagers' support for rejecting "married-in" women's claim for land compensation. Third, distribution of land compensation is usually subject to discretion by collective landowners. If they were poorly educated about women's rights to land and to land compensation, they would be inclined not to allocate compensation to "married-in" women.

Women's land rights are complete only when such rights are legally recognizable, socially recognizable, and enforceable by external authorities.<sup>144</sup> To protect women's right to compensation effectively, the first step is to make their entitlement enforceable under the law. Since the RLCL explicitly requires that a married woman's land share be retained with her maiden family unless she gets a new land share in her husband's village, a possible legal reform could be making her land share identified to her and allow her to partition her land from the household landholdings.

Collective landowners are the key for recognition of women's right to land and to compensation when a land expropriation occurs. Before such rules are promulgated, collective landowners should be educated with respect to existing laws on protection of women's rights and interests in general. Under the no-readjustment law, a woman who moves out of her maiden village because of marriage or divorce will retain her land share in the village and thus should have a legitimate claim for land compensation unless she has received a land share in her new village.

## 8. Reduce the Number of Involuntary Acquisitions by Clearly Defining and Narrowing the term "Public Interests"

One of the primary institutional reasons for rampant land expropriations in recent years is the lack of a clear and precise legal definition of "public interests." This lack of clarity is further exacerbated by the fact that the state exerts legally sanctioned compulsory acquisition

<sup>143</sup> The 2005 minimum wage in Beijing is yuan (CNY)580 per month. See Beijing Labor and Social Security Bureau and Beijing Bureau of Personnel. 2005. Notice on Adjusting Minimum Wage for Beijing Municipality. A resettlement subsidy calculated based on the new Beijing rule can amount to CNY27,840–34,800 per labor, which is already greater than the statutory ceiling of 30 times of average annual output value for grain farming.

<sup>144</sup> Mehra, Rekha. 1995. Women, Land, and Sustainable Development. *International Center for Research on Women Working Paper* No. 1, 4.



power in almost all cases, regardless of the nature of the end use. It is common that the construction of a commercial gas station is classified as “public interests.” Furthermore, the delegation of the state’s compulsory expropriation power to the county government gives local governments substantial incentive to expropriate land for commercial purposes because it generates revenue by paying farmers little under the mantle of “public interests” and selling to private, commercial developers for substantial amounts of money.

The PRC should adopt new legislative or regulatory measures that clearly define and limit the scope of “public interests.” One effective option, based on international experience, is to adopt an inclusive list of specific permissible public purposes. Other purposes such as commercial, nonagricultural uses of farmland by the private sector should be achieved through voluntary negotiation between the affected landowners and users on the one hand, and the party wishing to acquire rights to the land on the other.

#### **9. Improve Land Takings Procedures to Guarantee Farmers’ Right to Notice, Right to Participation, and Right to Appeal**

The PRC’s legal regime and its implementation are seriously inadequate with respect to farmers’ right to notice of the intended expropriation, their right to participation in the takings process, and their right to appeal. The recent policy measures taken by the central government in Document No. 28 in addressing the problems of inadequate procedural safeguards are an important step forward. Therefore, the PRC Government should take at least the following two steps to achieve the objectives of the recent procedural improvements.

First, the National People’s Congress should consider enacting the new policy measures as law. Although promulgating new policies will help decrease violations by local government officials and collective cadres of farmers’ right to due process, these policy measures do not have strong binding force as laws.

For example, violation of policies at most results in administrative sanctions, which are usually milder than legal penalties. Moreover, policy guidelines typically cannot be applied in court when the affected farmers bring their case for a judicial hearing. Without improved legal rules, the judges have to review the case based on existing legislations that have proven inadequate in addressing affected farmers’ complaints about violations of their procedural rights.

Second, the government should develop specialized institutions to address farmers’ grievances concerning land expropriations. Legislating good laws and rules is merely the first step in the long march toward protecting the farmers’ right to due process. At present, farmers’ grievances cannot be addressed in court because of high legal fees and other artificial restraints. The PRC should consider developing a semi-judicial land tribunal system as in Hong Kong, China or Australia. Land tribunals offer several important advantages over courts of general jurisdiction as a means of resolving rural land disputes: (i) the mere existence of land tribunals sends a message to the community about the importance of rural land management and the need for the rule of law in rural areas; (ii) land tribunal judges are presumably land law experts, ensuring that land disputes are resolved consistently and predictably according to applicable laws; and (iii) land tribunals streamline the dispute resolution process, avoiding a backlog of cases that often exists in courts of general jurisdiction.

As an alternative, the PRC may consider creating a special land-law panel within the existing courts of general jurisdiction to meet the imminent needs of the affected farmers for judicial redress. Judges sitting in such panel should receive specialized training on land laws and policies and other aspects of land disputes including land valuation, land survey, and land economics.

Whether it is a land tribunal or a specialized panel, farmers must have reasonable access to the dispute resolution body. Procedural rules may be modified as well so that the proceedings may be more accessible and less formal.

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# III. Expropriation Laws and Practices: India

## A. General Background

Experts estimate that large-scale development projects have displaced 21–50 million people in India since independence.<sup>145</sup> Unfortunately, the theme of India’s development-caused forced displacement history over the past 5 decades is characterized by unsuccessful resettlement and rehabilitation leading to increased impoverishment of those displaced. Consultation, compensation, and rehabilitation have typically been inadequate and often grossly inadequate, particularly in older projects—those commenced or concluded in the first 3 decades after independence.<sup>146</sup>

Problems with compensation and valuation have contributed to unsuccessful development-caused forced displacement experiences in India. Those problems are due to defects in both the legal framework and, particularly, its implementation. India’s statutory compensation standards fall short of ADB’s Policy on Involuntary Resettlement in several respects. Major discrepancies include:

- (i) **Not all persons defined as “APs” under ADB policy are legally entitled to compensation in India.** The ADB policy recognizes all persons affected by the project as eligible for compensation, irrespective of formal legal title to the land.<sup>147</sup> India’s statutory compensation standards only recognize persons with formal, legally recognized rights to a particular asset.
- (ii) **India’s statutory compensation provisions allow for but do not require the option of land-for-land compensation.** ADB policy favors land-for-land compensation to cash compensation in many situations and aims in all situations to establish both options to enable APs to select the best option.<sup>148</sup> India’s laws typically allow for land-to-land compensation, but do not require that it be offered as an option.
- (iii) **India’s statutory compensation practices use “market value” rather than methods that result in less than market value.** ADB policy calls for compensation that allows for replacing the assets that are lost so that people affected are at least as well off after resettlement. Applicable Indian statutory compensation provisions typically require “market value” along with some additional components such as a 30% premium (“solatium”), interest, moving expenses, and other direct damages. The fundamental discrepancy of the standards on paper is in outlook. ADB policy is forward-looking and the Indian statutory

<sup>145</sup> Hemadri, R. et al. 1999. *Dams, Displacement, Policy and Law in India*. Paper prepared for World Commission on Dams.

<sup>146</sup> For examples, see Mander H. 2005. Displacement with State Subterfuge: Case Study of Indira Sagar Parijoyana. *Economic and Political Weekly*. 26 November; Centre for Science and Environment. 1999. *State of India’s Environment*, vol. 1; Parasuraman, S. 1999. *The Development Dilemma: Displacement in India*. Institute of Social Studies; Fernandes, W., and S.A. Raj. 1992. *Development, Displacement, and Rehabilitation in the Tribal Areas of Orissa*. Indian Social Institute; Fernandes, W., and E.G. Thukral. eds. 1989. *Development, Displacement and Rehabilitation*. Indian Social Institute; Mahapatra, L.K., 1999. Testing the Risks and Reconstruction Model on India’s Resettlement Experience. In M.M. Cernea. ed. *The Economics of Involuntary Resettlement, Questions and Challenges*. World Bank; Pandey, B., et al. 1986. *Development, Displacement and Rehabilitation*. Institute for Socioeconomic Development; Singh, S., et al. 1992. Evaluating Major Irrigation Projects in India. in G. Thukral. ed. *Big Dams: Displaced People*. New Delhi: Sage Publications; Morse, B., and T.R. Berger. 1992. *Sardar Sarovar: Report of the Independent Review*. Resources Future International; and Paranjpye, V. 1990. *Evaluating the Tehri Dam: an Extended Cost-Benefit Appraisal*. Indian National Trust for Art and Culture.

<sup>147</sup> ADB policy defines “APs” as “those who stand to lose, as a consequence of the project, all or part of their physical and nonphysical assets (including homes, communities, productive lands, and resources, such as forests, rangelands, fishing areas, or important cultural sites, commercial properties, tenancy, income-earning opportunities, social and cultural networks, and activities).” *ADB Handbook on Resettlement: A Guide to Good Practice*. 1998. 3.

<sup>148</sup> Id., 6.

compensation standard, like most such standards worldwide, is backward looking. ADB policy aims to provide sufficient compensation to place the AP in a new situation that is at least equivalent as before the displacement. The focus, therefore, is on the cost of putting the AP in this new “replacement” situation. The outlook of the Indian law is to look back at what was lost and to pay for its value. If the Indian standards were met in practice, the difference here may not be so significant. The more important discrepancy has resulted from the insufficient application of the Indian standard in practice because the valuation is based on understated prices in publicly registered deeds.

- (iv) **India’s statutory compensation provisions do not require compensation for lost CPRs.** ADB policy aims to compensate APs for lost CPRs such as access to forests, rangelands, and water bodies. In many Indian settings, particularly rural settings, these are CPRs and play an important role in livelihoods, particularly for the poorest.<sup>149</sup> The rights to these CPRs are typically customary and not formally legal so the statutory compensatory provisions do not require compensation for lost access to such assets.

Well-known and documented problems with development-caused forced displacement in India<sup>150</sup> have stimulated the search for a better development-caused forced displacement policy and legal framework. The main policy and legal instruments governing development-caused forced displacement actions in India are based on land expropriation or acquisition<sup>151</sup> measures introduced in the 19th century. The centerpiece legislation was, and remains, the Land Acquisition Act (LAA) of 1894, as amended.

Historically, in India, the “rehabilitation” after displacement was seen as merely an issue of appropriate compensation. The government took no responsibility beyond the payment of compensation for loss of assets. It was expected that displaced people should use the

compensation money to rehabilitate themselves. This has changed somewhat in recent years as the concept of greater compensation as well as rehabilitation has crept into certain areas of India’s policy (mostly) and legal (less so) frameworks.

The Ministry of Energy and Irrigation, in 1980, was the first central government ministry to introduce rehabilitation aspects into a sector of central government policy by instructing all state governments completing major development projects—in this case, reservoir projects—to provide for the rehabilitation of displaced persons through grants of wasteland or by the acquisition of land from large landholders.<sup>152</sup> A few years later, the Ministry of Home Affairs issued guidelines on the rehabilitation of displaced tribal people.

The states of Maharashtra, Madhya Pradesh, and Karnataka took the lead among Indian states by passing laws on rehabilitation of displaced people affected by large projects, all of which took effect in the late 1980s and early 1990s. Other states, such as Orissa, have passed government orders (which are policy documents and as such not justiceable) concerning resettlement and rehabilitation of persons affected by large projects, particularly water projects. Various central government ministries and parastatal organizations have also prepared periodic and project-specific policy guidelines for resettlement and rehabilitation, often in part from the pressure of multilateral funding agencies.

In February 2004, the national government took what could turn out to be a significant step in the direction of going beyond a compensation-only approach by adopting a National Policy on Resettlement and Rehabilitation (NPRR) for Project-Affected Families.<sup>153</sup> NPRR applies only to projects where 500 families have been displaced (250 in hilly and other defined areas). NPRR calls for rehabilitation grants and other monetary benefits well beyond the statutory compensation provisions related to the loss of land and other immovable property.

NPRR, on its face, appears to take a few major steps forward in meeting ADB’s Involuntary Resettlement Policy. On its face, however, the policy applies only to projects where very substantial numbers

<sup>149</sup> In various semiarid regions of India, between 91 and 100% of firewood and 66–89% of poor households’ grazing needs are supplied by lands that are CPRs. L.K., Mahapatra, *supra* note 146.

<sup>150</sup> See *supra* note 146 and related text.

<sup>151</sup> Land expropriation using the government’s eminent domain power is referred to as “land acquisition” in India.

<sup>152</sup> Pandey, 1998, *supra* note 146(10).

<sup>153</sup> The National Policy on Resettlement and Rehabilitation (NPRR) for Project-affected Families was issued by India’s Ministry of Rural Development and (while it is officially called the NPRR of 2003) came into effect on 17 February 2004. This has been superseded by a recent policy in 2007.

of people are to be displaced.<sup>154</sup> Moreover, the policy has no legal force. Perhaps more importantly, there is yet no evidence that this policy has ever been applied. In fact, the Government of India (GOI) Ministry of Rural Development is not aware of any specific implementation of the policy and is in the process of soliciting information from the state governments concerning such implementation.

Although some significant policy and fewer legislative steps concerning rehabilitation have been taken at both the national and state levels in recent years, land acquisition legislation provides the primary legal entitlement to compensation for APs in India.<sup>155</sup>

India's legal framework for land acquisition, on its face, is better than land acquisition legislation in most low-income countries. Nonetheless, even on its face, it falls well short of the ADB Involuntary Resettlement Policy. However, as with so many topics in India, the problems within the law pale in comparison to the problems concerning its implementation. And the implementation statutory compensation provisions, especially in the context of development-caused forced displacement, have been fraught with problems.

India has a federal structure with its Constitution allocating the powers between the central government and its various states. Land acquisition is under the concurrent jurisdiction of the central and state governments.<sup>156</sup> That is, both the central and state governments have the authority to enact legislation on the topic. State legislation can differ but cannot defeat the objective of any central legislation.<sup>157</sup>

The LAA sets out the circumstances and the purposes by which the central and state Governments

of India ("Government") may acquire private lands through compulsory acquisition. The central government has also adopted other special laws that govern specific types of land acquisition, including the National Highways Act, the Indian Railways Act, the Indian Electricity Act, and the Coal Bearing Areas Acquisition and Development Act.<sup>158</sup> The basic principles of the LAA are incorporated into these special laws, with a few exceptions.

Because land acquisition legislation is the source of most legal compensatory entitlements in development-caused forced displacement and because the LAA is the centerpiece land acquisition law in India, the law's relevant provisions are discussed in some details below. Some of the details are important and tend to be glossed over in descriptions of the law in the resettlement literature. We look at three aspects of the legislation: (i) the purposes for which land may be compulsorily acquired; (ii) the basic process for the compulsory acquisition; and especially (iii) the compensation afforded to those who have their land compulsorily acquired. Because the focus of our paper is compensation and valuation, our emphasis will be on compensation—the third point—and particularly on how assets are valued.

## B. The Land Acquisition Act

### 1. Acquisition Purposes

Under LAA, land may be acquired when it is needed for a "public purpose" or a company. The definition of "public purpose," which started out as fairly expansive, has been stretched even wider over the years giving the state increasing power to exercise its strong right to unilaterally expropriate land. The public purpose need not benefit the public at large, so long as a fraction of the community is benefited. The LAA provides that the expression "public purpose" includes the provision of land for:

<sup>158</sup> Other central laws that include compulsory acquisition provisions for specific types of takings include:  
 Ancient Monuments and Archeological Sites and Remains Act. 1958.  
 Atomic Energy Act. 1962.  
 Cantonments Act. 1924.  
 Damodar Valley Corporation Act. 1948.  
 Defense of India Act. 1962.  
 Defense and Internal Security of India Act. 1971.  
 Indian Tramways Act. 1886.  
 Land Acquisition (Mines) Act. 1885.  
 Metro Railways (Construction of Works) Act. 1978.  
 Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act. 1962.  
 Requisitioning and Acquisition of Immovable Property Act. 1952.  
 Resettlement of Displaced Persons (Land Acquisition) Act. 1956.  
 Works of Defense Act. 1903.

<sup>154</sup> Indian activists have criticized other aspects of the NPRR. See, for example, Chittaroopa Palit. 2004. Short-changing the Displaced: National Rehabilitation Policy. *Economic and Political Weekly*. July 3.

<sup>155</sup> A series of environmental laws and forest laws impact mainly non-compensation aspects of involuntary resettlement by including procedural requirements for certain large development projects. These requirements sometimes include environmental clearance, consultation with APs, and rehabilitation plans. These laws and regulations include the Environmental Protection Act of 1986, the Environmental Impact Assessment of Development Projects Notification of 1994, the Forest Conservation Act of 1980, and the Forest Conservation Rules of 2003.

<sup>156</sup> Article 246(2) of the Constitution provides that Parliament and the Legislature of any State have the power to make laws with respect to any of the matters enumerated in List III of the Seventh Schedule, referred to as the "Concurrent List." Item 42 of List III of the Seventh Schedule includes acquisition and requisitioning of property. The Constitution of India. 1999. The Constitution is not clear on whether resettlement and rehabilitation—as distinct from land acquisition—is under the jurisdiction of the national government, state governments, or concurrently under both. No entry in the constitutional schedules clearly covers resettlement and rehabilitation. However, a strong argument can be made that the responsibility is concurrent because the concurrent list includes relief and rehabilitation of persons displaced by the original creation of India and Pakistan; and land acquisition is on the concurrent list.

<sup>157</sup> Id. Art. 254 of the Indian Constitution provides that inconsistencies between national and state law will be decided in favor of the national law.

- (i) village sites;
- (ii) town or rural planning;
- (iii) planned development of land from public funds in pursuance of a government program or policy;
- (iv) for a corporation owned or controlled by the state;
- (v) for residential purposes to the poor, landless, those affected by natural calamities, or those displaced by a government scheme;
- (vi) carrying out any educational, housing, health, or slum clearance scheme;
- (vii) any other development scheme sponsored by the government; or
- (viii) locating a public office.<sup>159</sup>

The definition of “public purpose” in the LAA was expanded in 1984 to include land needed for a government-owned or -controlled corporation. Moreover, even private companies may acquire land under the LAA in limited circumstances.<sup>160</sup> The expansion of the state’s expropriatory power for use by government-controlled corporations and even private companies (the latter, in circumstances that are more limited) is a troubling trend that has been widely criticized.

## 2. Scope and Process

Under the LAA, the government has a right to acquire “land” for public purposes and must both notify and compensate “persons interested” in the land. The definitions of “land” and “persons” interested are important for understanding the law’s scope.

“Land” includes both: anything attached or permanently fastened to anything attached to the land and any legally recognized rights or benefits arising out of the land.<sup>161</sup>

A “person interested” is one who has or claims a legally recognized interest or right in the land which is being acquired. Such interest may be absolute, such as that of an owner, or partial, such as that of a tenant, a licensee, or an easement holder.<sup>162</sup> A claimant to an interest in the compensation is a “person interested” even if their claim is ultimately invalidated. A person who has a real interest, but does not file a claim, is also a “person interested.” If they are lawfully entitled to compensation, the authorized government authority may not ignore them. However, if the authority does ignore such a person, their only remedy is to file a claim in the civil courts under section 18 of the LAA. The courts have interpreted the expression “persons interested” broadly. However, the competent authorities in charge of acquisition proceedings tend to define the term more narrowly, typically based on the land records. And while other nonformalized possessors or occupiers may fall within the courts’ broader definition, such persons rarely have the knowledge or resources to pursue a claim in court.

Notably, landless laborers, artisans, and forest-land cultivators are typically not regarded as “persons interested” under the LAA and are not entitled to receive any compensation on the ground of loss of earnings because of the acquisition of the land.<sup>163</sup> Moreover, because most agricultural tenants in India are informal and not legally recognized, such tenants are rarely, in practice, treated as “interested persons.”

The relatively narrow definition of “persons interested” in the LAA in practice has meant that many people who fall under ADB’s definition of “APs” are not legally entitled to compensation in India. This is a major shortcoming of the LAA. In recent years for projects financed by ADB and the World Bank, the project counterparts have addressed this shortcoming by providing supplementary rehabilitation packages to “APs” who do not fall within the category of “persons interested” under the land acquisition legislation.

Moreover, the application of the LAA’s definitions here typically results in no compensation for lost access to CPRs such as grazing land, forest, and water bodies. Especially in rural areas, such CPRs provide important livelihood benefits, particularly to the poorest segments of the population who often rely on the products of these CPRs for subsistence and income. These CPRs are often owned by the village or government, although

<sup>159</sup> LAA, § 3(f). The following reasons for land acquisitions have also been held by the courts to be within the meaning of “public purpose”: (i) establishing an industrial area in the State; (ii) for a school playground; (iii) for a maternity home or child welfare center; (iv) for opening a market on behalf of a local self-government; (v) for establishment of a slaughter house for maintaining supply of meat in the locality; (vi) to carry out a scheme of land reforms; (vii) for a public library; (viii) for military purposes; (ix) for accommodations for pilgrims to a temple; and (x) construction of roads. Ghosh, A. 2005. Land Acquisition Act. 1984. (101–103).

<sup>160</sup> Generally, land can only be acquired by companies for use for two purposes: (i) construction of residences for workers employed by the company or providing amenities for workers such as sewerage or sanitation; or (ii) construction of some work that is likely to prove useful to the public. Such companies must obtain consent of the appropriate government and execute an agreement between the government and the company. The government in providing consent and executing the agreement must satisfy itself that the purpose meets the definition of “public purpose” under the LAA.

<sup>161</sup> Id. § 3(a).

<sup>162</sup> See Ghosh, A. 2005. Land Acquisition Act. 1984. (59–70).

<sup>163</sup> Vaswani, Kalpana, Vasudha Dhagamwar, and Enakshi Ganguly Thukral, eds. 1990. *The Land Acquisition Act and You* (13).

they sometimes are privately owned. Those who access them rarely have rights sanctioned by law, although their access rights are typically socially recognized. The LAA provides no compensation for such socially recognized or customary rights. The result can help lead to impoverishment when APs are not compensated for their loss of access to CPRs.

The implementing authority for land acquisitions under the LAA is the state revenue department and its chief officer at the district level, typically the district collector or deputy commissioner.<sup>164</sup>

The LAA describes four stages that the government must comply with before land may be acquired. The government must (i) publish a preliminary notice of acquisition that allows officials to enter land for surveying; (ii) publish the intended acquisition with specific area demarcations; (iii) accept claims by those with an interest in the land and pay compensation; and only then (iv) take possession of the land.

First, the government must publish a preliminary notice that land in a particular area is needed for a public purpose or for a company.<sup>165</sup> This preliminary notice is known as a “section 4(1) notice.” It must be published in the Official Gazette, published in two daily newspapers circulating in the locality of which one is in the regional language, and publicly placed at “convenient places in the said locality.”<sup>166</sup> Notably, the government is not required to make efforts to notify each “interested person” directly. After the Section 4(1) notice is provided, authorized officials may temporarily enter the land to survey its suitability for the proposed use.<sup>167</sup>

Although the LAA provisions would suggest that the government should provide the 4(1) notice soon after the competent authorities decide that the area is needed for a public purpose, this often does not happen. For example, in the Indira Sagar Pariyojana project, researchers found that the section 4(1) notices were sometimes delayed by several years or even decades after the authorities decided to acquire the land and only months before physical displacement occurred.<sup>168</sup>

“Interested persons” may file, within 30 days, objections to the proposed acquisition in writing to the district collector.<sup>169</sup> The district collector must give the objector an opportunity for a hearing. After the hearing, the collector sends a written report to the “appropriate government” containing the recommendations on the objections and the record of proceedings.

If the government wants to proceed with the acquisition after the preliminary survey work is completed, it must make a declaration that the land is being acquired. This “Section 6” declaration, like the Section 4(1) preliminary notice, must also be published in the Official Gazette, in two daily newspapers, and publicly posted at convenient places in the given locality.<sup>170</sup> The government then also directs the district collector to acquire the land.<sup>171</sup> The Section 6 declaration must be made within 1 year of the Section 4(1) preliminary notice; otherwise, the government must start the process anew.

The collector must then make further notice, referred to as Section 9 notices, stating that the government intends to take possession of the land and that claims to compensation for all interests in the land may be made to him or her. The collector must post this notice at convenient places on or near the land to be taken,<sup>172</sup> as well as serve the notice to the occupier, if any, and to all such persons known or believed to have an interest in the land.<sup>173</sup>

After receiving claims from interested persons, the collector must inquire into:

- (i) the objections, if any, as to the measurements of the land to be acquired;
- (ii) the value of the land; and
- (iii) the respective interests of the persons claiming compensation.

In making these inquiries, the LAA gives the collector the power to summon and enforce the attendants of witnesses and documents.<sup>174</sup>

After processing the claims and conducting the necessary inquiries, the collector issues an “award” that includes: (i) the specific area of the land to be acquired; (ii) his determination of the compensation to be given; and (iii) how the compensation should

<sup>164</sup> Section 3(c) of the Act provides that the government can specifically appoint any officer to perform the functions of Collector for purposes of the Act. In numerous cases, the government has assigned these rights and duties to a party that is directly interested in the development project and has a direct interest in maximizing profit or reducing project costs. This “abdication” of what is expected to be independent state authority to a party whose interests is directly adverse to APs has been criticized by Indian human rights activists.

<sup>165</sup> LAA, § 4(1).

<sup>166</sup> Id. § 4(1).

<sup>167</sup> Id. §. 4(2). Officials conducting such survey work are not to enter an enclosed garden or courtyard adjacent to a house unless they have the consent of the occupier or they have given such occupier at least 7 days notice in writing. Id.

<sup>168</sup> H. Mander, *supra* note 146(5059–5060).

<sup>169</sup> Id. § 5-A.

<sup>170</sup> Id. § 6.

<sup>171</sup> Id. § 7.

<sup>172</sup> Id. § 9(1).

<sup>173</sup> Id. § 9(2–4).

<sup>174</sup> Id. § 14 and 15.

be apportioned among the interested persons.<sup>175</sup> On making the award, the collector must tender payment of the compensation awarded to the persons interested.<sup>176</sup> Instead of awarding money, the collector may provide land-for-land compensation or some other form of compensation that is “equitable;” however, the collector is not required to offer a land-for-land option.<sup>177</sup>

The award must be made within 2 years after the Section 6 declaration.<sup>178</sup> So given the 1-year limit from Section 4 “notice” to Section 6 “declaration”, the entire process from initial notice to compensation award must take place within 3 years.

“Interested persons” who are not satisfied with the award may require, by written application to the collector, that the matter be referred to the civil courts.<sup>179</sup> However, the LAA provides that the government may take possession of the land once the award is made even if it is yet to be accepted.<sup>180</sup>

While the opportunity in the LAA to appeal valuations and the compensation package may appear significant, in practice it has been of limited use to most APs. Very few APs appeal because of lack of knowledge—illiteracy still remains high in India, especially in rural areas—and fear of the consequences of official encounters. Their right to appeal is further restricted because the collector, who made the award, is often the sole arbitrator of the appeal in the first instance.

The LAA does provide for consensual agreements in lieu of “awards” dictated by the collector. If, at any stage in the process, interested persons agree in writing to all the award components, the collector can execute this consensual agreement with these interested persons without conducting further enquiries.<sup>181</sup> Such consensual agreements are the exception and, given the power imbalances often present, it is certain that many of these are not entirely “consensual.” The literature is full of examples of “consensual agreements” made under duress or false pretenses.

When the collector has made an award or executed a consensual agreement, the government may take possession of the land and the land shall “thereupon vest absolutely in the government, free of all encumbrances.”<sup>182</sup>

### 3. Compensation

In summary form, the LAA provides that “compensation”<sup>183</sup> should be comprised of five components:

Market value + 30% + Damages from the  
taking + Moving expenses + Interest

In implementation, however, problems with the determination of “market value” often lead to under-compensation. These valuation problems are the crux of perhaps the most important problem concerning the LAA compensation provisions and their implementation. Before moving to those problems related to “market value” determination, the other four components are briefly described as follows:

#### a. 30% “solatium”

The LAA provides that in addition to the market value of the land, each “interested person” is entitled to a sum of 30% of the commensurate market value in consideration of the compulsory nature of the acquisition.<sup>184</sup> The “solatium” is provided as reparation for the involuntary nature of the taking.

Notably, the National Highways Act and other central Acts that govern land acquisition for specific purposes do not provide for a “solatium” as an increment to “market value.” This is a major defect and inconsistency in the statutory framework, which the Indian Parliament should address. A nongovernment organization (NGO) consultant familiar with National Highways Authority of India (NHAI) projects states that despite the absence of solatium in the National Highways Act, that the land acquisition officers from the state-level revenue departments do include solatium in the compensation awards for highway projects. His understanding was that the land acquisition officers did this out of “habit” from applying the LAA compensation provisions.

<sup>175</sup> Id. § 11(1).

<sup>176</sup> Id. § 31(1). If the person interested has protested or appealed the award, the collector deposits the determined compensation with the concerned civil court.

<sup>177</sup> Id. § 31(3).

<sup>178</sup> Id. § 11A.

<sup>179</sup> Id. § 18.

<sup>180</sup> Id. § 16.

<sup>181</sup> Id. § 11(2).

<sup>182</sup> Id. § 16. In special cases of urgency, the collector can take possession of the land 15 days after the Section 6 notice and before an award is made. Id. § 17.

<sup>183</sup> In the accepted terminology of involuntary resettlement, “moving expenses” and perhaps some of the damages from the taking would not be defined as compensation, but rather as a distinct category of a resettlement and rehabilitation payment. In the terminology used in the LAA and other Indian land acquisition legislation, moving expenses are part of the legally entitled “compensation” award.

<sup>184</sup> Id. § 23(2). The solatium had been 15% before the Act was amended in 1984.

### b. Damages from the taking

In addition to “market value” and the 30% solatium, the LAA provides compensation for five types of damages that an interested person may sustain. An interested person can receive compensation for damages relating to:

- (i) taking of any standing crops or trees on the land;
- (ii) severing the taken land from the person's other land;
- (iii) injuries to other personal or real property due to the collector's taking possession;
- (iv) loss of earnings due to the taking; and
- (v) any decrease in profits of the land between the time of Section 6 declaration and the collector's taking possession.<sup>185</sup>

These provisions of the LAA, which are more generous than statutory compensation provisions in most developing countries and even developed countries, are often not applied in practice in part because many “interested persons” are not aware of these legal entitlements. Their presence should afford ADB the leverage to ensure that they are advantageously applied in ADB-funded projects.

### c. Moving expenses<sup>186</sup>

If as a consequence of the compulsory acquisition the person is compelled to change his residence or place of business, that person is entitled to the reasonable expenses incidental to such change.<sup>187</sup> While moving expenses are not typically categorized as “compensation” in involuntary resettlement terminology, the important point here is that ADB remain aware that state governments are legally obligated to provide moving expenses to “interested persons” when they are displaced.

### d. Interest

In addition to the market value and other compensation, the interested person is entitled to 12% annual interest on the market value<sup>188</sup> calculated from

the time of the Section 4(1) preliminary notification to the date of the award.<sup>189</sup> Interest does not accrue during any period within which the proceedings are held up because of a court-ordered stay or injunction.<sup>190</sup>

This legally required interest is not always paid in practice.<sup>191</sup> Its inclusion in the Act, however, is an important addition that is often missing from land acquisition legislation in other countries. ADB should ensure that it is properly implemented as a state government obligation in all ADB-funded projects.

The application of this interest obligation is unclear when land-for-land compensation is provided, but delayed. The statute does not directly address this situation, but a strong argument can be made that such interest is due even with land-for-land compensation. Unfortunately, if the land is provided after the written “award” is made (and such examples have been documented in the literature), the LAA is faulty in not entitling the interested person to accrued interest during that period.

### e. Market value

The LAA provides that the core of the compensation is to be the “market value of the land” at the time of the Section 4(1) notice.<sup>192</sup> However, the LAA, similar to other central laws and state laws concerning acquisition, does not define “market value” or specify mechanisms for determining “market value.” Substantial case law does provide some guidance on these issues, but that guidance is not entirely adequate.

The LAA does contain a list of factors, which are not to be taken into consideration in determining compensation. These include:

- (i) The degree of urgency which has led to the acquisition;
- (ii) Any disinclination of the person to part with the land acquired;
- (iii) Any damage sustained by him, which if caused by a private party, would not render such person liable to a suit;

<sup>185</sup> Id. § 23(1).

<sup>186</sup> See supra note 183.

<sup>187</sup> Id. § 23(1).

<sup>188</sup> The interested person is not entitled to interest on the solatium or on any of the damages. *Hydro Development Corporation v. S.P. Singh*, 1997. 1 SCC 249.

<sup>189</sup> LAA, § 23(1A).

<sup>190</sup> Id. § 23(1A).

<sup>191</sup> See, for example, Grievance Redressal Authority Report, 2005. In *Narmada Bachao Andolan v. Narmada Hydro-electric Development Corporation and others*. Writ petition 3022 of 2005 in High Court of Madhya Pradesh at Jabalpur, June 15.

<sup>192</sup> Id. § 23(1A). The Act, like similar legislation in most countries, points to the value at a time before the taking and the case law is clear that any increase in value in anticipation of the purpose for which the land is to be taken may not be considered.



- (iv) Any damage caused or likely to be caused to the land after the date of the Section 6 declaration;
- (v) Any increase in the value of the land acquired likely to accrue from the use to which it will be put when acquired;
- (vi) Any increase in the value of other non-acquired land owned by the person likely to accrue from the use to which the land acquired will be put;
- (vii) Any improvements made to the land after Section 4 notification; and
- (viii) Any increase to the value of the land because of its being put to any illegal use.<sup>193</sup>

Such provisions are common in the comparative law of land acquisition, but several act to create a gap between statutory compensation in India and ADB's standard of replacement cost. The most important problem here is that any increase in value of the land acquired caused by the project cannot be considered in determining compensation. In the common case where the project will increase the value of the land in the vicinity, this means that the AP will be compensated based on the pre-project rates, but will be expected to purchase replacement land at the higher post-project rates.

### C. Valuation: Defining "Market Value"

The Indian courts have consistently defined "market value" as the price that a willing seller might reasonably expect to obtain from a willing purchaser.<sup>194</sup> The courts acknowledge that this definition does not easily lead to a precise determine of market value.<sup>195</sup> Market conditions are never constant. The demand and supply factors vary substantially over time and place. The uniqueness of each property's location, size, quality, and possible potentialities affects market value. And each of these factors is difficult to be quantified in comparable monetary terms. In sum, it is difficult to quantify market value through a simple algebraic formula or mathematical exercise.

Notably, the standard of "market value"—despite the valuation method used to define it—is a fundamentally different approach than the standard of

"replacement cost." Market value focuses on the value of the lost asset. Replacement cost focuses on what it will take to replace that lost asset. In application, these differing approaches can result in different valuation approaches and different values, as discussed above in Section 1.

The Indian court decisions have generally accepted three different valuation methods for determining market value: (i) comparable sales; (ii) capitalization of income from land; and (iii) expert assessment. The three methods and the advantages and disadvantages of each are discussed below.

#### 1. Comparable Sales Method

Market value is best reflected in actual prices paid and received if the market is relatively active. One can fairly accurately ascertain the market value for a particular land parcel if that specific land parcel had been recently sold. And even when the specific land parcel has not been recently sold, one can approximate the market value by knowing the prices paid in "comparable sales"—that is, recent (non-compulsory) transactions for similar and nearby land parcels.

The land sales market is relatively active in most urban settings and many rural settings in India. Therefore, in most—but not all—cases, one can identify recent transactions for comparison and guidance. In addition, in what might appear to be fortunate, sale deeds for immovable property are required by law to be registered in India.<sup>196</sup> So one may search and find the public record of the sale deeds, which include the particulars of the property and a sales price.

Unfortunately, and this is the crux of the valuation problem in India, the vast majority of registered sale deeds understate the actual sales price to reduce tax liability. Despite this commonly understood understatement of the actual sales price, in applying the comparable sales method of valuation, land acquisition officers almost universally use such sales deeds.

Why do the sales deeds understate the actual value? Most states impose a transaction tax<sup>197</sup> on sales of immovable property. This transaction tax has typically ranged from 10–14% of the sales price. Parties to a transaction thus have had a substantial incentive to understate the sales price. In recognition of this prob-

<sup>193</sup> Id. § 24.

<sup>194</sup> Special Tahsildar, L.A. v. Mangala Gauri AIR 1992 SC 666.

<sup>195</sup> See K. Pasayya v. Special Tahsildar AIR 1995 SC 1641.

<sup>196</sup> While most land sales between nonrelatives are (eventually) registered in India, a significant minority, especially in remote rural regions, are not.

<sup>197</sup> The "transaction tax" typically has two components: a "stamp duty," which is the larger portion; and a registration fee.

lem, all states have developed government-determined “registration values” or “circle rates” to help determine the basis for tax liability. These rates are typically set by a Valuation Committee at the taluk (subdistrict) level and apply to broad land classifications within a given area, missing the unique and specific features of each particular land parcel. The rules typically state that the transaction tax is applied to the “registration value” or the actual sales price, whatever is lower. Thus, nearly all sellers and buyers just record the “registration value” in the sales deed even when the actual sales price is higher, which is usually the case.<sup>198</sup>

Actual sales prices typically range from 20–100% higher than the “registration value” based on RDI’s field experience in several Indian states and discussions with several Indian experts.<sup>199</sup> In ADB-funded NHA projects, the India Country Report notes that the applied definition of “replacement value” is 200–300% higher than the compensation award made by the land acquisition officers. A World Bank assessment report of a Karnataka irrigation project found that their applied definition of “replacement value” was 122% higher than the average compensation provided based on registered sale deeds.<sup>200</sup>

Of the various valuation methods for determining market value, the courts have favored the comparable sales method. It is also, by far, the most frequent method used by land acquisition officers to determine market value when land is compulsorily acquired under the LAA. Unfortunately, since registered sale deeds are usually the data used for applying the comparable sales method and those sale deeds contain fictitiously low prices, this typically results in substantial undervaluation.

Two other factors lead to undervaluation when using the comparable sales method even for those recognized as “interested persons” according to the LAA. First, tribal landowners typically are restricted by law from selling their land to non-tribals. These

legislative provisions, adopted to protect tribals from exploitative practices by non-tribals, significantly reduce the market value of their land and thus their compensation upon acquisition.

Second, poor people who have received land from the government through land reform measures or other government programs are often restricted by law from selling their land, sometimes for a number of years, but in many states in perpetuity. This restriction on alienation obviously substantially impacts the market value of that land and thus the compensation they receive upon expropriation. In some cases, land acquisition officers have taken the position that such government land grantees are not entitled to any compensation for the loss of the land granted them by the government. State governments have taken the position.

## 2. Capitalization of Income Method

Where comparable sales information is not available,<sup>201</sup> the capitalization of income method is sometimes used to determine compensation. Capitalized value is calculated by multiplying the annual net returns or profit by a certain multiplier. Calculation of net profit can be a complex exercise. First, gross annual income is ascertained from all known components of income from the land. Second, total annual cost incurred from the production of gross income is calculated.<sup>202</sup> Third, net annual income is obtained by deducting total cost from the gross income.

The choice of the multiplier is obviously important in reaching the determined compensation when using the capitalization of income method. The choice in India is typically based on conjectures and precedents. Ordinarily, a multiplier of 10 is used for agricultural land. This multiplier has been broadly accepted by the Indian courts.<sup>203</sup> For assessment of the value of buildings based on their net rental income, a multiplier of 15 or 20 is typically used.

Capitalization of income can be a useful valuation method, particularly in the absence of reliable

<sup>198</sup> In addition to tax avoidance, money laundering is another important reason for under-declaring actual transaction prices. Many households and businesses earn income that is “off the books” and thus not reported to the tax authorities. Using this “black money” to pay the increment between the “registered price” and the actual price in an immovable property transaction is a common way to launder this money.

<sup>199</sup> This estimate is based on one of the coauthor’s field research in 10 Indian states as well as informal interviews and discussions with people from numerous states familiar with local land market conditions. A survey comparing prevailing market prices to government-determined prices in Andhra Pradesh found that the prevailing market prices were typically 20–100% more than the government-determined registration prices in that state. (RDI. 2003. *Rural Land Market Survey Report for APRPRP Land Component*. April).

<sup>200</sup> Operation Evaluation Department. 1993. *Early Experience with Involuntary Resettlement: Impact Evaluation on India Karnataka Irrigation Project*. World Bank. Widespread court appeals of the compensation awards for this project led to an average 37% enhancement of the award. But with legal fees, the final compensation was still barely over half of replacement cost. Id.

<sup>201</sup> Comparable sales information is most often not available where land sale market activity is infrequent, giving few recent comparable sales. This occurs most often in more remote rural areas.

<sup>202</sup> In India, the courts have accepted as a rough guideline that costs for agricultural production equal 50% of the gross income from the land. See *Shakuntala Bai v. State of Maharashtra*. 1996. 2 SCC 152; *Special Land Acquisition Officer v. Kotraiah* AIR 1977 Kant 33; and *State of Gujarat v. Rama Rani*. 1997. 2 SCC 693.

<sup>203</sup> See *K. Pasayya v. Special Tehsildar* AIR 1995 SC 1641; *State of Gujarat v. Rama Rana* AIR 1997 SC 1845; *Special Land Acquisition Officer v. P. Veerabhajrappa* AIR 1984 SC 774; and *Special Land Acquisition Officer v. V.S. Nadagowda*. 1996. 6 SCC 124.

comparable sales information. But it has two major shortcomings. First, and most important, the method only reflects one of several factors that combine to make up the market value of land. Land most typically has value beyond its capacity to produce income. For example, land generally has speculative value, with which its market value will reflect possible future uses. Land is a preferred security by lenders, and thus, typically gives its owner increased access to credit. Land is a source of status. Land ownership often provides access to government programs and services. In sum, the capitalization of income valuation method can and typically does undervalue land by only reflecting one of many factors that determines market value.

Second, accurately ascertaining the income and costs can be extremely difficult and time-consuming. Prices of agricultural inputs and outputs vary seasonally and regionally. The variety, quality, and quantity of inputs applied to produce specific crops on a specific plot of land also vary widely across time and place.

### 3. Expert Opinion

Indian courts also support valuation based on the considered opinion of an expert when it is supported by or coincides with other evidence. In valuing land, valuation experts typically employ valuation methods based on comparable sales and capitalization of income; so in a sense, this is not a distinct valuation method. Professional valuers are often used to value unique or special non-land immovable property such as buildings, waterways, bunds, plantation crops, etc.

In practice, state governments use valuation experts to create schedules for determining the market value of buildings and other non-land property. These schedules then form the basis for determining the market value of such non-land property when it is compulsorily acquired.

### 4. Valuation in the NHAI Handbook<sup>204</sup>

Under the RETA, a draft handbook on resettlement (the “handbook”) was prepared for use by implementing agencies/NGOs employed by NHAI for rehabilitation and resettlement (R&R) work in its projects. The handbook recommends certain valuation methods for purposes of determining compensation. These valuation

methods are used by NHAI project staff and consultants for purposes of determining “replacement cost.” The competent authority for determining compensation for acquisition, which is the Revenue Department, does not use them.

The handbook recommends the use of three different and specific methodologies and then applying the highest result of the three.<sup>205</sup> Two of the methodologies are based on a capitalization method and the third is based on comparable sales. The three methods are:

- (i) Capitalizing income of agricultural land based on collection of primary data using a multiplier of 20.<sup>206</sup>
- (ii) Capitalizing income of agricultural land based on established Department of Agriculture rates for costs and output value using a multiplier of 20,<sup>207</sup> and
- (iii) Comparable sales based on sale deeds.<sup>208</sup>

The handbook’s valuation approach is an improvement over the single comparable sales approach typically applied by the revenue department competent authorities in land acquisition. By using three methods rather than just one, this approach decreases the likelihood of undervaluation. Moreover, the use of a larger multiplier for the two capitalization methods helps address the undervaluation issue of the typically applied capitalization method.

The handbook’s valuation approach, however, does have several apparent shortcomings or limitations. First, the approaches used are not fundamentally replacement cost approaches because they focus on the value of the asset lost rather than what is necessary to replace that asset. This might be addressed by identifying possible land nearby that is at least of equivalent quality and quantity, and valuing that land.

<sup>204</sup> Ghosh, Parthopriya. Handbook on Resettlement for Highway Projects in India (Draft). Forthcoming.

<sup>205</sup> Indian court opinions have often stated that it is ideal to use a combination of the three methods. See M.R. Mallick 2005. The Land Acquisition Act 1894. (739–740).

<sup>206</sup> The handbook describes a complex survey process involving in-depth interviews with landowners about the inputs, outputs, and related costs and prices for each major crop. A required sample of landowners is interviewed in a required sample of villages. The net income is then multiplied by 20. The handbook does not describe how 20 was chosen as the multiplier. It is twice the multiplier that is most commonly accepted by the Indian courts. See note 203 and related text.

<sup>207</sup> This methodology is also based on the land’s productivity as number 1, but instead of collecting and using primary data, it involves using existing secondary data collected from the District Statistical Handbook. Like the first methodology, this also uses a multiplier of 20.

<sup>208</sup> This third methodology collects data from registered sale deeds at the sub-registrar’s office. It considers the highest and lowest rates transacted during the last 5 years and arrives at a weighted average.

Another, not necessarily exclusive approach is to use a contingent valuation (willingness to accept or WTA) survey in the ISA or the Project Preparatory Technical Assistance (PPTA) feasibility study.<sup>209</sup> This WTA survey could target both the AP's land and any identified possible replacement land in the vicinity.

Second, the comparable sales method applied uses sale deeds as the information source and such deeds are not a reliable source of actual prevailing market values as discussed in Section II.B.3.a, above. It might be better to use key informant, including APs, interviews to determine the typical range of various broad categories of land in the vicinity.

Third, the capitalization methodology that involves the collection and use of primary data appears complex and time-consuming. Moreover, it is not apparent that the primary data will be any better than the secondary data in the District Statistical Handbook that already exists.

Finally, it is unclear why the highest of the three methodologies is chosen rather than the average. If each of the three methodologies has some validity, then it would appear more reasonable to take an average, rather than the highest.

#### D. Compensation and Valuation Problems

The legal framework for compensation and valuation has shortcomings that could and should be addressed in policy dialogue with the GOI. But the more substantial shortcomings have resulted from their inadequate implementation on the ground as documented by scores of studies.<sup>210</sup>

Those studies and our own research has identified several factors that cause compensation packages in practice to be well short of ADB's policy standards for involuntary resettlement, and often even short of what is called for in Indian law. These factors, many of which have been noted above, include:

- (i) Undervaluation due to reliance on understated values in sale deeds. This is perhaps the most widespread problem in India. Several factors unrelated to land acquisition

lead to understated values in sale deeds, yet this information is routinely used by land acquisition officers who apply the comparable sales valuation method to determine compensation.

- (ii) Undervaluation due to legal restrictions on alienation that substantially reduce market value, particularly for tribal landowners. Tribal landowners are typically restricted by law from selling their land to non-tribals, provisions that are meant to protect them from exploitation. One consequence is a sharp decrease in the market value of that land. When such land is expropriated, this leads to under-compensation.
- (iii) Many long-term, but not formalized, possessors of land do not receive compensation because their rights are not formalized. Land records in India suffer from deficiencies. Because entitlement to compensation for compulsory acquisition is based on land records, these deficiencies can result in long-time, but not formalized, occupiers not receiving compensation. Three types of cases are relatively common. First, cases—typically in remote areas—in which people have been living on land for years or even generations on which the government claims ownership. Such people may not have tried to formalize their rights to the land because their possession had never been disturbed. In many such areas, the government has never conducted initial survey and settlement operations, which provide the framework information for land records. Second, cases in which the original owner has died, the land has passed to heirs, but this transfer was never reflected in the land records. Third, cases in which the owner reflected in the land records have transferred the land through an unregistered sale deed.
- (iv) Customary use and access rights to CPRs are not compensated. The statutory compensation provisions do not apply to customary use rights to CPRs even though access to such CPRs play an important role in the livelihood of poor people, particularly in rural areas.<sup>211</sup>

<sup>209</sup> ADB's involuntary resettlement policy spells out a number of measures that must be completed during the project cycle, starting with the initial social assessment (ISA), which is undertaken for every development project. During ISA, the mission decides the scope and resources needed for resettlement planning. The ISA is followed by the Project Preparatory Technical Assistance (PPTA) Feasibility Study, which includes preparation of the Resettlement Plan. Currently, key action points for the PPTA Feasibility Study include consultations with all stakeholders, conducting a baseline survey with census and survey, and establishing a management and evaluation plan as part of the Resettlement Plan.

<sup>210</sup> See *supra* note 146 and related text.

<sup>211</sup> Many observers have asserted that access for community property resources should not be compensated with cash, in part because recipients find cash an unsuitable replacement. For an interesting counter-perspective, see Supriya Garikipati (2005) who finds in a survey of nine villages affected by construction of the Sardar Sarovar Project in the Narmada Valley that the majority of the respondents were willing to accept cash as compensation for loss of commons. Supriya Garikipati. 2005. Consulting the Development-Displaced Regarding their Resettlement: Is there a Way? *Journal of Refugee Studies* 18(3).

- (v) The government land grantees do not receive adequate or sometimes any compensation. Most state governments have implemented land reform or government land allocation programs from which poor households have received land. In many cases, these poor government land grantees do not have the right to sell the land, either temporarily or permanently. When the government has subsequently acquired such land compulsorily, the courts have ruled that such land—because it is inalienable—should be compensated at a much lower rate. In numerous other cases, the competent authorities have decided that such households were not entitled to any compensation.<sup>212</sup> This is a clear injustice.
- (vi) Under-compensation due to delays in compensation payments, including cases where the statutory stipulated interest is not paid. Although the LAA contains a useful provision entitling interested persons to interest payments during delays, this provision does not apply to all delays and it is often not implemented.<sup>213</sup>
- (vii) Subtraction of a portion of the compensation money by corrupt officials before it reaches the APs. This is a common, well-documented, and often even widely expected in India, where such “bribes” are too often ingrained into patterns of governance.
- (viii) Asset appreciation occurring after the determination of compensation. This results in a failure to reach replacement costs. By law, the valuation cannot consider this increase, yet the purchase price of replacement land in the vicinity will be affected. So the amount of cash compensation, even if properly valued by law, is based on pre-project rates, which is not enough for recipients to purchase equivalent land at higher post-project rates.
- (ix) Land-for-land compensation options often not considered or offered. The LAA gives the collector the option to offer land-for-land compensation in lieu of cash compensation, but does not require it. As a result, land-for-land compensation is rarely given the serious consideration it deserves.
- (x) An over reliance on cash compensation in cases where recipients are not accustomed to handling cash. The literature is replete with such examples, leading to misdirection by the recipients of compensation money, leaving them both assetless and cashless.<sup>214</sup>
- (xi) Persons not entitled to damages if the acquisition proceedings lapse. LAA requires the collector to declare an award within 2 years from the date of publication of the declaration. Otherwise, the acquisition proceedings lapse. If the acquisition proceedings do lapse, the person is not entitled to receive any damages, which he would otherwise be entitled to if acquisition proceedings were formally withdrawn under Section 48(1) of the LAA.
- (xii) National Highway Act and other central acquisition laws do not provide for the 30% solatium. LAA provides for a “solatium” equal to 30% of market value because of the involuntary nature of the land acquisition.
- (xiii) However, the National Highway Act and several other central acquisition laws<sup>215</sup> do not provide for this 30% solatium.<sup>216</sup> While we found evidence that the solatium is

<sup>212</sup> Including in national highway projects, NHAI officials at the India workshop spoke of examples in highway projects where Revenue Department authorities did not agree to provide land compensation for government land allottees

<sup>213</sup> For example, Pandey and associates document how in the Mahanadi Coalfields Project, compensation was typically delayed, at times for more than 15 years. Pandey, et al. 1996. *Development, Displacement and Rehabilitation in Orissa 1950–1990*. Institute for Socioeconomic Development (ISED); and Pandey, et al. 1998. *Depriving the Underprivileged for Development*. ISED. A World Bank Evaluation Report on a Karnataka irrigation project noted that compensation amounts were determined at the time of preliminary notification of intent to acquire lands, whereas actual payment of compensation often lagged by several years, with the adequacy of compensation further eroded by inflation. The payment of compensation in installments—terms ranged from 2–15 years—further aggravated this problem. Operation Evaluation Department. 1993. *Early Experience with Involuntary Resettlement: Impact Evaluation on India Karnataka Irrigation Project*. Washington, DC: World Bank.

<sup>214</sup> Mahapatra, L.K. 1994. *Tribal Development in India: Myth and Reality*. New Delhi, Vikas Publishers; Pandey, B. et al. 1998. *Depriving the Underprivileged for Development*. ISED; and Fernandes, W., and S.A. Raj. 1992. *Development, Displacement and Rehabilitation in the Tribal Areas of Orissa*. Indian Social Institute. An internal World Bank assessment of a Karnataka irrigation project found that only 25% of survey households in fully affected villages reported using cash compensation for purchase of replacement land. In practically affected villages, the proportion fell to 8%. Operation Evaluation Department. 1993. *Early Experience with Involuntary Resettlement: Impact Evaluation on India Karnataka Irrigation Project*. Washington, DC: World Bank.

<sup>215</sup> Of the numerous special acquisition laws listed in note 158, several refer to the LAA's provisions for determining compensation and thus do provide for solatium. Others that do not provide for solatium include: Atomic Energy Act. 1962. Coal-bearing Areas (Acquisition and Development) Act. 1957. Defense and Internal Security of India Act. 1971. Metro Railways (Construction of Works) Act. 1978. Petroleum and Minerals Pipelines Act. 1962. Resettlement of Displaced Persons (Land Acquisition) Act. 1948. Slum Areas (Improvement and Clearance) Act. 1956.

<sup>216</sup> NHA officials at the India workshop acknowledged that the valuation methods used by the competent authorities to acquire land (Revenue Department) result in undervaluation. They asserted that the NHA has addressed this undervaluation problem by increasing rehabilitation and resettlement (R&R) assistance. For example, they note that the average per household R&R assistance, not compensation for land, provided by NHA in the Western Transport Corridor project was Rs78,000 (\$1,900).

nonetheless granted in at least some NHA projects, it is not clear this always happens. The NHA Act should be amended to bring it in line with the LAA on solatium. In the meantime, ADB should insist that the LAA provisions on solatium be applied in ADB-funded NHA projects.

## E. Recommended Reforms

In this section, a valuation methodology is recommended for incorporation into ADB-funded projects in India and for the GOI to consider adopting regulations to LAA the incorporation of this recommended valuation methodology. After presenting and discussing the recommended valuation methodology, a series of other relevant recommendations is being offered. The following valuation methodology applies to cash compensation options and in cases where land-for-land compensation is feasible, it should also be presented as an option.

### 1. Recommended Land Valuation Methodology for India

Where land markets are sufficiently active, ADB should consider using a land valuation methodology that involves taking the higher of the two following methods:

- (i) RDI developed a rudimentary survey methodology for doing this in the state of Andhra Pradesh that worked well in trials. It leverages local knowledge. In most villages in India, land markets are sufficiently active and market values based on recent sales are common knowledge. Thus, the survey collects data through key informant interviews<sup>217</sup> as to the average prices for various types of land. It will be important to identify various classifications of land based on irrigation availability, land quality, and location. The information from these more reliable primary sources is then compared to the secondary data from the sub-registrar's office and the highest value is used. In a great majority of cases, the primary data values will be higher.

- (ii) Comparable sales method applied to equivalent land in the vicinity that is determined to be appropriate replacement land. Again, the collection of both primary information through key informant interviews and secondary data from the sub-registrar's office is urged, using the highest value.

In cases where land markets are not sufficiently active, we urge to consider a land valuation methodology that uses the highest value from the following three approaches:

- (i) Comparable sales method applied to expropriated land based on both primary and secondary data. As above, recognizing that the data may be limited.
- (ii) Comparable sales method applied to equivalent land in the vicinity that is determined to be appropriate replacement land. Again, as above.
- (iii) Capitalization approach based on secondary data. This involves using the most current input cost, crop value, and crop productivity data collected from the District Statistical Handbook. A multiplier of 20, which includes a premium to take into account non-productivity factors that influence land price, is recommended.

ADB should also consider experimenting with WTA and WTP questions in the ISA and/or PPTA feasibility study. Ideally, these survey questions should focus on both the immediate project area and a nearby and otherwise comparable non-project area, which might be candidate for replacement land. WTP questions in the non-project area would be appropriate and might yield different information as experience has shown that WTA values are typically higher than WTP values.<sup>218</sup> The data from this newer, innovative—yet controversial—valuation methodology is likely to provide a useful supplement to the other methodologies discussed above. Over time and with more experimentation, ADB might want to consider relying more on these CVMs as an important supplement to other more traditional methods.

<sup>217</sup> The key informants included the village sarpanch, the local revenue officer, and a focus group of various villagers from different socioeconomic groups.

<sup>218</sup> See Pearce, David. 1999. Methodological Issues in the Economic Analysis for Involuntary Resettlement Options. In *The Economics of Involuntary Resettlement, Questions and Challenges*, edited by Michael M. Cernea. Washington, DC: World Bank.

We further recommend that ADB pay close attention to who conducts and participates in the valuation. It is important that the process is transparent and involves both independent experts and APs.

## 2. Other Compensation and Valuation Considerations for ADB Projects

ADB might also consider introducing other project components or conditions into India projects that may help address some of the documented compensation problems. We offer seven specific recommendations.

- (i) To address the problem of inadequate land records that plagues many Indian settings, it might be useful to urge or require the state government to conduct a “land survey and settlement” in the project area before the project is commenced. Land surveys and settlements were the process used to create the original land records and maps. They involve an extensive on-the-ground process to determine land measurements and, importantly, who possesses the land to determine the actual land rights. Many states legislatively require that these procedures be re-conducted every 30 years by the state department in charge of settlement and survey (typically under the Revenue Department).<sup>219</sup> However, the states typically do not meet their own statutory obligation to conduct these resurveys. Conducting the resurvey before a development project that will cause displacement could help solve many of the compensation problems caused by inaccurate and out-of-date land records.
- (ii) For nonformalized possessors (those lacking formal legal rights), ADB should consider: (a) distinguishing between nonformalized possessors on government land and those on private land; (b) adopt a specific “date certain” related to time of possession to determine eligibility for compensation; and (c) allow claims of nonformalized possessors to be supported by oral evidence from surrounding residents. The time of possession

on government land should probably differ from the required time of possession on private land, with the required time of possession on government land relatively shorter. Indian revenue and forest laws often have provisions that allow for formalizing the rights to long-term possessors on government land.<sup>220</sup> These laws typically require a long period of uninterrupted possession, often 20 years or more, and apply only for those who fall under some income or landholding threshold. These legislative provisions also typically require claims to be supported by written documentary evidence, which is a substantial obstacle for the typical illiterate claimant (especially when the requirement is to show 20 years or more of uninterrupted possession). For non-titled possessors on private land, India has legislative provisions on adverse possession<sup>221</sup> laws that, in general, allow non-titled possessors to acquire or perfect title after 12 years of continuous, adverse possession on another’s land.<sup>222</sup> At the very least, ADB could consider urging the competent authority to implement the existing legislative provisions relating to “regularizing encroachment” on public land and facilitate adverse possession claims on private land to help ensure that more nonformalized possessors are legally entitled to possession. ADB should also consider establishing project-specific requirements that make nonformalized possessors eligible for compensation when they can show they have been on the public land for at least 3 years before the initial notice of land acquisition or on private land for at least 12 years.<sup>223</sup> All such claims should be verified through written evidence when possible and available, but also through oral evidence of nearby residents, verified by project implementers.

<sup>219</sup> In practice, few if any states maintain the legislated schedule. In both Madhya Pradesh and Karnataka, settlements remain in force for 30 years or until a reassessment is conducted. Madhya Pradesh Land Revenue Code § 101; Karnataka Land Revenue Act, § 115.

<sup>220</sup> These provisions and the related processes are called “regularizing encroachment.”

<sup>221</sup> Adverse possession is a legal concept under which long-term possessors of land they do not legally own are entitled to claim legal ownership under certain conditions. The conditions typically include a required time of uninterrupted possession that is open, not disclosed, and adverse (without permission from the legal owner). Adverse possession does not typically apply to government land. Narayana, P.S. 2000. *Law of Adverse Possession*.

<sup>222</sup> See Narayana, P.S. 2000. *Law of Adverse Possession*.

<sup>223</sup> The 3-year recommendation for public land is admittedly arbitrary but seeks to strike a balance between two objectives: easing the evidentiary requirements of bona-fide long-term possessors; and minimizing the incentives for and likelihood of fraudulent claims appearing after the disclosure of project plans. The 12-year requirement on private land follows the standard time requirement for adverse possession on private land.

- (iii) ADB should consider establishing expert tribunals to help set compensation in all projects involving land acquisition. Some of the central special land acquisition laws that apply to specific types of land acquisitions provide for the constitution of expert tribunals that set compensation for a particular large land acquisition. Although the land acquisition does not require such tribunals, it also does not forbid them. ADB should consider requesting the government to constitute such tribunals for ADB-funded projects. This could help address some of the undervaluation problems that occur when valuation is conducted by land acquisition officers from the state revenue departments. ADB, together with the relevant government counterpart agency, might even consider developing guidelines for such tribunals—consistent with many of the recommendations in this report—that are consistent with, but add more specificity to, the broad compensation guidelines in the LAA.
- (iv) Because the appeal process under Indian law for unsatisfactory compensation decisions is problematic—that is, access to courts is difficult, time-consuming, and costly and initial appeals to the collector involve a conflict of interest—ADB should require that every project include affordable and accessible mechanisms for third-party settlement of compensation disputes.
- (v) Whenever possible, compensation and R&R assistance should be provided in the joint names of both spouses. We found in our field visits of an NHA project that R&R assistance was being provided to the heads of households, typically males. In cases of formally titled land, law dictates that compensation must be given in the name of the titleholder, usually male. However, when the project is supplementing the legally required compensation, such as when land rights are not formal, compensation should always be made either independently to the woman or jointly in the names of both spouses.
- (vi) In land-for-land compensation, provide larger house plots. Research in India indicates the importance of an amply sized house plot to

the livelihoods of poor, rural households.<sup>224</sup> Adequate space around the house provides for the possibility of planting “kitchen gardens,” keeping livestock, and conducting other economic activities that provide important supplemental nutrition and income for the family. The ADB Handbook on Resettlement states that those losing residential land should be given alternative house plots of at least 60 square meters (m<sup>2</sup>). This is insufficient. Research findings in India indicate that significant nonresidential benefits such as nutrition, income, status, increased credit access, etc. are unlikely to be achieved unless the (rural) house plot is 100 m<sup>2</sup> and is ideally achieved when the plot is 300–500 m<sup>2</sup>.<sup>225</sup> The additional land required is not substantial in terms of either space or costs, but provides important livelihood benefits to the project-APs.

- (vii) Finally, ADB policies and those of their government counterparts might clarify that all APs who either lose house plots or do not own house plots should receive new house plots that are of sufficient size. The NHA policy provides for housing plots for APs when the APs number 25 or more. This policy could be improved by broadening it to all APs immaterial of group size.

### 3. Topics for Broader Policy Dialogue with Indian Government

India’s legal framework governing compensation in development-caused forced displacement and resettlement (DFDR) settings and, especially, its implementation must be improved. Many of the improvements are macro improvements that will require broad consensus and change at the policy and/or legislative level. We offer some of these salient recommendations here, recognizing that they are not within ADB’s control to accept and adopt. ADB might consider, however, pro-

<sup>224</sup> Mitchell, R., and T. Hanstad. 2004. *Small Home Garden Plots and Sustainable Livelihoods for the Poor*. UNFAO Livelihoods Support Program Working Paper; Hanstad, T., J. Brown, and R. Prosterman 2002. Larger Homestead Plots as Land Reform? International Experience and Analysis from Karnataka. *Economic and Political Weekly*. July 20.

<sup>225</sup> Hanstad, T., J. Brown, and R. Prosterman 2002. Larger Homestead Plots as Land Reform? International Experience and Analysis from Karnataka. *Economic and Political Weekly*. July 20.



moting these changes in macro-policy dialogues with the GOI or state governments, perhaps in concert with other donors such as the World Bank.<sup>226</sup>

- (i) Study application of NPRR policies for consideration of their integration into the LAA. The recent 2004 NPRR provides rehabilitation grants and other monetary benefits well beyond the compensation related to the loss of land and other immovable property. These provisions should be integrated into Section 23 of the LAA. NPRR, on its face, takes several substantial steps toward meeting ADB's Involuntary Resettlement Policy. However, being policy and not legislation, it has no legal force. Moreover, the GOI is not aware of any application of the policy, nor of the effect of any such application. This deserves more study so that the government can effectively consider if and how to integrate NPRR policies into the LAA.
- (ii) Substitute "replacement value" for "market value" in the LAA. This would be a dramatic and perhaps politically difficult change, but it would be an important step to address the most frequent manner of deprivation and impoverishment caused by development-caused forced displacement.
- (iii) Issue rules to the LAA that include specific guidelines for valuation methods. The government has never issued rules to the LAA, although it is considering doing so. Such rules, if they contained some specific valuation guidelines, could eliminate much of the undervaluation problems that currently occur through the LAA's implementation. Among other things, the rules could place specific obligations on the competent authority aimed at getting them to more seriously consider and offer land-for-land compensation as an option.
- (iv) Specify that "interested persons" include those who have occupied private land for at least 12 years or public land for at least

3 years and do not have more than 3 acres of land. Unregistered occupiers typically have a difficult time getting compensation even when they have occupied the land for long periods. India does have adverse possession legislation that entitles adverse possessors on privately owned land to have their possession formalized. The typical required possession period is 12 years. Moreover, most states have provisions in their Land Revenue Acts and Forest Acts that allow long-time possessors of government land, who do not own much other land, to get their possession formalized. The government should adopt, at the very least, these concepts into the LAA, or rules to the Act, to clarify that such long-term possessors are entitled to compensation even if their possession has not been previously formalized.

- (v) Do not consider alienation restrictions when valuing land. Most restrictions on alienation apply to people who have received government land grants or to members of scheduled tribes. The Act should make clear that people who hold land with such restrictions are entitled to compensation and that the alienation restrictions must not be considered when determining the compensation. In the absence of such provisions, such persons will not receive sufficient compensation to "replace" their lost land. Gujarat's state amendments to the LAA provide a good model. In Section 23 of the Act, which lists the matters to be considered in determining compensation, Gujarat has added a provision stating that all land whose tenure terms include restrictions on alienation should be valued as if it did not have the restriction.<sup>227</sup>
- (vi) Increase the amount of solatium. Landowners whose land is acquired are entitled to a solatium of 30% above market value according to Section 23(2) of the LAA. This solatium was increased to 30% from 15% in a 1984 amendment to the LAA. Increasing the sola-

<sup>226</sup> The World Bank is seeking a more active policy dialogue with the central and state governments on a broad array of land policy topics. Although R&R had not been on the World Bank's list of land-related topics, bank officials who are leading the dialogue have expressed recent interest in including R&R. This might provide an important opening for ADB.

<sup>227</sup> The specific language of Gujarat's amendment to Section 23 (matters to be considered in determining compensation) states: "...in case of any land which according to the terms of the tenure on which it is held is not transferable or partible by metes and bounds without the sanction of the State Government or any competent officer, the market value of similar land held without such restriction."

tium amount even further through a further LAA amendment would help address under-compensation problems.

- (vii) Clarify that interest on compensation applies to the solatium. Landowners are also entitled to annual interest of 12% on the market value for the period from the initial notification of acquisition to when the award is made. The courts had previously ruled that the 12% annual interest applies to the solatium as well as the “market value.” However, the Supreme Court has recently ruled that the annual interest does not apply to the solatium. The Act should be amended to clarify that the annual interest does apply to the solatium since it is an integral part of the compensation.
- (viii) Require the competent authority to send a notification to the registration authority that acquisition proceedings have been initiated. Intending private purchasers of land on which acquisition proceedings have been initiated can easily lack knowledge of such proceedings. This has led to unnecessary litigation when such persons have purchased land and later discovered that acquisition proceedings have been initiated on such land. Such problems can be avoided by requiring that the collector send a copy of the acquisition notifications to the sub-registrars office and cause a similar notification in the revenue records.
- (ix) Provide damages when acquisition lapses due to time limits. When government authorities initiate land acquisition proceedings and later formally terminate such proceedings, under Section 48, the affected landowners are entitled to compensation for any damages caused to them or their land by the proceedings. However, no such entitlement exists when the land acquisition proceedings lapse for failure to complete within the proscribed time limits under Section 11-A. Section 11-A should be amended to provide for the award of damages parallel to Section 48.
- (x) Apply time limits to Section 17 “urgent takings.” In most circumstances, government authorities cannot take possession of the land until an acquisition award is made. However, “in cases of urgency,” the Act allows the government to take possession 15 days after the Section 9 notice and before an award is

made. In nonurgent takings, the Act makes clear that the award must be declared within 2 years from the date of the Section 9 notice. In “urgent takings,” however, the Act does not provide for time limits and the Supreme Court has ruled that the 2-year limit does not apply to “urgent takings.” The ironic result is that the 2-year limit applies to non-dispossessed landowners but not dispossessed landowners. The Act should be amended to apply the Section 11-A time limits to Section 17 “urgent” takings.

- (xi) Reduce taxes on land sale transactions. Many of the undervaluation problems in India stem from the high taxes—stamp duty plus registration fees—on land sale transactions. Evidence indicates that the much of the incentives to understate the land sales price in the sales deeds disappears when the high taxes are reduced.
- (xii) Conduct every 5 years more rigorous valuations for land registration purposes. The state land revenue legislation typically requires a government committee to undertake land valuation every year or so to establish the minimum registration rates. These registration rates are used primarily for the land transaction taxes, but they are also used for land acquisition purposes. The frequency of the obligation helps ensure that such valuation is not done rigorously. In fact, in most cases, the data used to set the new land values comes from registered sale deeds—data which is not reliable because those prices are understated. State governments would be better served by conducting more rigorous and less frequent valuations and then using standard cost indexation for the intervening years. The more rigorous valuations should be based more on primary data from field surveys—admittedly more difficult to obtain, but not overly difficult—and less on secondary data that is easy to obtain but questionable.
- (xiii) Amend state-level *panchayat raj* legislation to require that *panchayats* be involved in land acquisition and R&R decisions. *Panchayats* are elected local government bodies. Indian law already requires *panchayats* in tribal areas or “scheduled areas” to be consulted before making the acquisition of land in the

scheduled areas for development projects and before resettling or rehabilitating persons affected by such projects. Parallel provisions should be inserted into *panchayat* raj legislation for non-tribal areas. This would increase the transparency of the process, the involvement of APs, and may act to limit both displacement and negative impacts when displacement does occur.

## **F. Closing Remarks**

India's experience with development-caused forced displacement has too often been characterized by

inadequate compensation, resulting in impoverishment. The result has been and continues to be that compensation provided under the country's laws falls short of ADB's policies on involuntary resettlement. The various problems include shortcomings in the legal framework and, more important, inadequate implementation of that framework. The view ahead, however, need not be dismal. Good potential exists for ADB to both improve valuation and compensation procedures within its India projects and to engage Indian policy makers in policy dialogue about improving the broader policy and legal framework. The India section of this paper has provided numerous recommendations to move in that direction.

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## IV. Expropriation Laws and Practices: Cambodia<sup>228</sup>

Cambodia became independent in 1946 and sovereign in 1956. The Constitution of newly independent Cambodia recognized private property rights, and required compensation for any taking of private property for “public use.”<sup>229</sup> Such private ownership of land continued through the years until the Khmer Rouge took power in 1975 when the private property system was abolished. The Khmer Rouge Constitution stated that property “for everyday use” remained in private hands whereas “all important means of production,” including land, belonged to “the people’s state.”<sup>230</sup> Under the Khmer Rouge’s dictatorship, all urban dwellers were forced to move to the countryside for farming, and their immovable properties were confiscated and transformed into state-owned property.<sup>231</sup>

The Khmer Rouge was defeated by Viet Nam in 1979. Ten years later, Cambodia gained its independence from Viet Nam (in 1989), followed by a massive government redistribution of land. While declaring all land to be “the collective property of the people,” the rights to use and possess land were given to farmers.<sup>232</sup> Because most urban property owners were killed or died and ownership documents were destroyed during 1975–1979, people came to cities and occupied vacant buildings on a “first-come, first-served” basis.<sup>233</sup>

Under the new land system, rural land was categorized into three types of usage: housing land, cultivating land, and concession land. Although farmers

were permitted to own housing land only, the practical difference between ownership rights and possessory rights was not significant since possessory rights were transferable, inheritable, and perpetual in length.<sup>234</sup> In urban areas, the government usually allowed people to remain on the land they occupied and to have the right to buy and sell such possessory rights.<sup>235</sup> However, they were considered informal settlers because they had no formal documents evidencing their right to the property.<sup>236</sup>

It was not until 1993 that private ownership was fully restored under the Constitution. The current legislation governing land ownership is the Land Law of August 2001. The current Land Law recognizes claims to land made only after the downfall of the Khmer Rouge in 1979.

### A. Land Expropriation Legislation in Cambodia

With respect to compensation for state expropriation of land, the Cambodian legal framework for land expropriation has three distinctive features. First, the 1993 Constitution provides that the state may expropriate private property “only in the public interest.”<sup>237</sup> The 2001 Land Law reiterates this requirement as follows: “No person shall be deprived of his ownership, unless it is in the public interest.”<sup>238</sup> Second, the standard of “fair and just compensation” for state expropriation is adopted both in the 1993 Constitution and in the 2001 Land Law.<sup>239</sup> Third, with respect to the timing of giving compensation, both the Constitution and Land Law explicitly require compensation be made before expropriation starts.<sup>240</sup> On the issue of who is entitled

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<sup>228</sup> Because authors have not conducted any field research in Cambodia, the discussion on the country’s land expropriation practice and recommendations provided for further reforms are based on the authors’ own research on Cambodian land expropriation laws and studies done by other researchers, including Cambodian consultants for the RETA 6091 project.

<sup>229</sup> Russell, Ray. 1997. Land Law in the Kingdom of Cambodia. *Property Management*, 15(101).

<sup>230</sup> Id.

<sup>231</sup> Beng Hong Socheat Khemro, and Geoffrey Payne. 2004. *Improving Tenure Security for the Urban Poor in Phnom Penh, Cambodia: An Analytical Case Study*. 181(28).

<sup>232</sup> Ramamurthy, Bhargavi, Sik Boreak, Per Ronnas, and Sok Hach. 2001. Cambodia Development Resource Institute, Cambodia 1999–2000: Land, Labour and Rural Livelihood in Focus 22–23. *Working Paper* 21.

<sup>233</sup> Khemro and Payne, *supra* note 231(182).

<sup>234</sup> Russell, *supra* note 229.

<sup>235</sup> Khemro and Payne, *supra* note 231(182).

<sup>236</sup> Id.

<sup>237</sup> Cambodia Constitution, Art. 44.

<sup>238</sup> The 2001 Land Law, Art. 5.

<sup>239</sup> See Cambodia Constitution, Art. 44; see also the 2001 Land Law, Art. 5.

<sup>240</sup> Id.

to compensation, the threshold requirement is the legality of possession or ownership. Due to many years of political turmoil and complete destruction of the land system and land records which existed before the Khmer Rouge's dictatorship, land system reconstruction was undertaken at a time of complete anarchy in regards to land possession. While recognizing the legality of some forms of physical possession, Cambodian laws explicitly preclude legalization of the following possessory acts: (i) entering into possession of state public land at any time;<sup>241</sup> (ii) entering into possession of state private land after the cutoff date, 30 August 2001 when the 2001 Land Law took effect; (iii) transformation of possessory rights to state private land into ownership not pursuant to relevant rules effective at the time of transformation; (iv) transformation of a land concession<sup>242</sup> into ownership before or after the cutoff date, except for concessions in response to social needs; (v) any land concession not in conformity with rules governing such concessions;<sup>243</sup> and (vi) any occupation of privately owned land without a title after the cutoff date.<sup>244</sup> Because these acts are categorized as illegal, the persons engaged in such acts are not entitled to any compensation or reimbursement.<sup>245</sup> Based on these provisions, Table 2 summarizes the people who appear not entitled to compensation.

**Table 2: People who are not Entitled to Compensation**

|   |                       |
|---|-----------------------|
| Those who enter into possession of state public land  | Anytime               |
| Those who enter into possession of state private land   | After the cutoff date |
| Those with ownership rights to non-social concession land   | Anytime               |
| Possessor of concession land obtained not in compliance with relevant rules governing land concessions  | Anytime               |
| Those with ownership rights to state private land obtained not in conformity with relevant rules governing transformation of possessory rights to ownership | Anytime               |

Source: Prepared by the author based on an analysis of various Cambodian laws.

<sup>241</sup> In Cambodia, state-owned land consists of state public land and state private land. The former is owned by the state and used by public institutions such as government organization, roads, ports, schools, etc. The state public land is not alienable. State private land, on the other hand, is owned by the state, but may be possessed and used by a private individual; such possessory rights are transferable, and may be legally changed into private ownership upon satisfaction of certain conditions.

<sup>242</sup> Land for concession is part of state private land, used for meeting social and economic needs. See the 2001 Land Law, Art. 49.

<sup>243</sup> The 2001 Land Law, Art. 18.

<sup>244</sup> Id., Art. 34.

<sup>245</sup> Id., Art. 19.

Although there is a constitutional standard of “fair and just compensation” in Cambodia, application of this standard remains unsettled under the law. As to the form of compensation, Cambodian laws allow provision of social concession land owned by the state for resettlement of poor and landless families.<sup>246</sup> Resettlers may not transfer social concession land within 5 years after resettlement. If they comply with the rules governing such land, they will be given ownership to such land after 5 years.<sup>247</sup>

Unlike most countries, Cambodia does not have any legal rules governing land expropriation procedures. As a result, private landowners and legal possessory rights holders, let alone squatters, have no reasonable opportunity to participate in the process, let alone appealing administrative decisions in a court of law.

## B. Problems: Five Ws<sup>248</sup>

The Cambodian Constitution is well-crafted with respect to land expropriation. Unfortunately, this has not resulted in satisfactory land expropriation practice. The lack of constitutional force, coupled with apparently unbridled government expropriation practice, has resulted in ineffective implementation of the constitutional provisions concerning expropriation. These problems can be outlined in five Ws: Who is entitled to compensation? What compensation is made to APs? When is the compensation paid? What determines the amount of compensation? Finally, why do these problems emerge?

This subsection will discuss problems, legal and institutional, existing in the Cambodian land expropriation system, as indicated in the practice associated with the ADB-funded project Phnom Penh-Ho Chi Minh City Highway Project (Highway No.1). This was the first project financed by ADB in Cambodia that included involuntary resettlement and a resettlement plan. The Cambodian Government had no experience in applying ADB's Policy on Involuntary Resettlement and no comparable law or procedures of its own. Because of such lack of experience and national regulations and procedures, resettlement was not very well implemented on that. Despite recent improvements in practice on ADB-financed projects, the Highway 1 experience may still be the norm on government-financed projects.

<sup>246</sup> Cambodian Sub-decree No. 19, 2003, Art. 3.

<sup>247</sup> Id., Art. 18.

<sup>248</sup> Discussions in this section are based on the facts as disclosed in the country report: RETA 6091: *Capacity Building for Resettlement Risk Management* (Cambodia), except otherwise noted.

## 1. Who is Entitled to Compensation?

As discussed above, the eligibility for compensation in case of a land expropriation depends on the legality of possession and ownership. If the rights to the property at issue were not obtained legally, no compensation would be awarded.

Further, the 2001 Land Law treats the land used for public infrastructure, such as road and its right of way (ROW),<sup>249</sup> as state public property,<sup>250</sup> and authorizes government to expand road as it sees fit, including announcing a new ROW or expanding the existing ROW.<sup>251</sup> Although the law requires compensation to owners of property located in the expanded portion of ROW,<sup>252</sup> all possessors farming and living within the original—but never enforced—ROW zone are not entitled to compensation even if they initially entered into the zone because of a government land redistribution program after the downfall of the Khmer Rouge. Moreover, these possessors are not even entitled to improvements they made on such land.<sup>253</sup> It is even unthinkable when government redefined ROW as 30 meters from the road's centerline for Highway No. 1 and declined compensation to possessors of the expanded portion of the new ROW zone.<sup>254</sup>

Such laws and policies appear to be irrational in a sense that current possessors of land within the zone initially occupied the land with a de facto government permission. Under present law, these people within the ROW would even be unable to recover their loss of improvements made while government did not say no to them. Some of such sad stories told by these settlers within ROW are reproduced in Box 4 and Box 5.

### Box 4: An Urban Informal Settler on the Side of a Railroad

A 35 year-old woman with two children lives beside the railroad track. She moved in the area in 1991 and purchased the land for building her house in informal market when the land was swampy. She made substantial improvements on land and the house, and her husband had a job as a taxi driver nearby in the city. When government announced the right of way of 25 meters from the centerline and demanded her to move without compensation, she was shocked. While agreeing to move, she demanded for compensation. Her request was rejected and she would have to face the harsh reality, that is, all her investments in the land and the house would be gone. Because they could not afford the land nearby, they had to move to a remote area. Living in a remote area would mean the loss of the source of income as a taxi driver. They would be forced into deeper poverty.

Source: Khemro and Payne. 2004. Improving Tenure Security for the Urban Poor in Phnom Penh, Cambodia: An Analytical Case Study. 28.

### Box 5: A Farmer with Land within ROW

A male farmer had 0.5 hectare (ha) of very productive rice paddies located within the right of way (ROW). The land produced enough food for the family and generated sufficient income for their living. When the Highway 1 project started, his 0.5 ha of rice paddies was taken without any compensation. Although he had land located outside the ROW, he had to give up farming because irrigation was destroyed by the project. The farmer became a motorbike taxi driver.

Source: RETA 6091: Capacity Building for Resettlement Risk Management—Cambodia Country Report.

Another indication that the government probably acts beyond the Constitution is its arbitrary declaration of the ROW, thus nullifying entitlement to compensation of those who live within such ROW without awareness of its public property nature. In Cambodia, it is common for people to live on and use the land within the ROW of a highway or road. Because the government never publicly claimed the land located within the later-announced ROW, average Cambodians moved into the ROW zone, cultivating, opening business, and building houses. Since the state would not pay for AP's assets within the ROW, these people would have no recourse whatsoever. Even if the people within the zone do not have legal title, the government has never objected to their physical possession and use of the land until a sudden announcement later. By arbitrarily and summarily declaring certain land as an ROW and

<sup>249</sup> A 50-meter right of way (ROW) was initially set under the Khmer dictatorship. Although the post-Khmer government assumes its legality, it had never enforced such ROW rules until possessors applied for title for the land within the ROW in 1989 when private ownership of land was reintroduced. Despite the fact that these possessors initially entered into the zone through a government land redistribution program without awareness of the ROW rules, government reinstated the ROW rule and declined compensation for assets located within such ROW zone. See RETA Country (Cambodia Report), 39.

<sup>250</sup> The 2001 Land Law, Art. 15.

<sup>251</sup> Id., Art 148.

<sup>252</sup> Id., Art 148.

<sup>253</sup> Ministry of Economic and Finance Decree No. 961 (2000) "disallows any payment to be drawn from the national budget for structures and other assets located within the ROW." See *supra* note 248(9).

<sup>254</sup> Prakas No. 6 of 2003. See RETA Country (Cambodia Report), 9.

refusing to pay compensation to the people who rely on the land within the ROW zone, the government the government did not conform to internationally accepted law on adverse possession.<sup>255</sup>

Some improvements have been made in recent years, mainly on urban squatters' right. Before 2000, the Phnom Penh municipal government maintained a rigid policy of not recognizing squatters as legitimate inhabitants of the city and evicted squatters without compensation.<sup>256</sup> Starting from the late 1990s, the city government began to offer to squatters free housing and free land about 20 km outside the city.<sup>257</sup> However, because of the lack of employment and basic healthcare services, about 90% of evicted resettlers had returned to informal slum settlement within the city. In 2003, the Cambodian government shifted its policy on urban squatters and informal settlement to a "twin-track" approach, which focused on both creating new settlements that are close to employment opportunities and on-site upgrading of existing settlements, rather than coercive evictions.<sup>258</sup>

## 2. What Type of Compensation is Paid?

Based on the country report for RETA 6091: Capacity Building for Resettlement: Risk Management (Cambodia) [hereinafter referred to as "country report"], in land expropriation for Highway No. 1, three types of compensation were paid to legitimate landholders:<sup>259</sup> compensation for land, compensation for main structures, and compensation for annual and perennial crops. A standard unit amount was provided for each subcategory of these three types of compensation.

Land was further grouped into farmland and residential land. Land located within the ROW was not compensated. The standard unit of compensation was \$0.50/m<sup>2</sup> for farmland and \$2.00/m<sup>2</sup> for other lands.<sup>260</sup>

Four categories of main structures were created, based on the construction materials used and the number of stories. The amount of compensation ranged from \$25.75/m<sup>2</sup> to \$185.00/m<sup>2</sup>.<sup>261</sup> In addition, a unit cost was assigned to other types of structures like wells, tombs, and fences. For annual crops, only two categories were entitled to compensation: rice and home garden products. A unit compensation was assigned to each of six categories of common perennial crops.<sup>262</sup> APs were asked to harvest annual crops before the civil work started, and were entitled to compensation for annual crops only if they could not harvest the crop on time.

Determination of the unit price did not take the unique features of each property into account. For example, in terms of land, there were no adjustments for soil quality, terrain, or access to irrigation water. For perennial crops, a unit price was offered for each category of trees regardless of its productivity and how many years of useful life remained.<sup>263</sup>

While these standards applicable for the highway project had serious flaws on the surface, the implementation was even more problematic. During the resettlement audit under the ADB project (RETA 6091), many APs reported that the actual compensation they had received was either much lower than the standards or none at all. For example, an affected farmer was told to provide the valuation officer with a meal in return for more compensation.<sup>264</sup> In another case, an affected farmer's 24 palm trees were cut down, and he received no compensation at all even though each palm tree generated \$2 of income per year for his household and was valued at \$5 per tree by official standards.<sup>265</sup> However, in response to ADB's audit recommendations, the second payment was paid by the government and all lost properties were paid fully.

As reported above, Cambodian expropriation laws permit using social concession land to provide land for landless people including resettlers. For outstanding and ongoing projects, on the one hand, resettlement sites have been provided to landless APs with a land plot of 7m x 15m per household and a basic infrastructure. This approach is also applied in government-financed projects. On the other hand, landless APs can also be provided cash for their preference.

<sup>255</sup> Countries like the US and the United Kingdom recognize claims on rights of adverse possession to public and private property under certain conditions. Some of these conditions include: (i) actual possession of the land in question (ii) continuously, (iii) exclusively, (iv) open and notoriously, (v) against the titled legal owner's willingness, (vi) for a statutory period of time. To establish the actual possession, the claimant must perform some physical acts of possession in connection with the land, such as using the land for farming or grazing, improving the land, or setting up an enclosure on the land. *Black's Law Dictionary*, Sixth Edition (1990).

<sup>256</sup> Kingdom of Cambodia Council for Social Development. 2005. *National Poverty Reduction Strategy 2003–2005*. Dec. 86.

<sup>257</sup> Legge, Michele, and Thor Savoenu. 2004. *Nine Years On: Displace People in Cambodia*. 14

<sup>258</sup> Khemro and Payne, *supra* note 231(139).

<sup>259</sup> As discussed in the text, legitimate landholders are those who have documents attesting to their rights to the land located outside of the discretionary ROW.

<sup>260</sup> Country Report, *supra* note 248(22).

<sup>261</sup> *Id.*, 23.

<sup>262</sup> However, the trees considered to be growing naturally on affected farmers' land were not entitled to compensation.

<sup>263</sup> Country Report, *supra* note 248(23–24).

<sup>264</sup> Resettlement Audit: Phnom Penh to Ho Chi Minh City (Loan 1659-CAM), 61.

<sup>265</sup> *Id.*, at 53.

### 3. When is Compensation Paid?

The Constitution and the 2001 Land Law require that compensation be paid before the expropriation process starts. Field visits indicated that these provisions were not universally followed in the Highway No. 1 project. The highway was built in 1999, but at the time of the 2004 resettlement audit, some APs who were legally entitled to compensation had not received compensation. Nor did they know when they would receive compensation. However, because of the audit, all outstanding compensation is being paid.<sup>266</sup>

No penalties are assessed for this failure to pay compensation on time as is required by existing laws and policies. Without timely compensation, APs face great difficulty in making a living during the transition period and beyond.

### 4. What Determines the Amount of Compensation?

Although the Constitution requires “fair and just compensation” for land takings for public interests, this standard is not defined either in law or in policy. In the Highway No. 1 project, the government claimed that compensation was based on market information obtained through the government’s land transaction records. The market for farmland, however, is not active and the information from land registration records is unreliable as it is common for parties to a land transaction to understate actual land prices.

The compensation amounts used in the Highway No. 1 project were, in fact, set by ADB consultant during the PPTA, based on some estimate of what was deemed to be replacement cost, however, the Cambodia Resettlement Implementation Plan (CRIP) that was revised by the government contained compensation rates that included depreciated rates for structures and reduced rates for land. The CRIP was approved by the Operations Department of ADB on the basis of which Loan 1659-CAM became effective.

It appears that government valuation officers had a great deal of discretion in applying the broadly formulated compensation standard and applied them inconsistently. Reports also indicate that APs who were educated and relatively well-off received much higher valuations than those who were poor and uneducated.

For example, one farmer complained to auditors that his shelter with a floor area of 31 m<sup>2</sup> had been valued at \$60, but his neighbor’s house of only 22 m<sup>2</sup> had been valued at \$1,100. The only difference was that his neighbor was influential in the local community.<sup>267</sup> The audit highlighted these discrepancies and all outstanding compensation is now being paid at replacement cost for all Highway 1 project APs.

### 5. Why Do These Problems Emerge?

The lack of functional land expropriation laws and supporting institutions appears to be the primary cause for these problems. Although the Constitution mandates the state to provide “just and fair compensation”, the legal restrictions preclude a substantial number of people from receiving any compensation.<sup>268</sup> Further, the government has issued additional rules and decrees announcing wider ROWs and thus expanding the scope of state public land, rendering more people at risk of losing their property without any compensation.

Second, the lack of a legal definition or guiding rules on the “fair and just compensation” standard has led to arbitrary determination of the compensation. The absence of guiding rules on compensation coupled with the lack of AP’s participation in the expropriation process results in the expropriating authorities having unchecked power to force APs to accept whatever compensation that is offered, how it is paid, and when it is paid. Moreover, the lack of a functional definition of “fair and just compensation” has further increased this power imbalance in the government’s favor. Despite the arbitrary valuation of assets referenced above, the government did conduct its own replacement cost or market survey as far back as 2000 and applied those rates on outstanding development partner-financed projects. However, the ongoing projects including the JICA-financed section of Highway 1, replacement cost study has been conducted by local consultant or NGOs to reflect current market price of affected assets. Recent ADB-financed projects have been applying units rates resulting from replacement cost surveys, although none are as high as the base rates used by the government for the ADB-financed Highway 1 project, which were validated by the resettlement audit as still being

<sup>266</sup> On 17 November 2006, Inter-ministerial Resettlement Committee confirmed that outstanding compensation was completely paid in late October 2006.

<sup>267</sup> *Supra* note 264(55).

<sup>268</sup> As of 2002, about 20% of urban population alone are undocumented informal squatters, and thus, “illegal” residents under the law. Kingdom of Cambodia 2002. Council for Social Development, National Poverty Reduction Strategy 2003–2005. 88. Dec.



within market rates at the time of compensation and still generally valid in 2005. Even after the deductions and depreciation, the amount paid to APs along the ADB-financed section of Highway 1 was still higher than the government's 2000 rates or the more recent replacement cost rates conducted on ADB-financed projects. The variation reflects the need for a more scientific methodology for asset valuation.

Third, and perhaps more important, is the complete absence of procedural laws. In this procedural vacuum, the expropriating authorities are not obligated to consult with APs on compensation and resettlement, to hear their concerns about their future, to make adjustments based on such concerns, or to address grievances through additional support measures. The actual experience with the Highway No. 1 project clearly indicates that APs were completely excluded from the decision-making process. APs were not consulted before determining compensation standards. They were invited to meetings notifying them of the compensation standards, but they were told the standards were the government's fixed rates with no possibility for negotiation. The Highway 1 audit report contains a compilation of complaints raised by APs, and none of these complaints was addressed appropriately. More seriously, the report discloses that "discontent was suppressed; complaints brushed aside with contempt and arrogance." As a result, most APs were forced to accept whatever amount was given to them. As a result of the Highway 1 audit, all affected people are now being fully compensated and procedures have improved significantly on recent ADB-financed projects. The Government is also demonstrating its commitment to improved resettlement by developing, with ADB's technical assistance, a resettlement sub decree that will be applied to all projects, regardless of financing.

Fourth, institutional deficiency also contributes to the problems arising from land expropriation in Cambodia. Currently, the Inter-ministerial Resettlement Committee (IRC) under the Ministry of Economy and Finance (MEF) is assigned with nearly all the responsibilities concerning land takings for ADB, World Bank, JICA, and JBIC-financed projects. Those responsibilities include approving compensation rate, compensation, resettlement, and practically all other pertinent issues. While some efforts are being made to improve procedures for some development partner-financed projects, the practice on government-financed projects is unknown.

This institutional structure is problematic in that it involves inherent conflicts of interest. One of MEF's objectives is to appropriate funding for compensation and resettlement to minimize overall costs for the infrastructure project. As an organization under MEF, IRC is expected to follow instructions from MEF and comply with MEF's project guidelines. It would be difficult, if not very impossible, for IRC to stand on the side of APs and ask for adequate funding for compensation and resettlement. On compensation and resettlement issues, IRC acts as a "legislature" in determining rules and standards for valuation of affected assets and resettlement, as an "executive" in implementing these standards and delivering compensation and resettlement options, and as a "judiciary" in addressing AP's grievances and complaints. With all three major government functions in one body, it is difficult to avoid abuse of power. On recent ADB-financed projects, IRC indirectly participate as an observer in a working group consisting of implementing agency, international and domestic implementation consultants to conduct replacement cost study. In the future, professional asset valuers will be part of this team. However, there are no such procedures on government projects.

Finally, the lack of access by APs to impartial adjudication of expropriation disputes. Three contributing factors give rise to this problematic nature of the Cambodian dispute resolution mechanism. First, unlike in most countries, APs do not know how to put their complaints through independent judicial review for concerning compensation. As the auditor found, APs do not know a process to appeal the decision on their asset value. Second, as a new democracy, Cambodian judicial system is not ready to challenge the government's decisions. The authors' conversations with many legal scholars in Cambodia indicate that Cambodian courts do not function well to play the role of the arbiter in disputes between the government and its people. Third, the totalitarian legacy left by Khmer Rouge has left a huge imprint on many government officials, including judges. Many of these officials believe that government activities always advance the common good no matter how private individuals are adversely affected. On recent ADB-financed projects, a grievance mechanism has been established and is operational. A grievance committee is established comprised of provincial governor, deputy provincial governor, deputy provincial land use management official, chief of provincial department of public works and transport, and chief of bureau of state property. An

NGO representative is also to be included. However, it is not known that there is any grievance mechanism for government-financed projects.

### C. Recommended Reforms

Cambodia's land expropriation laws and processes are fraught with problems and worse than those of the PRC and India. However, the situation can improve for several reasons. First, Cambodia's legal system is in an early development stage and can be influenced by constructive advice concerning reform. Second, international development agencies, such as ADB, are directly or indirectly involved in its policy-making process through their funded programs. This may provide these development agencies with important leverage to move the country to a positive direction regarding its compensation and resettlement policies. Third, the mere existence of many international NGOs indicates that the Cambodian Government permits, if not welcomes, the development of democratic process, which will inevitably lead to participation of citizens in the process, including the land expropriation process. This section will make several recommendations for immediate action with respect to compensation for loss of assets in government expropriations.

#### 1. Conduct legal and policy reforms on compensation and resettlement regimes to protect poor people from being further marginalized

As discussed above, six groups of people, most of whom are poor and marginalized, are not entitled to compensation under the law. This raises a serious question on the rationality of such legal restrictions. Such rule and practice are also inconsistent with ADB policy that all APs are entitled to compensation and resettlement assistance. We strongly recommend the following legal and policy steps in lifting most, if not all, existing restrictions on eligibility for compensation and resettlement assistance.

First, the rule that the resettlers of concession land cannot receive compensation when state expropriates such land should be abolished. One of the purposes of concession land is to provide replacement land to APs when their original land is taken for public purposes. By law, they must unambiguously and continuously possess that land for 5 years before becoming owner of the land. Within these 5 years, there should be a

strong presumption that they have legal possessory rights to concession land, and should be treated as a de facto owners of such land. However, the 2001 Land Law's explicitly declines their eligibility for compensation when the state withdraws the land for any purpose before they upgrade their possessory rights into ownership rights. In many countries, rights to possess and use in the absence of ownership are entitled to compensation under the law. Tenants in Italy and the United Kingdom and use-right holders in the PRC are fitting examples. Protecting land users' right to compensation in case of land taking will not only help achieve an equitable distribution of burden as a result of land taking, but also encourage them to invest in land before the taking, which is essential to the increase of agricultural productivity and economic development.

Second, establish a cutoff date that clearly defines the eligibility for compensation in cases of squatting. Squatting on state public land is common in Cambodia. This can be traced back to the initial years after the Khmer Rouge dictatorship collapsed when the country was in anarchy and no law defined state land. These squatters have established existence by farming and building structures on the then unclaimed land, and thus, established their de facto property interests in such land. Undoubtedly, the burden of loss should not be borne by these squatters because of the government's failure to object to the occupancy. More important, many of these squatters are poor and primarily depend on this later-announced state public land for meeting their subsistence needs. For public policy concerns, it is socially insensible to wipe out completely their interests in land by a simple announcement from the government.

A proper balance should also be struck to discourage future squatting on state public land. The best mechanism is to establish a cutoff date and make subsequent entering into public property illegal, and therefore, ineligible for compensation. The 2001 Land Law has set up a cutoff date for squatting on state private property, while categorically denying the legality of possession of state public property. It appears rational that the cutoff date rule is extended to state public property. For example, government may apply its rules on social concession land to all state public property and require precutoff date possessors to obtain formal government permission to use that land and continuously use is 5 years before obtaining ownership rights.

Third, make resettlement assistance available to the APs who are not otherwise eligible for compensation. Although Cambodian expropriation laws apparently decline paying compensation to those six groups of people for the loss of their assets, no law or government decree prevents the government from providing resettlement assistance to these people even if they are not legally entitled to compensation under the law. We strongly recommend that in the absence of legal reforms, the government should actively pursue both social and economic measures to mitigate the APs' losses and sufferings.

## **2. Clearly define the "fair and just compensation" requirement**

The experience in the expropriation for the Highway No. 1 project shows that the constitutional mandate of "fair and just compensation" is meaningless without a clear definition and a method for applying the standard. Most market economies define the amount of just compensation for expropriation of private land as the fair market value of that land achieved through free, open negotiation, and under no pressure between a willing buyer and a willing seller. For a country like Cambodia that has abandoned the planned economy under the Khmer Rouge and formally adopted a market economy,<sup>269</sup> it is important to introduce this market-based standard for land expropriations because it helps reinforce the principles of a market economy.

If this definition were adopted, a full and faithful implementation by expropriating authorities would be essential. The government needs to establish rules against discretionary or arbitrary endeavors of valuing properties to be expropriated below the fair market value. Moreover, the field officers of the expropriation agency should be educated and trained to use this standard in asset valuation, whether it is land, structure, or standing crops.

The land-for-land option should also be pursued, but with caution. While giving a farmer a piece of replacement land of similar amount and quality is desirable, such land-for-land program should be conducted in such a way that it will not compromise the legitimate interests of other people in the land. If either the owner or holder of use rights to the replacement land is farming on that land, requiring them to give up the land compulsorily creates problems of their own.

Moreover, affected farmers under the land-for-land program should be offered with two choices at the same time: cash compensation based on the fair market standard, or the replacement land of comparable quantity and quality. In case affected farmers choose cash compensation, the determination of the land's value should be conducted through non-compulsory negotiations between the expropriation agency and affected farmers until both parties reach an agreement on compensation. In such a process, the government may make an offer based on its assessment of the land's market value, but such an offer should be nonbinding and should be subject to the affected farmers' rebuttal, substantiated with evidence that the government's offer is sufficient for purchasing a similar piece of land.

## **3. Do not let the lack of formal title be a bar to compensation**

The Cambodian Government is conducting a land titling program with assistance from the World Bank and other international development agencies. The program intends to secure owner or holder's rights to their land through documenting and registering such rights. This is necessary for a market economy and this should be actively pursued. However, several points should be noted. First, a formal land title, or at minimum a formal permission to continuously possess the land, should be issued to all current possessors, including squatters, of state private land, as long as they can present evidence (including circumstantial evidence) that they had lived on the property long enough before the government announced its claim of ownership to that land. The Cambodian laws on social concession land explicitly include provision of residential land to homeless families and of farmland to poor families as one of the purposes for setting up social concession land from state private land.<sup>270</sup> If the squatters are poor, which is usually the case, they are certainly qualified as beneficiaries and there is no legitimate reason to reject their request for title.

Even if a formal title is not available to such squatters, the lack of a formal title should not be an absolute bar to compensation. Informal possessors should have the opportunity to make claims for compensation and back up that claim with evidence showing that they have maintained possession for the required length of time.

<sup>269</sup> Cambodian Constitution, Art. 56.

<sup>270</sup> Sub-decree on Social Land Concession. 2003. Art. 3.

**4. Establish an independent adjudication body to address AP's grievances**

Combining the “legislative,” “executive,” and “judicial” functions of land expropriation into one government body, such as IRC, conflicts with the check-and-balance principle, and is detrimental to democratic development. The audit report shows profound negative consequences of this institutional failure to address AP's grievances properly when their rights to fair and just compensation are violated.

Clearly, this institutional structure should be reformed. It would be desirable to take the judicial function away from IRC and let courts adjudicate disputes over land compensation and resettlement. At a

minimum, AP should be given the right to seek judicial review of the compensation standards set by the international or local consultant during the PPTA, the compensation amount that IRC delivers, and the resettlement plan made by IRC.

Independent and impartial judicial review of government actions is the last line of defense that people rely on to enforce their rights against the government. In Cambodia, APs do not know the process to file complaints with the court in part because IRC is supposed to handle such disputes before any involvement from the court system. The Cambodian Legislature should address this deficiency by either establishing a special land tribunal or explicitly allowing APs to appeal to general courts.

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# V. General Recommendations

**T**he recommendations made respectively for each of the three country settings above do not necessarily apply to other ADB developing country clients. With this in mind and drawing from the lessons from a variety of sources, more general recommendations that have broader application are provided in this section. The eventual goal of these recommendations is to move from a context where “forced eviction” or “involuntary acquisition” is assumed the norm to one where acquisition or displacement becomes as voluntary as possible and takes place based on negotiated agreements between developers and APs.

## A. Compensation and Valuation

We begin with a critique of ADB’s definition of replacement value. The ADB Policy on Involuntary Resettlement (“Policy”), as presented in Appendix 1 of the *ADB Handbook on Resettlement* (“Handbook”), includes several general provisions relevant to compensation, and proposes replacement cost as the standard for determining compensation. The broader handbook itself links the definition of “replacement cost” to situations where “markets reflect reliable information about prices and availability of alternatives to the assets lost.” In its Operations Manual of 2003, replacement cost is defined as “valuing assets to replace the loss at market value, or its nearest equivalent, plus any transaction costs such as administrative charges, taxes, registration, and titling costs.”

We identify the following shortcomings with ADB’s treatment of replacement costs within its Policy and Handbook and its Operations Manual:

- (i) Either the Policy or the Operations Manual does not give a functional definition of replacement costs. Replacement cost should be defined in a way that can be readily used by field officers and loan recipient countries.

- (ii) The Handbook’s definition<sup>271</sup> and the Operations Manual’s definition of “replacement cost” is limited to situations where markets are functioning. The definition presumes the existence of land markets. It implies that replacement cost applies only to situations where markets reflect reliable information about prices and availability of alternatives to the assets lost. Yet, it does not address explicitly and clearly how to define replacement cost in situations where those conditions are absent.
- (iii) The Handbook’s definition of replacement cost appears to focus on market cost of the expropriated asset rather than the market cost of an appropriate replacement for the expropriated asset. The market cost of the expropriated asset is not necessarily the same as the market cost of an appropriate replacement for the expropriated asset. Replacement cost should include ideally a focus on the cost of the replacement asset.

A series of recommendations for ADB’s consideration may be offered in an attempt to address these shortcomings and provide more specific direction for compensation and valuation issues. A functional definition of replacement cost, consisting of five components, can be offered as follows:

|   |
|---|
| $\text{Market value} + \text{Premium} + \text{Transaction Costs} \\ + \text{Interest} + \text{Damages}$ |
|---|

<sup>271</sup> The Handbook currently uses three related terms interchangeably: replacement costs, replacement rates, and replacement values. If the Handbook is to be revised, not only replacement cost (or rate, or value) should be defined, but one term should be used consistently as well throughout the Policy and Handbook.

## 1. Component 1: Market Value

“Market value” is the prevailing standard in the world of state expropriations or other forms of mandatory acquisitions. An active market is perhaps the most objective mechanism for determining asset values, as the price a willing buyer would pay a willing seller reflects the market value of the asset at issue.

In many Asian settings, however, markets are not sufficiently active or developed and thus cannot provide reliable or complete information about prices. Valuation guidelines, therefore, must distinguish between cases where markets are sufficiently active to provide reliable information and cases where they do not.

### a. Land

First, land-for-land compensation should be offered to APs as an option, in addition to cash, whenever equivalent land can be provided without displacing other persons (see Box 6).

Second, in settings where markets are sufficiently active, a comparable sales valuation method should be applied to both the expropriated asset as well as to equivalent land in the vicinity that has been identified by representatives of the APs as land suitable for replacement. Market value should be defined as the higher of the two values.

The data sources for the comparable sales information should not be limited to secondary data. Primary data should be collected from key informants, including local landowners, to supplement whatever secondary data exists. The primary data might be collected before the expropriation starts by including survey questions about the average range of prices for various categories of land in the vicinity.<sup>272</sup> As for secondary data sources, one should exercise great caution to determine if the prices recorded in government-registered land transactions are trustworthy.

Third, in settings where active land markets or reliable land market information are lacking, the income capitalization approach is an appropriate choice in the valuation of land. In applying the income capitalization approach to agricultural land, governments should be encouraged to estimate income stream based on the best permissible agricultural use of the land at issue,

rather than its current use as of the valuation date. This better reflects market value because a prudent buyer will likely put the land to best use.<sup>273</sup> Estimating income based on anything other than the best use could well lead to undervaluation of the land at issue.

Fourth, in settings where project administrators are not certain whether the market is sufficiently active to provide reliable information, they should consider using a combination of the comparable sales and income capitalization methods, with the final determination based on the highest result from the two methods.

Finally, CVMs should be experimented to supplement the other valuation methods eventually. Specifically, questions to explore AP's willingness to accept should be incorporated in the survey instrument in the ISA. As part of the ISA, the survey should identify a sample of respondents in a nearby non-project area with similar land and conduct a limited survey including both WTA and WTP questions. These CVMs are innovative and have much potential, but they are controversial. Incorporating them into ADB projects can provide a check or supplement for the other valuation methods and provide the opportunity for ADB to address methodological problems associated with this method. They can also help inform an initial offer of compensation through efforts to reach a voluntarily negotiated amount. Over time, depending on the results from experimenting with contingent valuation, ADB may want to place a greater reliance on these methods for determining land compensation.<sup>274</sup>

<sup>273</sup> The best use concept is also supported by market economic theory. Market value is realized when supply by the willing seller and demand by the willing buyer reaches equilibrium. The seller is willing to sell because he or she is willing to forego some of the benefits of holding up the property in exchange for other property that is expected to generate greater benefits. In land expropriations, the supply is at or close to zero because the seller-AP is not willing to sell. Such zero- or close-to-zero supply is expected to raise the bar of equilibrium at a new and higher point (higher market value) where the willing buyer-state accepts because the buyer will put the property into best use, and thus, generate greater benefits than the cost of a higher equilibrium.

<sup>274</sup> The contingent valuation method (CVM) (WTA and WTP surveys) offers some methodological challenges. One methodological problem with WTA is the “incentive incompatibility problem”; i.e., if respondents think their answer will affect the compensation they are to receive, they have the incentive to provide an inflated response. While this is a challenge, researchers are finding ways to mitigate the problem. One way to mitigate the problem that also is more consistent with the fundamental meaning of replacement cost is to use WTA questions not only in the ISA baseline with APs concerning their assets, but also apply both WTA and WTP questions in a survey to a group of non-AP respondents outside the area of the project, but in the general or similar vicinity where land is roughly comparable to the land to be expropriated. Of course, applying the WTA survey in the non-project, but “comparable land” area may increase the hypothetical bias problems while it decreases the incentive incompatibility problem.

Another aspect of the contingent valuation methodology is particularly relevant if the respondents are relatively uneducated and not significantly accustomed to operating in a cash, market economy. WTA questionnaires can use an open-ended format by asking the respondents to state a number, or a closed-ended format where the number(s) suggested by the enumerator are accepted or rejected. Closed-ended questions are not only more incentive compatible but are easier to answer. However, designing a close-ended questionnaire requires more work and background information and also more skilled enumerators.

<sup>272</sup> Such questions should be about land in the vicinity generally and not about the respondent's land.

**Box 6: Land for Land**

Because land continues to be a vital sustainable resource for millions of people who often lack skills for nonagricultural employment, land should be available to APs that are dependent on land-based livelihood. When the states have free land or reclaimed land available or are able to purchase land on the market, “land for land” may be a preferable option than cash compensation as it more likely to preserve existing lifestyles and communities. This is particularly true in the case of indigenous people, for whom land is often the only sustainable resource base. “Land for land” should be also seriously considered in cases of large-scale infrastructure projects such as reservoir constructions where a large number of communities have to be displaced.

Where land-for-land is given for home plots in rural areas, ADB should strive to provide plots of sufficient size to include a kitchen garden and area for livestock. Based on research findings from India on sufficient size, such plots should be at least 300 square meters (m<sup>2</sup>), not 60 m<sup>2</sup> as the ADB Handbook currently recommends.

Source: The authors.

**b. Structures**

A “modified replacement cost” approach should be used to value structures. Professional assessors could develop a unit cost manual through sample appraisals. Such manual should include per square meter unit cost for each horizontal structural component (such as floor and roofing) and per meter unit cost for each vertical component (such as wall) built with a particular material and amount of labor. Overall replacement cost for the structure could be derived by adding all these unit costs.

The traditional replacement cost approach estimates the present cost of building a structure that is same or similar to the existing structure under assessment, with a subtraction of accrued depreciation from the total present cost of the substituted structure. Accrued depreciation is estimated based on the structure’s remaining economic life, or the years remaining for functional use. Moreover, the value of salvage materials from the destroyed structure is typically deducted when this approach is used for structures.

The recommended “modified replacement cost” approach does not deduct for depreciation and does not deduct for value of salvage materials. The reasons for not including depreciation are twofold. First, active markets for structures (including houses) do not exist in most Asian settings. The implication for DFDR is that displaced persons who lose structures are unlikely, in most cases, to be able to find equivalent structures

for purchase; that is, structures with the same amount of depreciation. The much, more likely “replacement” option involves building a new structure. In such cases, compensation that deducts depreciation will not be sufficient to enable the APs rebuild. Second, in typical less-developed Asian settings, structures, especially those like residential houses, frequently undergo renovations and major maintenance that extend their economic lives.<sup>275</sup> It is unlikely that any application of depreciation will accurately take such improvements and major maintenance into account.

Salvage materials should become the property of the acquiring entity. The acquiring entity should not deduct, however, the value of the salvage materials from compensation. Doing so would involve substantial complexities in calculating the value of salvage materials not commensurate with the benefits achieved.<sup>276</sup>

It is also a good practice to improve substandard living conditions after displacement. Such improvement is beyond required compensation, but the compensation arrangements should be flexible enough to accommodate this practice where using the modified replacement cost method would only recreate or perpetuate poverty.

**c. Common property resources**

Because CPRs are generally nonmarketed goods, CVM should be used to determine the cash compensation option for compensating lost access to CPRs. Actual physical replacement of CPRs should also be offered as an option whenever possible.

Applying the contingent value method for CPRs will involve two steps. First, a full list of lost or affected CPRs and their users needs to be identified, such as forests, grazing or hunting ground, water sources, fisheries, and other customary rights to natural resources or common facilities. This inventory of CPRs and CPR users should be incorporated into the Initial Social Assessment. Second, the APs who are users should be asked WTA questions as part of the baseline survey. This data might also be supplemented by a WTA survey from a nearby non-project area where similar

<sup>275</sup> Examples include periodic—sometimes annual—replacement of thatch roofs or repairing of mud walls.

<sup>276</sup> Not deducting for depreciation or salvage materials is consistent with the World Bank’s approach. See *Involuntary Resettlement Sourcebook* 58, the World Bank, 2004. Available: [www-wds.worldbank.org/servert/WDSContentServer/WDS/IB/2004/10/04/000012009\\_20041004165645/Rendered/PDF/301180v110PAPE1ettlement0sourcebook.pdf](http://www-wds.worldbank.org/servert/WDSContentServer/WDS/IB/2004/10/04/000012009_20041004165645/Rendered/PDF/301180v110PAPE1ettlement0sourcebook.pdf)

CPRs are present. The survey results will form the basis of replacement value and thus the amount of cash compensation.

#### d. Crops

Valuation of crops for compensation purposes is relatively simple and straightforward. We propose valuation of annual crops based on the value of the standing crop at harvest, determined by the average gross market value of crops for the 3 previous years, adjusted for inflation. In areas of predominantly subsistence production, in-kind compensation should be offered as an option along with a cash option if it is a nonperishable grain.

#### e. Trees

Where sufficiently developed markets exist, the market value of trees of a similar age and use should be used in valuation. Where markets do not exist, surrogate values must be determined. For timber trees, the compensation should equal the value of the lumber resulting from the tree. For fruit trees, the compensation should equal the cumulative future value of the fruit crop for its productive life along with any timber value. If replacement trees are provided, compensation should also include the value of the harvests lost until the replacement trees come into full production.

## 2. Component 2: Premium

We propose, as the second component of the formula for “replacement cost,” a premium beyond market value as reparation for the involuntary nature of the taking.

Fair market value reflects the objective value of assets in a free market consisting of willing buyers and willing sellers. In cases of compulsory acquisition or expropriation, the fair market value is not fair to “sellers” because the sellers are not necessarily willing to sell and do not have a choice to walk away from the deal.<sup>277</sup> It is common for APs who have cultivated

over the years form a special attachment or bond with their properties including their land and other assets. It is also common, especially for poor people without alternative employment, that land provides not only the monetary wealth, but also functional and utility values of subsistence. Such a personal value and the disruption to normal life due to forceful alienation cannot be simply measured or bought by a sum of money. Given the compulsory nature of the expropriations or acquisitions, it is reasonable and fair that APs receive a “premium” for the loss of their assets.

The Indian LAA provides that in addition to the market value, APs are entitled to a sum of 30% of that market value in consideration of the compulsory nature of the expropriation or acquisition. Italian law goes even further by offering owners of arable land compensation up to three times a government-determined value of the land. British and German laws provide for similar premiums in certain compulsory acquisition cases.

The premium is probably most easily expressed as a percentage of market value. The choice of premium size is bound to involve some arbitrariness, but we believe the Indian statutory requirement of 30% of market cost is reasonable.

The inclusion of a two-tiered premium should also be considered to provide additional incentive for the parties to reach a consensual compensation agreement. Thus, a government might offer “market value” (as determined by the implementing agency) plus 40% if the landowner is willing to enter into a consent decree or voluntary agreement. If the landowner refuses (because he or she disagrees with the determination of “market value”), they can appeal the offer but are then only entitled to market value (as determined by a court or other appellate body) plus 20%. Offering an enhanced premium to encourage voluntary agreements may pay for itself in avoidance of long, complex acquisition procedures, costly litigation, social unrest, and project delay.

## 3. Component 3: Transaction Costs

Transaction costs should be defined to include all reasonable administrative charges, taxes, title or registration fees, and other legal costs associated with replacing the lost assets. Such costs must either be paid directly by the project or offered as part of the compensation package.

<sup>277</sup> This willing buyer and unwilling seller situation can also be analyzed under economic theory. Unlike in a willing seller situation, where the seller's opportunity cost of holding up land is higher than the benefits of exchanging it for another property, in land expropriations, AP's opportunity cost is zero and their “opportunity” benefits are certainly higher than what fair market (achieved in a willing seller and willing buyer situation) can convey.



#### 4. Component 4: Interest

An interest payment is an important element of compensation as substantial time can pass between the time of the determination of compensation and the time APs receive the compensation. The market value is typically determined as of the time the compulsory acquisition process commences, which is often months and years before the government provides actual payments. Accordingly, it is reasonable and necessary that interest—at least at the prevailing lending rate set by the central bank—is paid for the period between the determination date of market value and the payment date.

#### 5. Component 5: Direct Damages

Other damages directly caused by the physical occupation of the land by a government through expropriation deserve consideration and corresponding compensation. Conceivably, the government should compensate APs for damages resulting from the following:

- (i) Severing the taken land from his or her other land;<sup>278</sup>
- (ii) Physical injuries to or destruction of other personal or real property when the government enters and takes the land; and
- (iii) Loss of earnings from business due to the expropriation between the time of the initial notice of proposed taking and the time of the award.

The first two are self-explanatory. The final one envisions that for example, an affected farmer anticipates the forthcoming taking, and reasonably chooses to forgo or reduce the planting of a certain crop or business activities that he or she would not otherwise do. The taking directly results in the decreased production of the crop and lowered earnings, which are not captured by any of the above components. It also envisions situations where the project preparation or construction activities lead to a loss of business income for an affected business before land acquisition occurs. In both such cases, it is appropriate to compensate for these losses so that the AP's incomes are not affected by the project negatively.

<sup>278</sup> For example, the compulsory acquisition of a portion of a person's contiguous landholding may reduce the usefulness and thus value of the remaining portion.

## B. Procedural Mechanism

A legal right that cannot be effectively enforced is not a right at all. The right to just compensation is meaningless without the existence of effective mechanisms to enforce the right. While developing reasonable compensation practices through both project-specific practices and (if possible) legislative change is an important first step to improve current practice in many countries, the importance of establishing and improving the institutions that implement and enforce the laws cannot be overestimated.

The foremost task is to establish an explicit timetable for various notices and official actions. A well-defined procedure for expropriations should provide clarity, transparency, and predictability. Considering good international practice and balancing the interests between achieving justice through due process and advancing government-sponsored public projects in an efficient manner, the following procedure (divided into six stages) may be considered:

- (i) Initial notice,
- (ii) Formal declaration,
- (iii) Public negotiation and consultation,
- (iv) Adjudication,
- (v) Payment of compensation, and
- (vi) Taking possession of the land by the government.

### 1. Initial Notice

The initial notice appraises the public of the proposed land taking and allows officials to enter land for surveying. It must be publicized widely through various means including posting physically at a conspicuous location on or near the land at issue, given due regard to the generally low level of education of rural residents.

### 2. Formal Declaration

If the government decides to proceed with the expropriation after conducting the survey and planning work, it should make a formal declaration within a specified period—for example, 1 year—of the initial notice to offer some degree of certainty. The formal declaration should be publicized like the initial notice, and should include the details on the specific area demarcations, basic compensation options, and the AP's rights to due process and applicable procedures of filing claims.

### 3. Public Negotiation and Consultation

AP's participation in the early stages of the project is the key to converting forced displacement and alienation into a voluntary, participatory, and collectively negotiated process. Meaningful participation must take place before most of the crucial decisions regarding various aspects of the project are made. Its importance to all APs—particularly vulnerable groups such as women and indigenous people—cannot be overstated.

Public meetings have been proven an effective way of disseminating information and collecting opinions from APs. Key governmental officials or project representatives should be present at the meetings to answer questions and to absorb and take into account of the opinions from APs.

A special office should be established or designated in the locale to continue disseminating information, answering questions, and collecting opinions.

If a large number of people are affected, they should be encouraged to self-organize and to select their own representatives (with the help of NGOs, if possible). As a means of further empowerment, these representatives should be allowed to participate and to vote, with other stakeholders such as the developers, on important decisions including compensation methods, phasing of physical relocation, resettlement, and rehabilitation assistances, and so on.

At the end of the public negotiation and consultation, a report should be published and circulated among APs. The report should summarize the opinions of various parties and propose a specific compensation and resettlement package including the eligibility criteria of receiving benefits, methods of valuation, timing of the payments, etc. If the parties agree to the report and its proposal, a consensual agreement will be executed.

### 4. Adjudication

Within 60 days of the publication of the report on compensation and resettlement, any APs, including those without formal legal title to the land, may file a written claim with the governmental agency in charge and initiate an adjudication process, which may include the following:

- (i) The agency should conduct public administrative hearings on issues including measurement of the land to be expropriated, the deter-

mination of the compensation package (each of the four components plus R&R, if any), and respective interests of the claimants.

- (ii) If one of the parties disagrees with the award, he or she, within 30 days of the announcement of the award, should be able to appeal to a civil court with general jurisdiction (or a special land tribunal where is available). After the parties have exhausted all administrative and judicial recourses, the award becomes final.

### 5. Payment of compensation

The full amount of the compensation should be immediately paid to the parties as provided by the consensual agreement or final award. Accrued interests should be paid for any delay in payment.

### 6. Taking Possession

In normal circumstances, the government should not be allowed to take possession of the land until the compensation is paid in full.

## C. Supporting Institutions

### 1. Training Judges and Lawyers

Governments and international development partner agencies may need to support and fund the establishment of a force of qualified professionals who are essential to the implementation of the policies, laws, and project-specific guidelines. Land laws and policies are a specialized area, and a legal professional with legal training in general practice may not be knowledgeable about the existing laws, legislative intentions, and judicial interpretations of land laws, regulations, and policies. Topics concerning land economy, land appraisal, and social development constantly come into play as well. Additionally, lawyers and judges should become skillful negotiators and mediators as alternative dispute resolution such as voluntary mediation and conciliation tends to be more effective among people who are not familiar with the formal legal systems.

Training on land law, valuation, alternative dispute resolution, and other related topics may be conducted through seminars, workshops, continuing professional education, or exchange studies. The training sessions should be organized in a participatory or clinical fashion so that trainees receive practical advice.

## 2. Establishing Special Land Tribunals

International experience indicates that specialized bodies for land acquisition, compensation, and other land or resettlement disputes can be quite effective and tend to produce consistent and predictable rulings. Such bodies can be established as permanent bodies within the existing administrative or civil court system. Alternatively, such bodies can be established as temporary bodies for specific large development projects. In either case, APs should have easy and affordable access to such bodies.

## 3. Offering Legal Aid

Whether in Cambodia, PRC, and India, or other developing countries, most poor people have little knowledge of their rights concerning compulsory expropriation. They cannot effectively enforce their rights if they are not aware of the existence of such rights. Even if they do know that their rights have been deprived, the majority of affected poor people probably cannot afford to retain the services of lawyers and find themselves at the mercy of government officials.

Free or low-cost legal aid services have proven exceedingly useful in educating poor people about their rights and helping them enforce these rights in various settings. Lawyers or paralegals of legal aid centers can employ a variety of methods to disseminate legal information, including publication in the local media, distribution of written materials, group education meetings with villagers, and individual consultations with farmers. If circumstances warrant, the lawyers

may offer representation at formal proceedings.

Almost all legal aid centers share two common characteristics: accessibility and independence. The legal aid offices should be near areas where land grievances often occur. The lawyers should regularly travel to rural areas to educate farmers and local officials, meet with potential clients, and represent clients in negotiation or adjudication proceedings. The operation of legal aid offices should also be free from the government's direction or interference. This is vital because governments themselves are parties to cases involving expropriations.

## 4. Developing Administrative Capacity in Handling Compensation and Rehabilitation Issues

Most governments of developing countries are ill equipped to identify and resolve compensation and rehabilitation issues. Often the agency in charge of construction of the projects is carrying out the responsibility of providing necessary services to APs. In some settings, multiple agencies are involved with conflicting or overlapping authorities and agendas.

The first need is to develop and train staff members and professionals who are capable of identifying and resolving issues relating to compensation and resettlement. There should be a special agency or office that assumes the overall responsibility and the coordinating functions. Appropriate legal framework should be established as well to govern the displacement process, which is glaringly lacking in many settings and is typically dictated by the construction schedule of the project or administrative expediency.

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## VI. Conclusion

**W**hile there is little disagreement on the principle that APs' livelihood should not be worse off as a result of land takings, the actual operation of the principle and corresponding laws in many developing countries have, by and large, fallen short. An extensive body of literature from various countries shows that many of these APs have left behind with serious impoverishment risks. In this context, international development organizations, such as ADB, have developed useful policy guidelines to address this problem through socially sensible compensation and rehabilitation measures.

Experience has shown that loss of land, houses, and other assets are one of the major impoverishment risks. Mitigation or elimination of such asset-related risks requires that APs be adequately compensated.

To achieve this objective entails substantial legislative reforms and practice improvements on compensation standards, valuation methods, and procedural safeguards to ensure sufficient compensation for lost assets. As suggested in this paper, while each country may have its unique problems, which should be addressed through a specific package of improved measures, a range of broader strategies can be discussed and developed to deal with shared risks faced by APs in most developing countries. Regardless, we believe that the first step would be an open and honest dialogue among, and concerted efforts by, governments, international development organizations, civil societies, and APs, so that these problems are confronted and eventually resolved.

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## **About the Compensation and Valuation in Resettlement: Cambodia, People's Republic of China, and India**

Development-caused forced displacement and resettlement (DFDR) is frequently characterized by the resulting impoverishment of those displaced. The lack of appropriate valuation of and compensation for lost assets is one major underlying factor. This paper offers insights into the valuation and compensation issues within the context of three Asian countries (Cambodia, People's Republic of China, and India).

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