

# PPP INSIGHTS

AN EXPLANATORY NOTE ON ISSUES RELEVANT TO PUBLIC-PRIVATE PARTNERSHIPS

## Compulsory Acquisition of Land and Compensation in Infrastructure Projects

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### I. INTRODUCTION

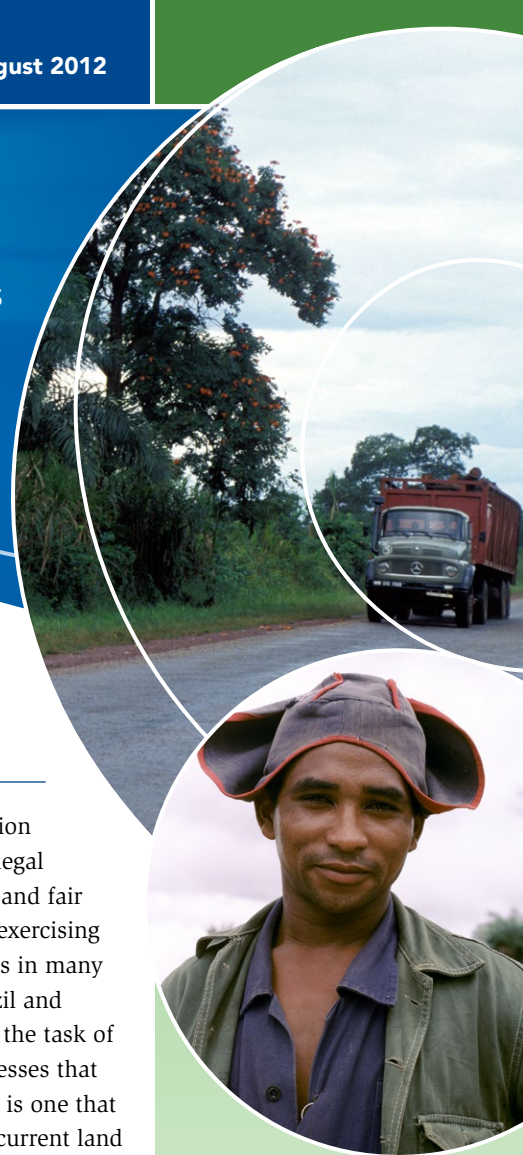
Compulsory acquisition is the power of government to acquire private rights in land for a public purpose, without the willing consent of its owner or occupant (Keith, 2008). This power is known by a variety of names depending on a country's legal traditions, including *eminent domain*, *expropriation*, *takings* and *compulsory purchase*. Regardless of the label, compulsory acquisition is a critical development tool for governments, and for ensuring that land is available when needed for essential infrastructure—a contingency that land markets are not always able to meet.

Yet despite being a core and necessary governmental power, compulsory acquisition has always attracted controversy, both in theory and practice. The reasons for this are unsurprising. Whenever people are displaced, the human costs in terms of disruption to community cohesion, livelihood patterns and way of life, may go beyond what can be fully mitigated through standard compensation packages, however generous those may be. Such inevitable costs are compounded, sometimes many times over, where the process is designed or implemented poorly—tenure insecurity is exacerbated, land markets are weakened, investment incentives are undermined, corruption is facilitated, and communities and livelihoods may be destroyed.

Although the compulsory acquisition power is deeply rooted in virtually all legal systems, the establishment of efficient and fair legal and institutional frameworks for exercising this power remains unfinished business in many countries around the world. From Brazil and China to Ghana and the United States, the task of better defining the principles and processes that govern compulsory acquisition powers is one that is very much alive and at the heart of current land policy debates.

An important dimension of evolving law and practice relates to the deployment of government taking powers in respect of public-private partnerships (PPP's). The extent to which private end-users of property should be allowed to be beneficiaries of compulsory government land acquisition has long been an issue, and national laws vary in how they define and circumscribe the potential involvement of the private sector. The issue has become more acute as governments and their development partners increasingly emphasize the importance of leveraging private investment for activities that have traditionally fallen within the public domain.

This Note is intended to summarize for development professionals and policy makers some key considerations in the design of compulsory acquisition mechanisms, particularly in



the context of infrastructure projects and public private partnerships and to highlight some areas of continuing controversy. Brief reference will be made to norms promoted at the international level, such as those embodied in the World

Bank's Policy on Involuntary Resettlement (OP 4.12); however, the main emphasis of this Note is on lessons that emerge from reviewing developments in national legislation and practice.

## II. PUBLIC PURPOSE

### Definition

National constitutions and laws typically refer to compulsory acquisition being used for “public purposes”, for “public uses” and/or in the “public interest.” In some jurisdictions, these terms have distinct if overlapping meanings. In other cases, these distinctions are blurred or non-existent. In this Note, the term “public purpose” will be used for convenience.

When it comes to defining public purposes, there is great variety among national laws in the extent of specificity. In some countries, laws provide an itemized list of land uses that fall within the definition of public purpose. Such lists typically include uses such as (Keith, 2008):

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

In contrast to this approach, some countries instead leave the definition of public purpose open ended, providing much greater space for the exercise of discretion and interpretation. Both approaches have their advantages and disadvantages. An exclusive list of purposes provides a degree of certainty and works to prevent the creeping expansion of government powers into areas that are arguably beyond the proper theoretical limits of eminent domain—limiting discretion is seen as key to preventing some of the governance abuses often associated with compulsory acquisition. On the other hand, exclusive lists may suffer from excessive inflexibility

and may fail to provide for the full range of public needs: the government may eventually need to acquire land for a public purpose that was not anticipated when the law was written (Keith 2008).

Despite the variations that exist on this point, an overarching principle in most cases is that a government's taking powers are *extraordinary* powers that are intended to meet public needs that are not well-addressed through the operation of the market. Hence, it is not typical for laws to allow governments to use compulsory acquisition as the normal means of assembling land for purposes that are clearly for commercial, industrial or other profitable private uses alone.

### Private sector initiatives

Yet the task of drawing credible lines can be difficult and is the focus of considerable controversy. Many national laws have long contemplated the possibility that the initiative for a particular compulsory acquisition may come from a private actor—in most countries, the private identity of a proponent does not disqualify it from benefiting from the exercise of government power provided the end purpose can be characterized as “public.” In the United States for example, eminent domain has been one tool at the disposal of local governments engaged in assembling land for urban renewal, even when the ultimate end use is private low-cost housing or a commercial building intended to stimulate economic revival in a blighted area. A hotly debated instance of this came before the US Supreme Court in *Kelo vs. City of New London*, which held that the city's use of eminent domain in order to facilitate private economic redevelopment met the public purpose test because it would increase the city's tax base.<sup>1</sup>

There are numerous examples of the extension of the public purpose/use concept to support

<sup>1</sup> *Kelo v. City of New London*, 545 U.S. 469 (2005).

private activities on the basis that they may contribute to national economic growth—as opposed to the more specific and tangible public benefits usually associated with eminent domain. A topical illustration can be found in the case of investment by foreign firms in large-scale agricultural holdings in developing countries. This phenomenon has attracted a lot of international attention, promoted by some as key to unleashing the agricultural potential of regions such as sub-Saharan Africa, while others characterize it as “land grabbing” bringing few benefits to host communities and putting local livelihoods at risk. Whatever the merits of the various sides in this debate (and those merits are likely to be highly context specific and depend on the nature of the investment), it is noteworthy that a number of countries have included commercial agriculture amongst the public purposes justifying the exercise of compulsory acquisition, and have used that power as a tool for assembling land for large-scale investments.<sup>2</sup> Some countries, by contrast, have tended to eschew this approach in favor of encouraging voluntary negotiations between investors and local communities.<sup>3</sup>

China provides a particularly interesting case of compulsory acquisition used for channelling land into ultimately non-public uses. Although the law stipulates that the state can acquire collectively-owned rural land only in the public interest, this term is not defined. Under law, rural land can only be converted to urban uses if it has first been acquired by the state—although there is now an active market for urban land use rights in China, the options for rural users to sell to urban users are extremely limited. As a consequence, the exercise of compulsory acquisition is widespread on the edges of China’s exploding cities as local governments struggle to find land for urban expansion. The public interest in such situations is implicitly defined to include actions deemed to be necessary to support rational urban growth. As part of China’s ongoing efforts to address a wide range of problems associated with compulsory acquisition, however, ways of limiting the concept of public interest are being considered.

<sup>2</sup> See Tanzania, *Land Acquisition Act, 1967*, section 4(1)(g).

<sup>3</sup> Although not specifically reflected in national law, this approach has been adopted by the Government of Ghana in the context of the *Ghana Commercial Agriculture Project*, recently approved for financing by the World Bank. See World Bank, *Ghana Commercial Agriculture Project*, Project Appraisal Document, at 100.

### Public Private Partnerships

These types of issues are not new—but they are increasingly coming to the fore in the context of public-private partnerships, particularly in countries where jurisprudence on the subject has not been as expansive as that found in the United States. In such contexts, governments may find that the exercise of compulsory acquisition at times encounters public scepticism, particularly where the claimed public benefits are indirect or speculative. Some laws or proposed laws currently under consideration deal with this by provisions intended to “raise the bar” when private actors are involved. A draft bill under consideration in India<sup>4</sup>, for example, would limit the exercise of government acquisition on behalf of a private or PPP proponent to a relatively small fraction of the overall land needed for the enterprise—the rest would need to be acquired through private negotiation leading to voluntary sales. In such cases, the eminent domain power can be seen as a tool to deploy where the majority of landowners have willingly consented to a land transfer, and only a few holdouts remain.

### Legislative mechanisms to limit scope of ‘public purpose’

There are other tools that legislators have used to try to ensure that the public purpose limitation has some “teeth”, whether the ultimate user of the land is a public, private or PPP entity. In Kenya, for example, the proponent of a compulsory acquisition is required to provide credible evidence that the benefit to the public of the acquisition will outweigh the hardships to those affected. A number of countries try to restrict subsequent transfers and land use changes of land taken for a specific public purpose, in order to ensure that the public purpose justification was genuine, and not simply a disguise for facilitating future commercial transfers. Thus, some laws or proposals require governments to offer the land back to the original owners if it is not used for the purpose for which it was acquired<sup>5</sup>, or allow the original owners to share in the profits if acquired land is transferred to an unanticipated private use.<sup>6</sup>

<sup>4</sup> India, *Draft National Land Acquisition and Rehabilitation and Resettlement Bill*, 2011.

<sup>5</sup> See for example, *Cambodia’s Law on Expropriation, 2010*, Article 9, which gives the original owner priority to repurchase expropriated property that is not used for the intended purpose.

<sup>6</sup> India, *supra*. Note 4, section 70.

### III. COMPENSATION

Issues surrounding compensation for losses suffered—who-gets-what when government acquires a piece of land—are typically the most complex and controversial aspects of compulsory acquisition. A long-standing principle in many jurisdictions is that compensation should be guided by the objectives of “equity” and “equivalence”—that is, the adequacy of compensation should be measured against the goal of ensuring that people are neither impoverished nor enriched (Keith, 2008).

A variation on this standard view argues that it may be appropriate in some cases, particularly where a taking is occurring in the context of a development project or program, to aim beyond equivalence to improving the position of those affected wherever possible. This is the principle articulated in the World Bank Policy on Involuntary Resettlement: *“Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.”*<sup>7</sup>

In either case, applying the principles of compensation in practice has always been an extremely complex challenge. Appreciation of this complexity has deepened as fuller and more nuanced views of the rights that people hold over land have taken root in many parts of the world. Indeed, one key insight supported by comparative analysis is that legal approaches developed in the context of Europe or North America—where land rights are generally standardized and well-defined, land markets function, and land records are reliable—have proven to be ill-equipped for dealing with many developing country contexts where such attributes are less common.

Compensation issues can be conveniently grouped according to two overlapping sets of questions: *who should receive compensation for what kind of loss*; and *how should the quantum and type of compensation be determined*?

#### A. IDENTIFYING COMPENSABLE INTERESTS AND THOSE WHO HOLD THEM

Under the classical model, a government acquires an entire land parcel from a private owner and compensates the owner for the ownership interest in the parcel, along with other elements of compensation discussed below. Yet in many places, particularly in developing countries, this simple model encounters a wide range of exceptions and complications, often poorly or incompletely addressed in national legislation.

##### Private rights over state land

In many countries, full private ownership of land does not exist, and instead people hold land under long-term leaseholds, certificates of occupancy, concessions or other arrangements while the state retains ownership of the land. In some such cases, state ownership is nominal, and private rights over state land are held and transacted for all practical purposes as if the land were privately owned. In other cases, the nature of the retained state interest may be more significant. In any event, in applying the principles of compulsory acquisition, it is important to focus on the private rights to land that will be terminated as a result of a taking, whether or not such rights amount to a narrow definition of ownership.

##### Multiple layers of rights

There may be multiple layers of rights held by any number of rights holders. A privately owned parcel may be subject to leaseholds, mortgages, rights of way for utilities or transportation, concessions, rights of traditional or other uses, rights to forest products, etc. Ownership of land, trees, buildings and other improvements may all be separately held. Each of these separate interests may represent a significant loss to its holder if the land parcel is acquired by government and the right is terminated. Existing compulsory acquisition laws and practices may not be well adapted to “catching” all relevant interests in a land parcel. Some laws may target land owners without mentioning the array of other potential rights that may also be relevant and affected by the acquisition. A more frequent scenario is that even where the legal framework clearly recognizes subsidiary

<sup>7</sup> World Bank Operational Policy 4.12 on Involuntary Resettlement, paragraph 2(c).

or secondary rights, the processes put in place for identifying, notifying and compensating interest holders are not well-designed to discover the existence of such rights in a particular context, or to bring the holders of those rights into the discussion of compensation. This is particular the case with respect to customary rights, discussed below.

### Unregistered or inaccurately documented rights

It is not unusual for compulsory acquisition laws to presume a level of documentation of rights that may in fact not exist—once again perhaps a legacy of legal approaches from developed land market economies not being sufficiently adapted to the realities of less developed contexts. Some laws, for example, tie eligibility for compensation narrowly to whether the land right is registered in accordance with the country’s land registration legislation. This can be problematic where, as is frequently the case, only a fraction of a given country’s land has actually been registered. Many countries have modern registration laws on the books, but implementation frequently suffers from financial or other capacity constraints or a lack of political will. And in many cases registration systems may not capture all important secondary rights that are present. In such contexts, too strict application of a “registered-interests-only” rule to compensation would result in many interests going uncompensated or under-compensated.

To deal with this problem realistically can place additional burdens on government. In Albania, for example, it is reported that the Directorate of Roads devotes a significant amount of time and resources to assisting unregistered landowners to register their land, just so that the land can then immediately be expropriated and the owners compensated in accordance with the expropriation legislation. In practice, governments may in fact rely on alternate forms of evidence in implementation of compulsory acquisition laws, relaxing the rule to accommodate facts on the ground. A more desirable approach would be to explore the possibility of building flexibility into legislative design where needed.

The issue of registration touches upon the broader problem of official records that are inaccurate or out-of-date, again a common feature in many countries. A frequent constraint to the fair and efficient implementation of compulsory acquisition laws is that geographic data may

wrongly define the size or location of the parcel, and that legal data lists the wrong person as the holder of the land right.

### Customary rights

The issue of how customary land rights—present in many countries in Africa, Latin America, Asia and the Pacific and elsewhere—should be treated in relation to compulsory acquisition shares some of the same features of issues outlined in the preceding paragraphs. Land within a customary tenure regime may be held according to various rights configurations, with the group collectively holding some rights alongside an array of individual or household rights to individual parcels or resources.

Recent decades have witnessed a growing willingness on the part of a number of national governments to accord some formal recognition to customary rights. A clear example of this is Ghana, where up to 80% of all land is recognized in accordance with the Constitution as owned by traditional communities. In a range of other countries, including Mozambique, Tanzania, Uganda, Burkina Faso, Mali, Philippines, Cambodia, Peru and elsewhere in Latin America, land laws have been adopted that provide for the recognition of customary tenure regimes to varying degrees. In short, the distinction between customary and statutory tenure is in a number of places less significant than it used to be.

On the one hand, this trend is encouraging because it promises more robust and equitable treatment under law for land rights that governments have historically tended to ignore or only to acknowledge weakly. On the other hand, in many countries, while the principle of recognition of customary rights is proclaimed, the legal framework for such recognition is vaguely articulated and moves towards operationalizing it have been ambivalent. As a result, the situation on the ground is often one where rights remain unclear and vulnerable. Compounding this is the fact that many compulsory acquisition laws on the books pre-date recent land law reforms and are ill-suited to deal with issues such as the

valuation and compensation for customary rights (as discussed below).<sup>8</sup>

### Shared resources

Land held by groups or under some sort of collective arrangement can pose special challenges to the application of the principles of compensation, both in customary and some non-customary tenure contexts. An example of the former is Ghana, where traditional authorities (referred to in some parts of the country as “stools” or “skins”) hold “allodial” (full) ownership to the land on behalf of their communities. A non-customary law example is the ownership of rural agricultural land in China, where law recognizes the collective as owner. In such instances, the law treats the traditional authority or the collective entity as the holder of the compensable interest in land, and relies on them—implicitly or explicitly, depending on the country—to ensure that land rights compensation is appropriately shared within the group. Yet in both contexts, there have been significant and growing concerns that deficiencies in intra-group governance structures have led to compensation not reaching the actually displaced individual or household. This has received particular attention in recent years in China, where central government authorities have issued increasingly strong policy statements designed to ensure that land compensation paid under the Land Administration Law actually reaches the “land losing farmer.”

### Compensation for informal occupation

The payment of compensation for rights that are not legally recognized raises difficult policy questions. The policies of international organizations

for the most part include “squatters” and other informal occupants or users as among those entitled to received resettlement assistance, but this is a frequent area in which international norms and national law diverge. Many governments object to the idea that even those who are clearly occupying land illegally are entitled to some level of compensation. This, it is argued, creates perverse incentives for people to ignore rules when they occupy land, and rewards illegal behaviour to the detriment of the rule of law. These objections are compounded when the illegal occupiers in question are not poor and vulnerable but are relatively well-off and well-connected investors. On the other hand, it needs to be recognized that a resettlement approach that focuses only on those with formal legal rights to their occupation could have detrimental development consequences. Informal occupation of land in many settings is not a matter of choice but of necessity, induced by poverty, exacerbated by inaccessible land markets and poorly functioning planning regimes, and in some cases condoned and encouraged by authorities. Hence, while a full legislative embrace of the notion that squatters should be compensated is perhaps unlikely to occur in most countries, there is a growing trend on the part of governments to adjust law and practice to deal with the individual and societal consequences associated with the displacement of informal occupants.

## B. DEFINING THE APPROPRIATE QUANTUM AND FORM OF COMPENSATION

Market value is the benchmark found in most compulsory acquisition laws when it comes to the calculation of compensation for an acquired asset. Laws and constitutions may also refer more broadly to principles such as “just” or “fair” compensation. Yet a key consideration that emerges when one surveys the wide variety of economic, social and cultural settings in which takings occur is that there is no universally appropriate method for calculating loss. To design compensation packages that will genuinely approach the objective of ensuring that people are no worse off than they were before the taking requires careful tailoring to local realities. Thus, even laws from highly developed market economies generally recognize that compensation needs to go beyond the value of

<sup>8</sup> See Government of Botswana, Land Policy Review (2003), quoted in R. Knight, *Statutory Recognition of Customary Land Rights in Africa*, FAO (2010). “The present policy, under which holders of property rights under customary law on tribal land are entitled to receive less compensation than holders of common law lease rights on state land and tribal land is unjust. A unified and fair system of land acquisition and compensation should be established that is applicable to all land and all people with property interests in land. ...The scope of compensation offered and the rights of those to be compensated under the Tribal Land Act should be extended to achieve parity with the provisions of the Acquisition of Property Act... There is no justification for the continuance of two separate systems of land acquisition and compensation—one for user rights in tribal land and one for all other sorts of rights in tribal land, in state land and in freehold land. The operation of the dual system penalizes the poor and benefits the well off.”

land and other assets, and to varying degrees contemplate compensation for losses associated with disturbance, costs related to moving and transition, in some cases harm to business, etc.<sup>9</sup>. Yet in many developing country settings, assembling the right compensation package may encounter an even more complex array of variables, as the following paragraphs will highlight.

### Assessing the fair market value of lost assets

A common legislative approach is to define market value as the amount a willing buyer would pay a willing seller on the open market where some choice exists. There are several reasons this calculation might be difficult to make in a given setting (particularly when it comes to land values as opposed to other non-land assets). In some areas, formal land markets may be non-existent or extremely thin, especially in rural areas. Some legal systems disallow the sale of particular categories of land or place severe limits on such sales. Underlying rights, as we have seen, may be poorly defined in terms of content or duration. In some cases, active informal markets may exist that, if studied, could in theory reveal what land is selling for in the area, but governments are generally reluctant to acknowledge officially the existence of such markets. And even where formal land markets may exist, the absence of an established, independent valuation profession and the tendency of buyers and sellers to understate prices in order to minimize taxation can conspire to make the ascertainment of market value very difficult.

In the face of these constraints, laws may rely on a variety of proxies for land value. In China, for example, the value of agricultural land is determined by applying a multiplier (which varies from place to place) to the average productivity of the land over a three year period. In Albania and Ghana values are assigned to different categories of land on the basis of schedules and maps prepared periodically by government. India's proposed land acquisition bill defines market value by reference to the amounts stated in recent deeds for comparable land, but includes a multiplier as a frank acknowledgement of the

routine gap between stated values and actual values.<sup>10</sup> Although admittedly easier to apply, none of the approaches are ideal, and may in some cases result in significant divergence between the "legal" and "actual" market value of land.

### Replacement cost vs. fair market value

International norms such as those promoted by the World Bank, IFC and others refer to "replacement cost" as the appropriate benchmark for valuation of assets. This is also a term found in a minority of national laws<sup>11</sup>. Where land markets are robust, replacement cost and fair market value should be roughly equivalent. But as noted above, fair market value may be defined at the national level in a way that does not ensure that compensation will be adequate to acquire equivalent assets. In such contexts, a focus on "replacement costs" at least in theory shifts attention usefully to the calculation of what it would really take in a given market to replace lost assets. When it comes to non-land assets such as housing and other improvements, a replacement cost approach also ensures that the depreciation of lost assets are not taken into account in the calculation of compensation, and that transaction costs associated with the purchase of new assets are covered.

### Land-for-land vs. cash compensation

The complexities associated with assigning realistic monetary values to lost assets and displaced rights is symptomatic of the difficulties of applying a "standard" compulsory acquisition legal framework to social situations in which land is valued differently than it is in functioning market economies. In developed countries, modern takings law is predicated on the assumption that land is a fungible commodity. While this assumption does not always hold true even in such countries, it encounters numerous exceptions in the developing world, particularly in rural areas. Some land rights that are critical to rural livelihoods, such as rights of pasture or access to forest resources, may simply not be susceptible to monetization—their loss may only be genuinely addressed through the provision of alternatives.

<sup>10</sup> Supra note 4, section 20.

<sup>11</sup> See for example Tanzania, *Village Land Regulations*, section 10. These regulations are also notable for listing a range of losses beyond land and other asset values that may need to be compensated in a particular situation, including loss of profits and disturbance.

<sup>9</sup> See for example South Australia, *Land Acquisition Act*, 1969.

More generally, where markets for land are weak or severely distorted, cash compensation based on fair market value may be insufficient to compensate for the disruption to livelihoods and social cohesion caused by a taking. For example, if communities are seeking a solution where they can remain geographically together, they may prefer to receive land as compensation rather than money. The offer of alternative land as compensation may also avoid problems that can arise “when financial compensation is paid to people who are unused to handling large amounts of money and who may soon after receiving compensation, find themselves with no land to farm, no income stream to support themselves, and no job skills to compete in a non-agricultural economy.” (Keith, 2008) Hence, the World Bank Policy on Involuntary Resettlement stresses the provision of alternative and equivalent land as a preferred solution where livelihoods are land-based. A number of countries have also explicitly included such a concept in their laws<sup>12</sup>, and in other cases legal frameworks are flexible enough to accommodate the provision of “in kind” compensation where appropriate. There are, of course, constraints that limit the application of such an approach, particularly in rapidly changing areas where suitable alternative land may be difficult to find in light of population pressures.

### Alternatives to land takings

In light of the difficulties and hardships often associated with compulsory acquisition, there has been increasing attention in recent years to identifying possible alternatives to the standard compulsory acquisition approach. In addition to the considerations outlined above, a number of other factors have underscored the desirability

<sup>12</sup> See for example Tanzania, *supra*, note 10, section 25, which presents a list of potential forms of compensation that may be appropriate depending on the circumstances, including land-for-land.

of exploring different approaches. In periurban areas, for example, at the interface of urban and agricultural land, the taking and compensating of land is frequently fraught with tension because of the steep appreciation in value that often occurs when land is converted to higher value urban uses. Local populations compensated for their land at agricultural land rates may watch with considerable resentment as the value of their former land skyrockets. To some extent, this might be addressed by including a compensatory increment designed to represent a share in the presumed future value increase, but generally this is disfavored by national law and valuation standards.

Other approaches, instead, focus on trying to design the end-use of the land in a way that allows for participation by those who would ordinarily have been displaced. These approaches can take a variety of different forms. There is, for example, a renewed interest in urban centers of the developing world in the land readjustment approaches pioneered after World War II in Japan and Korea, whereby land targeted for investment is first pooled, and individual holdings are consolidated within a portion of the area and offered to existing residents. Though often downsized, the values of the plots or housing that existing residents receive are expected to increase, often many-fold, by virtue of the adjacent development.

In other examples, displaced people are offered equity shares in the acquiring enterprise, thus again allowing for participation in rising land values. This approach, while promising in theory, can be risky in practice, depending on the economic soundness of the enterprise, and on whether governance mechanisms are in place to ensure that unsophisticated participants are not victimized by corruption or asymmetries in knowledge or access to information.

## IV. PROCESS

The procedural aspects of compulsory acquisition may play a very significant part in the cost to government and its private sector partners on the one hand, and to displaced people and the communities of which they are a part on the other. In

discussions of process, the desire for efficiency and speed on the one hand (prized especially by the acquiring entity and the private sector), and the objective of safeguarding the interests of affected people are sometimes seen as co-existing



in a state of tension—the latter ‘bogging down’ the former, while speed is assumed to work to the detriment of social justice. It is clear, however, that the two work in complementary ways. Endlessly drawn out processes disadvantage those who are being displaced, not only those who are waiting to use the land. At the same time, cutting corners on procedures designed to address the needs and aspirations of affected people can have severe debilitating effects on the success of the eventual investment, by creating long-standing local resentments and other negative legacies.

Generally speaking, there is significant room for improvement in process, both in terms of how it is spelled out in national legislation and in how it is administered in practice. Key areas that are likely to need attention are:

### **Including greater emphasis on participation and consultation**

Most national laws would benefit from provisions that enhance participation and more explicitly require consultation with affected people at key decision points, ensuring for example meaningful discussion about site selection, and the amount and form of compensation, and a greater emphasis on ensuring that people know what their rights are and what the process entails.

### **Improving information delivery requirements**

Often notification of an impending expropriation is done through general announcements and direct notification is required only to registered owners. This is a problem if an owner or third party right-holder is not registered, or the registration data is incorrect or not current. Attention should be given to devising proactive ways for ensuring that people are genuinely informed of a process that may affect their interests, whether or not those interests are formally recognized and registered rights. Notification periods need also to be long enough for people to be able, realistically, to understand the situation and react appropriately.

### **Putting in place appropriate and accessible grievance mechanisms**

Although perhaps not necessary where only a few landowners are affected, where projects involve large-scale resettlement, international practice and some national laws encourage the creation

and use of local, targeted and accessible bodies to deal with grievances, at least as a first step. This reduces the problem of complaints being immediately funnelled into court systems, which often have a reputation for being slow, backlogged and expensive. Properly constituted, a grievance mechanism would involve representation from amongst the affected community, some government representation from institutions not directly involved in the acquisition and other independent experts. This needs to be accompanied by clear communication channels and proactive measures to improve the legal literacy of affected people.

### **Ensuring that compensation is provided in a timely manner**

The timing of the payment of monetary compensation, or the provision of other types of compensation (such as land) is of critical importance. In many parts of the world, failure of governments to provide compensation in a timely fashion has left dispossessed people in limbo, and without even the leverage that comes from still occupying the property that was the subject of the expropriation. This outcome is facilitated by some national laws that vest ownership of land in the government from the moment an expropriation decree is issued, leaving compensation as a post-taking obligation of government only. A sounder approach found in a number of countries is to require full provision of compensation as a prerequisite for government taking possession of the land in question, and a showing by the acquiring entity that the funds for compensation have been set aside before the taking is approved by government decision makers. To prevent the possibility of development being stalled indefinitely by affected people challenging the compensation in court, a number of laws (as well as the World Bank’s Involuntary Resettlement Policy) provide for the possibility of establishing an escrow account for the payment of compensation when disputes have been finally adjudicated.<sup>13</sup>

<sup>13</sup> Ghana, State Land Act, No. 125 of 1962, section 6. <http://ghanalegal.com/?id=3&law=63&t=ghana-laws>.

## V. Further reading:

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1. World Bank Operational Policy on Involuntary Resettlement (OP 4.12).
2. Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security.
3. S. Keith, P. McAuslan, R. Knight, J. Lindsay, P. Munro-Faure and D. Palmer. *Compulsory acquisition of land and compensation*. (FAO Land Tenure Series, 2008)
4. J. Bruce et. al. *Land law reform: achieving development policy objectives*. (World Bank Law, Justice and Development Series, 2006).

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